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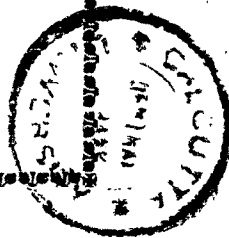
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—Sch. 2, Item 3 — Dismissal of workman

—Charge was one of attempt to steal company's property — Workman being watchman, charge was serious one and, if held proved, he deserved dismissal SC 2025 A

—Sch. 2, Item 3 — Dismissal of workman

—Charge was one of attempt to steal company's property — Workman being watchman, charge was serious one and, if held proved, he deserved dismissal SC 2025 A

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- (1) Advocates Act (1961), S. 37 SC 2092 B
- (2) Constitution of India, Art. 246 (1) SC 2016 A
- (3) Constitution of India, Art. 358 Pat 295 D
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- (5) Tenancy Laws — Calcutta Thika Tenancy Act (1949), S. 2 (5) SC 1994 A
- Deeming provision — Effect — See Imports and Exports (Control) Act (1947), S. 3 Cal 440 B
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- S. 6 (2) (a) and (b) — Addition of new items of agricultural produce by S. 5 notification — Fresh notification declaring market and market yard is not necessary. (1975) 2 Kant LJ 110, Reversed Kant 220

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- S. 3 — See Motor Vehicles Act (1939), S. 2 (3) Kant 211
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- Ss. 4 (1) and 9 (3) — "Land" includes buildings thereon — Notification describing property as land not bad on the ground that there are buildings on the land Mad 345 C
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—S. 68-F (2) — See Ibid, S. 57

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STAMP DUTY**Stamp Act (2 of 1899)**

—S. 2 (17), Sch. 1, Art. 40 (b) — 'Mortgage Deed' — Document sought to be registered styled as trust-deed securing debentures in

Stamp Duty — Stamp Act (contd.)

favour of a Bank — Deed creating a floating charge — Held, it was not a mortgage deed and hence Art. 40 (b) was not attracted

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—S. 3, Proviso (1) — Exemption under — Document executed by the President by way of guarantee, in his capacity as President, is not liable for stamp duty Mad 362 A (SB)

—S. 4 — See Ibid, Sch. I, Art. 40 (b) and (c) Mad 362 B (FB)

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—Sch. I, Arts. 40 (b) and (c); 27 and S. 4 — Loan and note purchase agreement between a company and a Bank — Notes to be issued under and secured by mortgage-cum-trust deeds

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—S. 29 — See Ibid, S. 31 All 416 (FB)

—Ss. 31, 29 and 32 — Recovery of loan advanced by Corporation to industrial concern — Proceedings under S. 31 — Property of surety cannot be subject-matter of proceedings. 1971 All LJ 756; Overruled All 416 (FB)

—S. 32 — See Ibid, S. 31 All 416 (FB)

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—S. 115 (7) — See Bombay Re-organisation Act (1960), S. 81 (6) SC 2089

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—S. 74 — Will — Construction — Bequest of income from residuary estate to several beneficiaries for life in defined shares — Clause providing for devolution on death of any beneficiary — Devolution per stirpes or per capita Cal 424

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—S. 255 — Joint account in Bank — Wife entitled to draw amount in her own right — Letters of Administration unnecessary — Court

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—S. 255 — Letters of Administration granted in absence of other party at whose instance the same was set aside — Order being final, objection to the maintainability of appeal, not acceptable Mad 342 B

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—Pre. — See also Constitution of India, Art. 368 Andh Pra 315 B (FB)

—Pre. and S. 3 (f) — Act is a measure of agrarian reform and falls within the scope of Art. 31-A Andh Pra 315 A (FB)

—Pre. — In view of the inclusion of the Act in the Ninth Schedule of the Constitution, it cannot be challenged on the scope of violation of Arts. 14, 19 and 31

—Pre. — Act whether entitled to protection of Art. 31-C — Art. 31-C whether operates only in industrial sphere and not in agrarian sphere Andh Pra 315 I (FB)

—S. 3 (1), Expln. — See Ibid, S. 7 (1) Andh Pra 315 G (FB)

—S. 3 (f) — See also Ibid, Pre. Andh Pra 315 A (FB)

—Ss. 3 (f), 3 (o), 4, 8, 7 (1), (4) and (5) read with Ss. 8 (1), Expl. 2, and 24 — Validity of — Competence of State Legislature Andh Pra 315 C (FB)

—Ss. 3 (f) and (o) and 4 (1). — Definitions of 'family unit' and 'person' do not offend Second proviso to Art. 31-A (1) — AIR 1974 Punj and Har 162, Dissented from Andh Pra 315 F (FB)

—S. 3 (j) — See Ibid, S. 7 (3) Andh Pra 315 D, E (FB)

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—Ss. 7 (1), 10 (5) (ii) and 3 (1), Expln. — Validity — Provisions whether offend Art. 31-A (1) Proviso 2 — Whether protected by Article 31-B Andh Pra 315 G (FB)

—Ss. 7 (3) and (j) — Provisions of S. 7 (3) read with definition of 'land' in S. 3 (j) in so far as they are made applicable to lands converted as Salt Pans are valid Andh Pra 315 D (FB)

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**LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM
ETC. IN A. I. R. 1975 NOVEMBER**

**Diss. = Dissented From in; Not F. = Not Followed in; Over. = Overruled in;
Revers. = Reversed in.**

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ALLAHABAD

1971 All LJ 756 = ILR (1971) 2 All 185 —
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(1972) Spl. Appeal No. 914 of 1963, D/- 3-5-1972 (All) — Revers. AIR 1975 SC 2057 C.

(1975) 1 All LR 391 (FB) — Revers. AIR 1975 SC 2140.

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(1972) A. A. O. No. 16 of 1971, D/- 24-8-1972 (Andh Pra) — Revers. AIR 1975 Andh Pra 310.

ILR (1974) Andh Pra 686 — Revers. AIR 1975 SC 2030.

GUJARAT

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(1974) 2 Kant LJ 310 — Revers. AIR 1975 Kant 211.

(1975) 2 Kant LJ 110 — Revers. AIR 1975 Kant 220.

KERALA

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Kerala (contd.)

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(1973) Appln. No. 466 of 1973, D/- 19-4-1973 (Mad) — Revers. AIR 1975 Mad 342 A.

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(1970) 36 Cut LT 519 — Diss. AIR 1975 Orissa 219 D (FB).

(1972) F. A. No. 26 of 1965, D/- 5-7-1972 (Orissa) — Revers. AIR 1975 Orissa 214 A, B.

(1973) 1 Cut WR 203 — Over. AIR 1975 Orissa 219 D (FB).

(1973) F. A. No. 108 of 1970, D/- 10-12-1973 (Orissa) — Revers. AIR 1975 Orissa 208.

AIR 1975 Orissa 100 — Revers. AIR 1975 SC 1967.

PUNJAB

AIR 1956 Punj 239 = ILR (1956) Punj 428 —
Diss. AIR 1975 Delhi 215 B.

(1970) Cri. A. No. 318 of 1967, D/- 21-1-1970 (Punj) — Revers. AIR 1975 SC 1962 A.

(1973) S. A. No. 1469 of 1969, D/- 2-5-1973 (Punj) — Revers. AIR 1975 SC 1957.

AIR 1974 Punj 162 = 76 Pun LR 273 (FB) — Diss. AIR 1975 Andh Pra 315 F (FB).

ERRATA

A. I. R. 1975 SC 1646 (September)

Page 1651, Para. 24, in last but one line, read (sic) after the word ‘not’ and before the word ‘within’.

COMPARATIVE TABLE

(10-10-1975)

1975 November

All India Reporter = Other Journals

AIR 1975 S C		AIR 1975 SC		AIR 1975 Calcutta		AIR 1975 Madras	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1957	(1975) 2 S C C 505	2112	---	417	---	337con	88 Mad L W 343
1960	1975 U J (SC) 648	2117	---	418	---		1975 (2) Serv
1962	1975 Cur L J 378	2125	30 Fac L R 169	424	---		L R 153
	1975 S C C		(1975) 1 Lab	427	---	342	88 Mad L W 432
	(Cri) 601		L J 391	429	(1975) 1 Cal	343	88 Mad L W 371
	(1975) 4 S C C 511	2128	(1975) 4 S C C 492		L J 440		(1975) 2 Mad
1967	(1975) 2 S C C 414,	2130	---	433	---		L J 27
	430, 431, 436	2135	---	436	---	345	---
1985	1975 S C C	2140	---	440	---	380(SB)	88 Mad L W 402
	(Cri) 644	2144	---	445	---	382(SB)	88 Mad L W 440
1991	1975 Tax L R 1958	AIR 1975 Allahabad		AIR 1975 Delhi		AIR 1975 Orissa	
	36 S T C 232	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
	1975 S C C	402	---	210	---	201	41 Cut L T 465
	(Tax) 369	406	---	215	---	(FB)	(1975) 1 Cut
1994	(1975) 2 S C C 394	408	---	221	1974 Rajdhami		W R 355
1996	(1975) 2 S C C 526	410	---		L R 638	202	ILR (1975) Cut 724
	1975 S C C	411	---		(1975) 77 Pun	203	41 Cut L T 493
	(Tax) 362	413	---		L R (D) 56	(FB)	ILR (1975) Cut 684
	(1975) 2 S C C 399	416(FB)	---	223	---	208	41 Cut L T 454
	100 ITR 715	420	---	236(FB)	---		ILR (1975) Cut 536
2001	1975 S C C	422	---	AIR 1975 Gujarat		205	(1975) 1 Cut
	(Cri) 625	424	(1975) 1 All	AIR	Other Journals		W R 191
	1975 Cur L J 580	425	L R 352	194	---		41 Cut L T 430
2008	---	430	---	205	---		1975 A C J 249
2016	1975 S C C	431	---	AIR 1975 Karnataka			ILR (1975) Cut 644
	(Tax) 374	AIR 1975 Andh-Pra.		AIR	Other Journals	208	(1975) 1 Cut
	(1975) 2 S C C 454	AIR	Other Journals	211	---		W R 106
2025	31 Fac L R 173	308	(1975) 1 Andh	215	---	209	ILR (1975) Cut 291
2030	(1975) 2 S C C 480		W R 28	220	(1975) 2 Kant	211	ILR (1975) Cut 319
2032	---	310	(1974) 1 Andh		L J 132	214	41 Cut L T 306
2035	47 F J R 364		L T 405	224	(1975) 2 Kant	216	ILR (1975) Cut 328
	31 Fac L R 42		(1975) 1 Andh		L J 121	219	41 Cut L T 526
	(1975) 2 Lab	315(FB)	ILR (1975) Andh	AIR 1975 Kerala		(FB)	ILR (1975) Cut 789
	L J 125		Pra 310	AIR	Other Journals	AIR 1975 Patna	
	(1975) 4 S C C 357		(1975) 2 Andh	178	---	AIR	Other Journals
2037	(1975) 2 S C C 274		WR 70	182	---	295	---
2045	(1975) 2 Serv	AIR 1975 Bombay		185	1975 Ker L T 388	307	---
	L R 267	AIR	Other Journals	(FB)	ILR (1975) 2 Ker 1	312	---
	(1975) 2 Lab L J 93	278	77 Bom L R 330	189	1975 Ker L T 551	320	---
2049	(1975) 2 S C C 2	281	---	AIR 1975 Madh-Pra.		AIR 1975 Punjab	
	1975 S C C	297	1975 Mah L J 233	AIR	Other Journals	AIR	Other Journals
	(Cri) 360	301	1975 Mah L J 295	209	1975 M P L J 612	321	77 Pun L R 316
2051	(1975) 2 S C C 523	303	77 Bom L R 333	212	---	324	1975 Pun L J
2054	---	AIR 1975 Calcutta		217	1975 M P L J 515		(Cri) 156
2056	1975 Cri L R	AIR	Other Journals	223	1975 M P L J 525	343	1975 Pun L J 131
	(SC) 324	404	---	AIR 1975 Madras		AIR 1975 Rajasthan	
2057	31 Fac L R 135	410	(1975) 2 Cal	AIR	Other Journals	AIR	Other Journals
2065	---		L J 256	209	1975 M P L J 612	211	---
2079	(1975) 2 S C C 144	411	79 Cal W N 830	212	---	213	---
2083	---	413	---	217	1975 M P L J 515	215	1975 Raj L W 199
2085	---	415	(1975) 1 Cal		L J 269	217	---
2089	---		L J 219				
2092	---						
2106	100 ITR 706						
	(1975) 2 S C C 538						

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the order, decision or instrument authenticated in the manner specified in sub-section (1), on payment of such fee as may be prescribed.

12. Staff of Board.

(1) Subject to the provisions of sub-section (2), the Board may, for the purpose of enabling it efficiently to perform its functions under this Act, appoint such number of officers and other employees as it may think fit.

(2) The recruitment and conditions of service of such officers and employees shall be such as may be provided by regulations made under this Act.

13. Transfer of service of existing employees to Board.

Subject to the provisions of this Act, every person employed in the library immediately before the date of establishment of the Board shall, on and from such date, become an employee of the Board with such designation as the Board may determine and shall hold his office or service therein by the same tenure, at the same remuneration and upon the same terms and conditions as he would have held the same on such date if the Board had not been established and shall continue to do so unless and until his employment in the Board is duly terminated or until such tenure, remuneration and terms and conditions are duly altered by the Board:

Provided that the tenure, remuneration and terms and conditions of service of any such person shall not be altered to his disadvantage without the previous approval of the Central Government.

14. Location of library.

The library and the collections thereof shall continue to be located at Rampur.

CHAPTER III

PROPERTY, LIABILITIES AND FUNCTIONS OF BOARD

15. Properties and liabilities of Board.

(1) On the establishment of the Board—

(i) all properties, funds and dues which are vested in, or realisable by, the trustees of the library constituted by the deed of trust, in their capacity as such, shall vest in, and be realisable by, the Board; and

(ii) all liabilities in relation to the library, which are enforceable against the said trustees, shall be enforceable only against the Board.

(2) All properties, which may, after the establishment of the Board, be given, bequeathed or otherwise transferred to the

library or acquired by the Board, shall vest in the Board.

16. Duties of Board.

(1) Subject to the provisions of the deed of trust, it shall be the general duty of the Board to manage the library and to plan, promote, organise and implement programmes for the development of the library on modern scientific lines (including provision of adequate facilities for preservation and photo-duplication of rare manuscripts) and to perform such other functions as the Central Government may, from time to time, assign to the Board.

(2) In particular and without prejudice to the generality of the foregoing provisions, the Board may take such steps as it thinks fit—

(a) to provide for instruction and research in matters relating to libraries and for the advancement of learning and dissemination of knowledge in such matters;

(b) to protect, enlarge and improve the collections in the library;

(c) to promote study and research and to provide facilities to scholars for this purpose;

(d) to do all such other things as may be necessary for the discharge of its functions under this Act.

17. Powers of Board.

(1) Subject to such conditions and restrictions as the Central Government may think fit to impose, the Board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions and duties under this Act.

(2) Subject to such regulations as may be made by the Board in this behalf, the Board may, from time to time, purchase or otherwise acquire such manuscripts, books, articles or things as may, in the opinion of the Board, be worthy of preservation in the library.

CHAPTER IV

FINANCE, ACCOUNTS, AUDIT AND REPORTS

18. Grants by Central Government to Board.

For the purpose of enabling the Board to discharge its functions efficiently under this Act, the Central Government may, after due appropriation made by Parliament by law in this behalf, pay to the Board in each financial year such sums of money as that Government considers necessary by way of grant, loan or otherwise.

19. Fund of Board.

(1) The Board shall maintain a Fund to which shall be credited—

(a) all moneys paid to it by the Central Government;

(b) such sums of money as the State Government may pay annually for specified purposes;

(c) all fees and other charges levied by it under this Act;

(d) all moneys received by the Board by way of grant, gift, donation, benefaction, bequest, subscription, contribution or transfer;

(e) all other moneys received by the Board in any other manner or from any other source.

(2) The Board may expend such sums as it thinks fit for performing its functions under this Act and such sums shall be treated as expenditure payable out of the Fund.

(3) A sum of money, not exceeding such sum as may be specified by regulations made under this Act, shall be kept in current account with any nationalised bank, or any other scheduled or other bank approved by the Central Government in this behalf, but any moneys in excess of that sum shall be deposited in the Reserve Bank of India or with the agents of the Reserve Bank of India or invested in such manner as may be generally or specially approved by the Central Government.

Explanation.—In this sub-section,—

(a) "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;

(b) "scheduled bank" means a bank included for the time being in the Second Schedule to the Reserve Bank of India Act, 1934.

20. Budget.

(1) The Board shall, by such date in each financial year as may be specified by the Central Government, submit to it for approval a budget for the next financial year in the form specified by that Government, showing therein the estimated receipts and expenditure, and the sums which would be required from the Central Government during that financial year.

(2) The budget for a financial year, as approved by the Central Government for any financial year, shall be the budget of the library for that financial year.

(3) If any sum granted by the Central Government to the library for any financial year remains wholly or partly unspent in that financial year, the unspent sum may be carried forward to the next financial year and taken into account in determining the sum to be provided for by the Central Government for that year.

(4) Subject to the provisions of sub-section (5), no sum shall be expended by or on behalf of the Board, unless the expenditure is covered by provision in the budget approved by the Central Government.

(5) Subject to such conditions and restrictions as the Central Government may think fit to impose, the Board may sanction any re-appropriation from one head of expenditure to another or from a provision made for one purpose to that for another purpose.

21. Accounts and audit.

(1) The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, including the balance-sheet in such form as may be specified, in accordance with such general directions as may be issued by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Board shall be audited annually by the Comptroller and Auditor-General of India or any officer authorised by him in this behalf, and any expenditure incurred by him in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any person authorised by him in connection with the audit of the accounts of the Board shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the audit of Government accounts, and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect the office of the Board, and the library.

(4) The accounts of the Board, as certified by the Comptroller and Auditor-General of India or any other person authorised by him in this behalf, together with the audit report thereon, shall be forwarded annually to the Central Government and that Government shall, as soon as may be after the receipt thereof, cause the same to be laid before each House of Parliament.

22. Returns and reports.

(1) The Board shall furnish to the Central Government, at such time and in such form, and in such manner as the Central Government may direct, such returns, statements and particulars as the Central Government may, from time to time, require.

(2) Without prejudice to the provisions of sub-section (1), the Board shall as soon as possible after the commencement of each financial year, submit to the Central Govern

ment, within such time as may be specified by the Central Government, a report giving true and full account of the activities of the Board during the previous financial year and an account of activities likely to be undertaken during the current financial year.

CHAPTER V

MISCELLANEOUS

23. Power of Central Government to issue directions to Board.

In the discharge of its functions under this Act, the Board shall be bound by such directions on questions of policy as the Central Government may give to it from time to time :

Provided that the Board shall be given an opportunity to express its views before any direction is given to it under this sub-section.

24. Delegation of powers and duties.

The Board may, by general or special order in writing, direct that all or any of the powers or duties, which may be exercised or discharged by it, shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercised or discharged also by any member, officer or employee of the Board specified in this behalf in the order.

25. Officers and employees of Board to be public servants.

Every officer or employee of the Board shall, when acting or purporting to act in pursuance of the provisions of this Act or of any rule or regulation made thereunder, be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

26. Protection of action taken under the Act.

No suit, prosecution or other legal proceeding shall lie against the Board or any member, officer or other employee of the Board for anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or regulation made thereunder.

27. Power of Central Government to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules to give effect to the provisions of this Act:

Provided that when the Board has been established, no such rules shall be made without consulting the Board.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :

(a) the term of office of, and the manner of filling casual vacancies among, the members nominated under clause (a), clause (f) or clause (h) of sub-section (1) of section 5;

(b) the travelling and other allowances payable to a member other than the Chairman and to a person associated with the Board under section 10;

(c) the disqualifications for membership of the Board and the procedure to be followed in removing a member who is or becomes subject to any disqualification;

(d) the conditions subject to which, and the mode in which, contracts may be entered into by or on behalf of the Board;

(e) any other matter which has to be or may be prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

28. Power of Board to make regulations

(1) The Board may, with the previous approval of the Central Government, make regulations, not inconsistent with the provisions of this Act and the rules made thereunder with regard to the discharge of its functions under this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :—

(a) the conditions and restrictions subject to which manuscripts and books in the library may be used;

(b) the manner in which, and the purposes for which, persons may be associated with the Board;

(c) the time and place of meetings of the Board, the procedure to be followed in regard to the transaction of business at such meetings and the quorum necessary for the transaction of business at a meeting of the Board;

(d) the maintenance of minutes of meetings of the Board and the transmission of copies thereof to the Central Government;

(e) the recruitment and conditions of service of officers and other employees of the Board;

(f) the persons by whom, and the manner in which, payments, deposits and investments may be made on behalf of the Board;

(g) the maximum amount that may be kept by the Board in a current account;

(h) the maintenance of registers and accounts;

(i) the compilation of catalogues and inventories of the manuscripts, books and other articles and things in the library;

(j) the steps to be taken for the preservation of the manuscripts, books and other articles and things in the library;

(k) the general management of the library;

(l) the fees and other charges to be levied for the use of any manuscript or book in the library;

(m) any other matter in respect of which provision is, in the opinion of the Board, necessary for the performance or its functions under this Act.

(3) The Central Government may, after consultation with the Board, by notification in the Official Gazette, amend, vary or rescind any regulation which it has approved and thereupon the regulation shall have effect as so amended or varied or be of no effect, as the case may be, but without prejudice to the exercise of the powers of the Board under sub-sections (1) and (2).

29. Act to override other enactments and instruments.

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any law other than this Act for the time being in force or any instrument having effect by virtue of any enactment other than this Act.

THE ALL-INDIA SERVICES (AMENDMENT) ACT, 1975

(Act No. 23 of 1975)§

[9th May, 1975]

An Act further to amend the All-India Services Act, 1951.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

[§] Received the assent of the President on 9-5-1975 Act published in Gaz. of India; 12-5-1975 Part II-S. 1, Ext., p. 135.

For Statement of Objects and Reasons, see Gaz. of India, 21-12-1974, Part II-S. 2, Ext., p. 1232.

1. Short title.

This Act may be called THE ALL-INDIA SERVICES (AMENDMENT) ACT, 1975.

2. Amendment of section 3.

In section 3 of the All-India Services Act, 1951 (hereinafter referred to as the principal Act), after sub-section (1), the following sub-section shall be inserted, namely:—

“(1A) The power to make rules conferred by this section shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable.”.

3. Validation.

No rule made, or purporting to have been made, with retrospective effect, under section 3 of the principal Act before the commencement of this Act shall be deemed to be invalid or ever to have been invalid merely on the ground that such rule was made with retrospective effect and accordingly every such rule and any action taken or thing done thereunder shall be as valid and effective as if the provisions of section 3 of the principal Act, as so amended by this Act, were in force at all material times when such rule was made or action or thing was taken or done.

THE FORMER SECRETARY OF STATE SERVICE OFFICERS (CONDITIONS OF SERVICE) AMENDMENT ACT, 1975

(Act No. 24 of 1975)*†

(9th May, 1975)

An Act to amend the Former Secretary of State Service Officers (Conditions of Service) Act, 1972.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title.

This Act may be called THE FORMER SECRETARY OF STATE SERVICE OFFICERS (CONDITIONS OF SERVICE) AMENDMENT ACT, 1975.

2. Amendment of section 8.

In the former Secretary of State Service Officers (Conditions of Service) Act, 1972

[*†] Received the assent of the President on 9-5-1975 Act published in Gaz. of India; 12-5-1975, Part II-S. 1, Ext., p. 137.

For Statement of Objects and Reasons, see Gaz. of India, 21-12-1974, Part II-S. 2, Ext., p. 1237.

(hereinafter referred to as the principal Act), in section 8,—

(a) in sub-section (1), after clause (c), the following provisos and Explanations shall be inserted, and shall be deemed always to have been inserted, namely:—

'Provided that in relation to every former Secretary of State Service officer who, having been in service on the 1st day of February, 1921, and domiciled in India on that date, is entitled immediately before the appointed day to claim his pension computed in the rupee equivalent of the amount fixed in sterling at a rate of exchange of rupees fifteen to a pound sterling clause (c) shall have effect as if for the words "thirteen and one-third," the word "fifteen" were substituted:

Provided further that every former Secretary of State Service officer whose pension was expressed in sterling or in respect of whose pension a fixed sterling minimum was applicable, and who, immediately before the appointed day, is a foreigner having taken up permanent residence outside India, shall, so long as he continues to be a foreigner permanently residing outside India, be allowed to convert the annuity of rupees thirteen thousand three hundred and thirty-three and one-third or the annuity actually payable to him in rupees, whichever is less, into pound sterling at the rate of rupees thirteen and one-third to a pound sterling, and the annuity so converted into pound sterling shall be paid outside India.

Explanation 1.—Nothing contained in the foregoing proviso shall be deemed to entitle any former Secretary of State Service officer to claim conversion of amounts representing the annuity or the commuted value thereof, already drawn in rupees before the commencement of the Former Secretary of State Service Officers (Conditions of Service) Amendment Act, 1975, into pound sterling.

Explanation 2.—In this sub-section, the expression "foreigner" means a person who is not a citizen of India;

(b) in sub-section (2), after the words "every former Secretary of State Service officer," the brackets, words and figure "[not being an officer to whom the first proviso or the second proviso to sub-section (1) applies]" shall be inserted and shall be deemed always to have been inserted.

3. Insertion of new section 10A.

After section 10 of the principal Act, the following section shall be inserted, namely:—

Power of Central Government to make orders in certain cases to ensure parity.

"10A. (1) If the Central Government is satisfied that the conditions of service as respects any matter applicable to, or in relation to, any class or category of former Secretary of State Service officers under section 6, 7 or 8 or as respects any benefits by way of compensation for the increase in cost of living or any other reason, have become less favourable than those applicable to or in relation to any corresponding class or category of other officers of the Indian Administrative Service or the Indian Police Service or, as the case may be, any comparable service, it may, notwithstanding anything contained in those sections, by general or special order and subject to such conditions and restrictions (including conditions as to refund adjustment or recovery), as may be specified therein, make such provisions as it may deem fit for securing, so far as may be, parity in such cases.

(2) Any order under sub-section (1) may be made so as to have retrospective effect.

(3) Every order made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the order or both Houses agree that the order should not be made, the order shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that order."

THE TOBACCO CESS ACT, 1975

(Act No. 26 of 1975)*†

(12th May, 1975)

An Act to provide for the levy and collection, by way of cess, of a duty of excise on virginia tobacco and a duty of customs on tobacco, for the development of tobacco industry and for matters connected therewith.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:

[*] Received the assent of the President on 12-5-1975 Act published in Gaz. of India; 12-5-1975, Part II-S. 1, Ext. P. 187.

For Statement of Objects and Reasons, see Gaz. of India; 7-3-1975, Part II-S. 2, Ext. p. 179.

1. Short title, extent and commencement.

(1) This Act may be called THE TOBACCO CESS ACT, 1975.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions.

2. Definitions.

(1) In this Act, unless the context otherwise requires,—

(a) "Board" means the Tobacco Board established under section 4 of the Tobacco Board Act, 1975;

(b) "prescribed" means prescribed by rules made under this Act;

(c) "registered auction platform" means an auction platform registered with the Board in accordance with the rules made under the Tobacco Board Act, 1975.

(2) All words and expressions used in this Act and not defined, but defined in the Tobacco Board Act, 1975, shall have the meanings respectively assigned to them in that Act.

3. Duties of excise on virginia tobacco.

(1) There shall be levied and collected, by way of a cess for the purposes of the Tobacco Board Act, 1975, a duty of excise at the rate of one paise per kilogram on virginia tobacco which is produced in India and sold at a registered auction platform.

(2) The duty of excise levied under sub-section (1) shall be in addition to any cess or duty leviable on virginia tobacco under any other law for the time being in force.

(3) The duty of excise payable under sub-section (1) in respect of any virginia tobacco sold at a registered auction platform shall be payable by the seller thereof to the person or authority prescribed in respect of such platform.

(4) The person or authority prescribed in respect of a registered auction platform shall collect the duty of excise payable on virginia tobacco sold at such platform and pay the amount so collected to the Central Government in such manner and within such time as may be prescribed.

(5) If any duty of excise payable under this section, or if any amount collected under this section by way of such duty, has not been paid to the Central Government within the period prescribed under sub-section (4), the Central Government may recover such duty or amount in the same manner as an arrear of land revenue.

4. Duties of customs on tobacco.

(1) There shall be levied and collected, by way of a cess for the purposes of the Tobacco Board Act, 1975, a duty of customs at such rate not exceeding one per cent. ad valorem as the Central Government may specify, by notification in the Official Gazette, on all tobacco, which is exported.

Explanation. — "Exported" means taken out of India by land, sea or air.

(2) The duties of customs levied under sub-section (1) shall be in addition to any cess or duty leviable on tobacco under any other law for the time being in force.

(3) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duty, shall, as far as may be, apply in relation to the levy and collection of the duty of customs leviable under sub-section (1) as they apply in relation to the levy and collection of duties of customs under that Act or those rules and regulations.

5. Crediting proceeds of duties to Consolidated Fund of India.

The proceeds of the duties of excise and customs levied under sections 3 and 4 respectively shall first be credited to the Consolidated Fund of India and the Central Government may, if Parliament, by appropriation made by law in this behalf, so provides, pay to the Board, from time to time, from out of such proceeds, after deducting the expenses on collection, such sums of money as it may think fit for being utilised for the purposes of the Tobacco Board Act, 1975.

6. Penalty for evasion of duty of excise payable under section 3.

Whoever wilfully or intentionally evades or attempts to evade the payment of any duty of excise payable by him under section 3, or the payment of any amount collected by way of duty under that section shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

7. Offences by companies.

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. — For the purposes of this section, —

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director," in relation to a firm, means a partner in the firm.

3. Jurisdiction of court.

No court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

9. Previous sanction of Central Government.

No prosecution for any offence punishable under this Act shall be instituted except with the previous sanction of the Central Government.

10. Protection of action taken in good faith.

No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer or other employee of the Central Government or against the Board or any officer or employee of the Board for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

11. Power of Central Government to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely : —

(a) the assessment and collection of the duties of excise levied under section 3 and

the functions and powers which may be exercised and the duties which may be discharged in connection therewith by the Board or any officers or other employees of the Board;

(b) the persons or authorities who may collect duties of excise under sub-sections (3) and (4) of section 3, the time within which and the manner in which the proceeds of such duties of excise shall be paid to the Central Government;

(c) the returns which the persons or authorities referred to in clause (b) shall furnish to the Central Government and the form and the manner in which and the intervals at which such returns shall be furnished;

(d) any other matter which has to be, or may be, prescribed by, or provided for, by rules, under this Act.

(3) In making any rule under this section, the Central Government may direct that a contravention thereof shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both, and in the case of a continuing contravention, with an additional fine which may extend to fifty rupees for every day during which such contravention continues after conviction for the first such contravention.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

THE NAGALAND APPROPRIATION (No. 2) ACT, 1975

(Act No. 27 of 1975)

[14th May, 1975].

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State of Nagaland for the services of the financial year 1975-76.

[Text of the Act Not Printed.]

THE COMPANIES (TEMPORARY
RESTRICTIONS ON DIVIDENDS)
AMENDMENT ACT, 1975

(Act No. 28 of 1975)*

[21st May, 1975]

An Act to amend the Companies (Temporary Restrictions on Dividends) Act, 1974.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the COMPANIES (TEMPORARY RESTRICTIONS ON DIVIDENDS) AMENDMENT ACT, 1975.

(2) It shall be deemed to have come into force on the 1st day of March, 1975.

2. Amendment of section 4.

In the Companies (Temporary Restrictions on Dividends) Act, 1974 (hereinafter referred to as the principal Act), in section 4, in sub-section (1), for the words "For a period of two years," the words "Save as otherwise provided in section 5A, for a period of two years" shall be substituted.

3. Amendment of section 5.

In section 5 of the principal Act, for the words "For a period of two years," the words "Save as otherwise provided in section 5A, for a period of two years" shall be substituted.

4. Insertion of new section 5A.

After section 5 of the principal Act, the following section shall be inserted namely:—

Restrictions under which dividends in excess of distributable profits may be declared.

'5A. (1) On and from the commencement of the Companies (Temporary Restrictions on Dividends) Amendment Act, 1975, and subject to the provisions of sub-section (2), it shall be lawful for a company to which this Act applies to declare, out of its profits for any financial year, dividend exceeding, in the aggregate, its distributable profits for that financial year.

(2) Where, after the commencement of the Companies (Temporary Restrictions on Dividends) Amendment Act, 1975, a company to which this Act applies declares dividend for any financial year exceeding, in the aggregate, its distributable profits for that

financial year, such company shall not, for a period of two years from the appointed day, make payment of so much of such dividend as exceeds its distributable profits for that financial year, and on the expiry of the said period, so much of the dividend as is in excess of the distributable profits of the company for the financial year aforesaid (the amount in excess as aforesaid being herein-after referred to as the "deferred dividend"), shall be payable, together with interest due thereon at the rate of eight per cent. per annum, in two equal annual instalments, the first of which shall become due and payable on the date on which the said period of two years expires.

(3) The provisions of sections 4 and 5 shall, except to the extent they are inconsistent with the provisions of this section, apply to a dividend declared under this section.

(4) No dividend shall be declared under sub-section (1) except after complying with the provisions of sub-section (2A) of section 205 of the Companies Act, 1956.

(5) The provisions of section 205A of the Companies Act, 1956, shall not apply to any instalment of deferred dividend:

Provided that if the whole or any part of an instalment of deferred dividend remains unpaid after the expiry of a period of thirty days from the date on which such instalment becomes due and payable, the provisions of the said section 205A shall apply to the amount so remaining unpaid.

(6) Where, after the commencement of the Companies (Temporary Restrictions on Dividends) Amendment Act, 1975, a company to which this Act applies declares dividend for any financial year exceeding in the aggregate, its distributable profits for that financial year, the provisions of the Income-tax Act, 1961, shall subject to the provisions of sub-section (10), apply in relation to the whole of the dividend so declared, as they apply in relation to dividend which is declared but payment of no part of which is deferred.

(7) Where, after the commencement of the Companies (Temporary Restrictions on Dividends) Amendment Act, 1975, a company to which this Act applies declares dividend for a financial year exceeding, in the aggregate, its distributable profits for that financial year, the company shall post, within forty-two days from the date of such declaration, to every share-holder entitled to the payment of the dividend, a warrant authorising the payment of the dividend so declared.

[*] Received the assent of the President on 21.5.1975 Act published in Gaz. of India; 21.5.1975, Part II-S. 1, Ext. P. 199. For Statement of Objects and Reasons, see Gaz. of India 5-5-1975; Part II-S. 2, Ext. P. 388.

ed, but the said warrant shall be so prepared as to authorise—

(a) immediate payment of so much of the dividend as does not exceed the distributable profits of the company for the financial year aforesaid (hereinafter referred to as the "immediate dividend"), and

(b) the payment of the deferred dividend on the respective dates on which each instalment of the deferred dividend becomes due and payable.

(8) Income-tax deducted under sub-section (6) from dividends shall be so apportioned between the immediate dividend and each instalment of the deferred dividend as to ensure that the income-tax deducted from the immediate dividend and each instalment of the deferred dividend bears the same proportion to the gross amount of the immediate dividend and the gross amount of each instalment of the deferred dividend as the total amount of the income-tax so deducted bears to the gross amount of the total dividend declared by the company.

(9) Every warrant issued under sub-section (7) shall be in such form and contain such particulars as may be specified by rules made under this Act.

(10) Notwithstanding anything to the contrary contained in the Income-tax Act, 1961, the Income-tax Officer shall not, for the purposes of that Act, treat an assessee to whom any instalment of deferred dividend is payable as in default in respect of that part of income-tax which is due in respect of such instalment of deferred dividend, as reduced by the income-tax, if any, deducted at source from such instalment, and shall continue to treat the assessee as not in default in respect of the said part of the income-tax, as so reduced, until the expiry of thirty-five days from the date on which such instalment becomes due and payable to the assessee or the warrant in respect of such instalment is transferred by the assessee to any person, whichever is earlier, and no interest shall be chargeable under sub-section (2) of section 220 of that Act in respect of the said part of the income-tax, as so reduced, for the period during which the assessee is treated as not in default.

Explanation. — In this sub-section, "assessee" has the meaning assigned to it in clause (7) of section 2 of the Income-tax Act, 1961."

THE GOVERNMENT OF UNION TERRITORIES (AMENDMENT) ACT, 1975

(Act No. 29 of 1975)*§

[22nd May, 1975]

An Act further to amend the Government of Union Territories Act, 1963, the Representation of the People Act, 1950 and the Representation of the People Act, 1951 and also to amend the North-Eastern Council Act, 1971.

Be it enacted by Parliament in the Twenty-sixth year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE GOVERNMENT OF UNION TERRITORIES (AMENDMENT) ACT, 1975.

(2) It shall come into force on such date, being a date not earlier than the date of commencement of the Constitution (Thirty-Seventh Amendment) Act, 1975, as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 1.

In section 1 of the Government of Union Territories Act, 1963 (hereinafter referred to as the principal Act), in sub-section (2).—

(i) before the second proviso, the following proviso shall be inserted, namely:—

"Provided further that it shall come into force in the Union territory of Arunachal Pradesh on such date, being a date not earlier than the date of commencement of the Government of Union Territories (Amendment) Act, 1975, as the Central Government may, by notification in the Official Gazette, appoint:—";

(ii) in the second proviso, for the words "Provided further that", the words "Provided also that, subject to the preceding provisos", shall be substituted.

3. Amendment of section 2.

In section 2 of the principal Act, in sub-section (1), in clause (h), for the words "Pondicherry and Mizoram", the words "Pondicherry, Mizoram and Arunachal Pradesh" shall be substituted.

[*§] Received the assent of the President on 22-5-75. Act published in Gaz. of India; 22-5-1975, Part II-S. 1, Ext. p. 203.

For Statement of Objects and Reasons, see Gaz. of India; 15-4-1975, Part II-S. 2, Ext. p. 307.

4. Substitution of new section for section 21.

For section 21 of the principal Act, the following section shall be substituted, namely:—

Inconsistency between laws made by Parliament and laws made by Legislative Assembly.

"21. If any provision of a law made by the Legislative Assembly of a Union territory with respect to any matter enumerated in the State List in the Seventh Schedule to the Constitution is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly of the Union territory, or, if any provision of a law made by the Legislative Assembly of a Union territory with respect to any matter enumerated in the Concurrent List in the Seventh Schedule to the Constitution is repugnant to any provision of any earlier law, other than a law made by the Legislative Assembly of the Union territory, with respect to that matter, then, in either case, the law made by Parliament, or as the case may be, such earlier law shall prevail and the law made by the Legislative Assembly of the Union territory shall, to the extent of the repugnancy, be void :

Provided that if such law made by the Legislative Assembly of the Union territory has been reserved for the consideration of the President and has received his assent, such law shall prevail in that Union territory :

Provided further that nothing in this section shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly of the Union territory."

5. Amendment of section 26.

In section 26 of the principal Act, for the words "by the President", the words "by the Administrator, or, on being reserved by the Administrator for the consideration of the President, by the President" shall be substituted.

6. Amendment of section 33.

In section 33 of the principal Act, in the proviso to sub-section (2), for the words "the Legislative Assembly of the Union territory of Mizoram", the words "the Legislative Assemblies of the Union territories of Arunachal Pradesh and Mizoram" shall be substituted.

7. Amendment of section 38.

In section 38 of the principal Act, in clause (a), for the words, figures and letter

"under section 43A", the words, figures and letters "under section 43A or section 43C" shall be substituted.

8. Insertion of new sections 43B and 43C.

After section 43A of the principal Act, the following sections shall be inserted, namely :

Representation of Arunachal Pradesh in the House of the People.

"43B. In the House of the People to be constituted after the general election to that House to be held after the commencement of the Government of Union Territories (Amendment) Act, 1975 and thereafter, there shall be allotted two seats to the Union territory of Arunachal Pradesh and the First Schedule to the Representation of the People Act, 1950 shall be deemed to have been amended accordingly.

Special provisions for delimitation of parliamentary constituencies in Arunachal Pradesh and constituencies of Arunachal Pradesh Legislative Assembly.

430. (1) The provisions of sections 39 to 43 (both inclusive) shall not apply to the delimitation of parliamentary constituencies in the Union territory of Arunachal Pradesh or to the delimitation of constituencies for the purpose of elections to the Legislative Assembly of that Union territory.

(2) The Election Commission shall divide the Union territory of Arunachal Pradesh into two single-member parliamentary constituencies on the basis of the latest census figures.

(3) The Election Commission shall also, in the manner herein provided, distribute the seats assigned to the Legislative Assembly of the Union territory of Arunachal Pradesh under sub-section (2) of section 3 to single-member assembly constituencies and delimit them on the basis of the latest census figures having regard to the following provisions:—

(a) all constituencies shall, as far as practicable, be geographically compact areas;

(b) every assembly constituency shall be so delimited as to fall only within one parliamentary constituency;

(c) in delimiting the constituencies, regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience.

(4) For the purpose of assisting in the performance of its functions under sub-sections (2) and (3), the Election Commission shall associate with itself as associate members—

(a) the member of the House of the People representing the Union territory of Arunachal Pradesh;

(b) such five members of the Legislative Assembly of the Union territory of Arunachal Pradesh as the Speaker of that Assembly shall, having regard to the composition of the Legislative Assembly, nominate :

Provided that none of the associate members shall have a right to vote or sign any decision of the Election Commission.

(5) If owing to death or resignation, the office of an associate members falls vacant, it shall be filled, if practicable, in accordance with the provisions of sub-section (4).

(6) The Election Commission shall—

(a) publish its proposals for the delimitation of constituencies together with the dissenting proposals if any, of any associate member who desires publication thereof in the Official Gazette and in such other manner as the Commission may consider fit, together with a notice inviting objections and suggestions in relation to the proposals and specifying a date on or after which the proposals will be further considered by it;

(b) consider all objections and suggestions which may have been received by it before the date so specified;

(c) after consideration of objections and suggestions which may have been received by it before the date so specified determine by one or more orders the delimitation of constituencies and cause such order or orders to be published in the Official Gazette: and upon such publication, the order or orders shall have the full force of law and shall not be called in question in any court.

(7) The Election Commission may, from time to time, by notification in the Official Gazette,—

(a) correct any printing mistake in any order made under sub-section (6) or any error arising therein from inadvertent slip or omission;

(b) where the boundaries or name of any territorial division mentioned in any such order or orders are or is altered, make such amendments as appear to it to be necessary or expedient for bringing such order up to date.

(8) Every order made under sub-section (6) and every notification issued under sub-section (7) shall be laid as soon as may be after it is made or issued before the House of the People and the Legislative Assembly of the Union territory of Arunachal Pradesh.

(9) All things done, and all steps taken, before the commencement of this Act in the Union territory of Arunachal Pradesh with a view to delimiting the territorial constituencies of that Union territory for purposes of

elections to the Legislative Assembly of that Union territory shall, in so far as they are in conformity with the foregoing provisions of this section, be deemed to have been done or taken under those provisions as if these provisions were in force at the time such things were done or such steps were taken.”.

9. Amendment of section 44.

In section 44 of the principal Act, in sub-section (2), for the words “the Administrator of the Union territory of Mizoram”, the words “the Administrator of each of the Union territories of Arunachal Pradesh and Mizoram” shall be substituted.

10. Insertion of new section 54A.

After section 54 of the principal Act, the following section shall be inserted, namely :—

Provision as to provisional Legislative Assembly of Arunachal Pradesh.

“54A. (1) Notwithstanding anything contained in this Act (including provisions relating to the strength of the Legislative Assembly of the Union territory of Arunachal Pradesh), until the Legislative Assembly of the Union territory of Arunachal Pradesh has been duly constituted and summoned to meet for the first session under and in accordance with the provisions of this Act, there shall be a provisional Legislative Assembly which shall consist of members, being those persons referred to in clauses (b), (c) and (d) of section 3 of the North East Frontier Agency (Administration) Supplementary Regulation, 1971 and who are functioning immediately before the commencement of this Act in the Union territory of Arunachal Pradesh, as members of the Pradesh Council constituted under the said section 3.

(2) The term of office of the members of the provisional Legislative Assembly shall expire immediately before the first meeting of the Legislative Assembly duly constituted after the first general election to that Assembly.

(3) The provisional Legislative Assembly constituted under this section shall, for so long it is in existence, be deemed to be the Legislative Assembly duly constituted under this Act and accordingly the other provisions of this Act, so far as may be, apply in relation to the provisional Legislative Assembly as they apply in relation to the Legislative Assembly.”.

11. Amendment of Act 43 of 1950.

In the Representation of the People Act, 1950,—

(i) in section 4,—

(a) sub-section (1) shall be omitted;

(b) for sub-section (2), the following sub-section shall be substituted, namely :—

"(2) All the seats in the House of the People allotted to the States under section 3 shall be seats to be filled by persons chosen by direct election from parliamentary constituencies in the States.";

(ii) in section 27A,—

(a) in sub-section (1), for the words, brackets and figure "Subject to the provisions of sub-section (5), for the purpose of filling any seat", the words "For the purpose of filling any seat" shall be substituted;

(b) in sub-section (4), for the words "The electoral college for each of the Union territories of Pondicherry and Mizoram", the words "The electoral college for each of the Union territories of Arunachal Pradesh, Mizoram and Pondicherry" shall be substituted;

(c) sub-section (5) shall be omitted.

12. Amendment of Act 43 of 1951.

In the Representation of the People Act, 1951, in section 4, in the opening portion, the words "other than a seat allotted to the Union territory of Arunachal Pradesh" shall be omitted.

13. Provision as to sitting members in the House of the People and the Council of States.

Notwithstanding anything contained in sections 11 and 12—

(a) the member representing, immediately before the commencement of this Act, the Union territory of Arunachal Pradesh in the present House of the People shall continue to represent that Union territory until the dissolution of the present House of the People and so often as before such dissolution the seat allotted to that Union territory in the present House of the People becomes vacant, it shall be filled by a person nominated by the President and that person shall represent that Union territory in the present House of the People until its dissolution;

(b) the member representing, immediately before the commencement of this Act, the Union territory of Arunachal Pradesh in the Council of States shall continue to represent that Union territory until the expiry of his term of office.

14. Amendment of Act 84 of 1971.

In the North-Eastern Council Act, 1971, in section 3, in sub-section (1),—

(a) in clause (b), for the words "and of the Union territory of Mizoram", the words "and of the Union territories of Arunachal Pradesh and Mizoram" shall be substituted;

(b) clause (c) shall be omitted;

(c) in the proviso, for the words, brackets and letter "in any State referred to in clause (b) or in the Union territory referred to in that clause", the words, brackets and letter "in any State or Union territory referred to in clause (b)" shall be substituted.

15. Repeal of Regulation 4 of 1971.

As from the commencement of the principal Act, in the Union territory of Arunachal Pradesh, the North-East Frontier Agency (Administration) Supplementary Regulation, 1971 shall stand repealed.

THE PONDICHERRY APPROPRIATION (NO. 2) ACT, 1975 (Act No. 30 of 1975)

[29th July, 1975.]

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the Union territory of Pondicherry for the services of the financial year 1975-76.

BE it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

(Text of the Act not printed.)

THE NAGALAND STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1975 (Act No. 31 of 1975)

[30th July, 1975.]

An Act to confer on the President the power of the Legislature of the State of Nagaland to make laws.

BE it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

(Text of the Act not printed.)

THE DEFENCE OF INDIA (AMENDMENT) ACT, 1975 (Act No. 32 of 1975)†

[31st July, 1975.]

An Act to amend the Defence of India Act, 1971.

[†] Received the assent of the President on 31-7-1975 Act Published in Gaz. of India, 1-8-1975, Part II-S. 1, Ext. p. 235.

For Statement of Objects and Reasons, see Gaz. of India, 21-7-1975, Part II, S. 2, Ext., p. 406

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title and duration.

(1) This Act may be called **THE DEFENCE OF INDIA (AMENDMENT) ACT, 1975**.

(2) The amendments made to the Defence of India Act, 1971 (hereinafter referred to as the principal Act), by the provisions of this Act shall remain in force during the period of operation of the Proclamation of Emergency issued under clause (1) of article 352 of the Constitution on the 25th day of June, 1975, and for a period of six months thereafter, but their expiry under the operation of this sub-section shall not affect—

(a) the previous operation of, or anything duly done or suffered under, the principal Act, as amended by this Act, or any rule made thereunder or any order made under any such rule, or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the principal Act, as amended by this Act, or any rule made thereunder or any order made under any such rule, or

(c) any penalty, forfeiture or punishment incurred in respect of any offence under the principal Act, as amended by this Act, or any contravention of any rule made thereunder or of any order made under any such rule, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the said amendments had not expired.

2. Amendment of long title.

In the long title to the principal Act, after the words "civil defence", the words "and internal security," shall be inserted.

3. Amendment of preamble.

In the preamble to the principal Act,—

(a) in the first paragraph,—

(i) for the word "Proclamation", the word "Proclamations" shall be substituted;

(ii) after the words "by external aggression", the words "and by internal disturbance" shall be inserted;

(b) in the second paragraph, after the words "and civil defence", the words "and internal security" shall be inserted.

4. Amendment of section 1.

In section 1 of the principal Act,—

(a) in sub-section (1), for the words "the Defence of India", the words "Defence and Internal Security of India" shall be substituted;

(b) in sub-section (3), for the words "shall remain in force during the period of operation of the Proclamation of Emergency", the following shall be substituted, namely:—

"shall, subject to the provisions of the Defence of India (Amendment) Act, 1975, remain in force during the period of operation of the Proclamation of Emergency issued on the 3rd day of December, 1971".

5. Amendment of section 2.

In section 2 of the principal Act, in clause (g), after the words, figures and letters "the 3rd day of December, 1971", the words, figures and letters "or the Proclamation issued under that clause on the 25th day of June, 1975" shall be inserted.

6. Amendment of section 3.

In section 3 of the principal Act,—

(a) In sub-section (1), after the words "civil defence," the words "the internal security," shall be inserted;

(b) in section (2),—

(i) in clause (4),—

(A) in the opening paragraph, for the words "or civil defence", the words "civil defence or internal security" shall be substituted;

(B) in sub-clause (e), after the words "civil defence", the words "internal security" shall be inserted;

(ii) in sub-clause (a) of clause (7), sub-clause (j) of clause (10) and clause (32), after the words "civil defence," the words "the internal security," shall be inserted;

(iii) in clause (9), after the words "any scheme of defence", the words "or any scheme for the prevention of internal disturbance" shall be inserted;

(iv) in clauses (21), (25) and (27), after the words "civil defence", the words "or for internal security" shall be inserted;

(v) in clause (40), after the words "civil defence", the words "or the internal security" shall be inserted;

(vi) in clause (46), after the words "civil defence", the words "to the internal security" shall be inserted;

(c) in sub-section (3), in clause (viii), after the words "civil defence", the words "or the internal security" shall be inserted.

7. Amendment of section 6.

In section 6 of the principal Act, in sub-clause (a) of clause (1), and in sub-clauses (a) and (d) of clause 6), for the words "Defence of India Act", wherever they occur, the words "Defence and Internal Security of India Act" shall be substituted.

8. Amendment of section 16.

In sub-section (1) of section 16 of the principal Act, after the words "civil defence", the words "the internal security," shall be inserted.

9. Amendment of section 23.

In sub-section (1) of S. 23 of the principal Act, after the words "civil defence," the words "internal security," shall be inserted.

10. Amendment of section 38.

In section 38 of the principal Act, for the words "and the defence of India and civil defence", the words "the defence of India and civil defence and the internal security" shall be substituted.

11. Repeal and saving.

(1) The Defence of India (Amendment) Ordinance, 1975, is hereby repealed.

(2) Notwithstanding such repeal, any rules made, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been made, done or taken under the principal Act, as amended by this Act, as if this Act had come into force on the 30th day of June 1975.

**THE KERALA LEGISLATIVE
ASSEMBLY (EXTENSION OF
DURATION) ACT, 1975**

(Act No. 33 of 1975)

(31st July, 1975)

An Act to provide for the extension of the duration of the present Legislative Assembly of the State of Kerala.

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 8,000 | <i>Nil</i> ; |
| (2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000 | 17 per cent. of the amount by which the total income exceeds Rs. 8,000; |
| (3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,190 plus 20 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25 000 | Rs. 2,190 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000; |

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:
(Text of the Act not printed.)

**THE FINANCE (AMENDMENT)
ACT, 1975**

(Act No. 34 of 1975)*†

[31st July, 1975]

An Act to amend the Finance Act, 1975.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows :—

1. Short title.

This Act may be called THE FINANCE (AMENDMENT) ACT, 1975.

2. Amendment of section 2.

In section 2 of the Finance Act, 1975 (hereinafter referred to as the principal Act), in sub-section (7), for the words "six thousand rupees", wherever they occur, the words "eight thousand rupees" shall be substituted, and shall be deemed to have been substituted with effect from the 1st day of April, 1975.

3. Amendment of the First Schedule.

In the First Schedule to the principal Act, for Paragraph A of Part III, the following Paragraph shall be substituted, and shall be deemed to have been substituted with effect from the 1st day of April, 1975, namely:—

"PARAGRAPH A

Sub-paragraph I

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies.—

[*†] Received the assent of the President on 31-7-1975. Act published in Gaz. of India, 1-8-1975, Part II-S. 1, Ext. p. 241. For Statement of Objects and Reasons, see Gaz. of India, 22-7-1975, Part II-S. 2, Ext. p. 439.

- (5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 Rs. 8,690 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (6) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 Rs. 5,690 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000;
- (7) where the total income exceeds Rs. 50,000 but does not exceed Rs. 70,000 Rs. 15,690 plus 60 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (8) where the total income exceeds Rs. 70,000 Rs. 27,690 plus 70 per cent. of the amount by which the total income exceeds Rs. 70,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub.Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub.Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1976 exceeds Rs. 8,000,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 8,000 Nil;
- (2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000 20 per cent. of the amount by which the total income exceeds Rs. 8,000;
- (3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 Rs. 1,400 plus 30 per cent. of the amount by which the total income exceeds Rs. 15,000;
- (4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 Rs. 2,900 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000;
- (5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 Rs. 4,900 plus 50 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (6) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 Rs. 7,400 plus 60 per cent. of the amount by which the total income exceeds Rs. 30,000;
- (7) where the total income exceeds Rs. 50,000 Rs. 19,400 plus 70 per cent. of the amount by which the total income exceeds Rs. 50,000.

Surcharge on income tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub.Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax."

4. Special provision in relation to advance tax payable during the financial year 1975-76.

Notwithstanding the amendments made by this Act to the principal Act, where, in the case of an assessee, an order has been made by the Income-tax Officer under section 210 of the Income-tax Act, 1961 and in pursuance thereof a notice of demand for payment of advance tax during the financial year commencing on the 1st day of April, 1975 has been issued by the Income-tax Officer before the commencement of this Act,—

(i) the validity of such order or notice shall not be called in question merely on the ground that the rate or rates for the purposes of

computing the advance tax have been varied by this Act;

(ii) every such order and notice of demand shall have effect as if the amount of advance tax specified therein had been substituted by the amount of advance tax computed in accordance with the rate or rates as so varied; and

(iii) the excess amount, if any, paid by the assessee in an instalment due on the 15th day of June, 1975 may be adjusted against the amount payable in the instalment due on the 15th day of September, 1975.

Explanation. — All words and expressions used in this section which are defined in the Income-tax Act, 1961 shall have the meanings, respectively, assigned to them in that Act.

**THE CONSERVATION OF FOREIGN
EXCHANGE AND PREVENTION
OF SMUGGLING ACTIVITIES
(AMENDMENT) ACT, 1975**

(Act No. 35 of 1975)*†

[1st August, 1975]

An Act to amend the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES (AMENDMENT) ACT, 1975.

(2) It shall be deemed to have come into force on the 1st day of July, 1975

2. Insertion of new section 5A.

In the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as the principal Act), after section 5, the following section shall be inserted, namely:—

Grounds of detention severable.

"5A. Where a person has been detained in pursuance of an order of detention under sub-section (1) of section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly—

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are—

- (i) vague,
- (ii) non-existent,
- (iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever, and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub-section (1) of section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds."

3. Amendment of section 12.

In section 12 of the principal Act, after sub-section (5), the following sub-section shall be inserted, namely:—

"(6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise."

4. Insertion of new section 12A.

After section 12 of the principal Act, the following section shall be inserted, namely:—

Special provisions for dealing with emergency.

"12A, (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under clause (1) of article 352 of the Constitution on the 3rd day of December, 1971, or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.

(2) When making an order of detention under this Act against any person after the commencement of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned :

Provided that where such declaration is made by an officer, it shall be reviewed by the appropriate Government within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by that Government, after such review, within the said period of fifteen days.

[*†] Received the assent of the President on 1-8-1975. Act published in Gaz. of India, 1-8-1975, Part II-S. 1, Ext., p. 245.

For Statement of Objects and Reasons, see Gaz. of India, 22-7-1975, Part II-S. 2, Ext., p. 420.

(3) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months, and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency, that Government may revoke the declaration.

(4) In making any consideration, review or reconsideration under sub-section (2) or (3), the appropriate Government or officer may, if such Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(5) It shall not be necessary to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and, accordingly, such period shall not be taken into account for the purposes of sub-section (3) of section 3.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purpose of computing—

(i) the periods specified in clauses (b) and (c) of section 8;

(ii) the periods of "one year" and "five weeks" specified in sub-section (1), the period of "one year" specified in sub-section (2) (i) and the period of "six months" specified in sub-section (3), of section 9.

5. Repeal and saving.

(1) The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Ordinance, 1975, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the principal Act as amended by this Act.

THE APPROPRIATION (NO. 3)

ACT, 1975

(Act No. 36 of 1975)

(1st August, 1975)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the services of the financial year 1975-76.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows :—

(Text of the Act not printed.)

THE APPROPRIATION (NO. 4)

ACT, 1975

(Act No. 37 of 1975)

(1st August, 1975)

An Act to provide for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet the amounts spent on certain services during the financial year ended on the 31st day of March, 1973 in excess of the amount granted for those services and for that year.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows :—

(Text of the Act not printed.)

THE EMPLOYEES' STATE INSURANCE (AMENDMENT)

ACT, 1975

(Act No. 38 of 1975) + +

[1st August, 1975]

An Act further to amend the Employees' State Insurance Act, 1948, and to incorporate an explanatory provision connected therewith in section 405 of the Indian Penal Code.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows :—

1. Short title and commencement.

(1) This Act may be called THE EMPLOYEES' STATE INSURANCE (AMENDMENT) ACT, 1975.

[+] Received the assent of the President on 1-8-1975 Act published in Gaz. of India; 1-8-1975. Part II-S. 1, Ext. P. 255. For Statement of Objects and Reasons; see Gaz. of India; 22-3-1975 Part II-S. 2, Ext. P. 288.

(2) It shall come into force on such date* as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act.

[*] 1-B-1975 Gaz. of Ind. 1975, Pt. II S. 3 (ii) Ext. p. 1979.

2. Amendment of section 2.

In section 2 of the Employees' State Insurance Act, 1948 (hereinafter referred to as the principal Act), in sub-clause (b) of clause (9), for the words "five hundred rupees" in both the places where they occur, the words "one thousand rupees" shall be substituted.

3. Amendment of section 17.

In sub-section (1) of section 17 of the principal Act, for the words "with a maximum monthly salary of five hundred rupees and above," the words "the maximum monthly salary of which exceeds one thousand and two hundred rupees" shall be substituted.

4. Amendment of section 85.

In section 85 of the principal Act, for the words "he shall be punishable with imprisonment which may extend to three months or with fine which may extend to five hundred rupees, or with both," the following shall be substituted, namely:—

"he shall be punishable—

(i) where he commits an offence under clause (a), with imprisonment for a term which may extend to six months but—

(a) which shall not be less than three months, in case of failure to pay the employees' contribution which has been deducted by him from the employee's wages;

(b) which shall not be less than one month, in any other case,

and shall also be liable to fine which may extend to two thousand rupees;

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term or of fine only in lieu of imprisonment;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

5. Insertion of new sections 85A, 85B and 85C.

After section 85 of the principal Act, the following sections shall be inserted, namely:—

Enhanced punishment in certain cases after previous conviction.

"85A. Whoever, having been convicted by a court of an offence punishable under this Act, commits the same offence shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both:

Provided that where such subsequent offence is for failure by the employer to pay any contribution which under this Act he is liable to pay, he shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to one year but which shall not be less than three months and shall also be liable to fine which may extend to four thousand rupees.

Power to recover damages.

85B. (1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer such damages not exceeding the amount of arrears as it may think fit to impose:

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue.

Power of Court to make orders.

85C. (1) Where an employer is convicted of an offence for failure to pay any contribution payable under this Act, the Court may, in addition to awarding any punishment, by order, in writing require him within a period specified in the order (which the Court may if it thinks fit and on application in that behalf, from time to time, extend), to pay the amount of contribution in respect of which the offence was committed.

(2) Where an order is made under sub-section (1), the employer shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the Court, but if, on the expiry of such period or extended period, as the case may be, the order of the Court has not been fully complied with, the employer shall be deemed to have committed a further offence and shall be punishable with imprisonment in respect thereof under section 85 and shall also be liable to pay fine which may extend to one hundred rupees for every day after such expiry on which the order has not been complied with."

6. Insertion of new section 93A.

After section 93 of the principal Act, the following section shall be inserted, namely :—

Liability in case of transfer of establishment.

"93A. Where an employer, in relation to a factory or establishment transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods up to the date of such transfer:

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer."

7. Amendment of section 95.

In section 95 of the principal Act, in sub-section (4), for the words "or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following", the words "or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid" shall be substituted.

8. Amendment of the First Schedule.

In the First Schedule to the principal Act, in paragraph 3, for the Table, the following Table shall be substituted, namely :—

"TABLE

Group of employees whose average daily wages are	Employees' weekly con. tribution (recoverable from employees)	Employer's weekly con. tribution	Total weekly con. tribution (employee's and employer's contribution)	Corresponding daily standard benefit rate :
1	2	3	4	5
1. Below Rs. 2	Paise Nil	Paise 75	Paise 75	Paise 100
2. Rs. 2 and above but below Rs. 3	40	80	120	130
3. Rs. 3 and above but below Rs. 4	50	100	150	175
4. Rs. 4 and above but below Rs. 6	70	140	210	250
5. Rs. 6 and above but below Rs. 8	95	190	285	350
6. Rs. 8 and above but below Rs. 12	125	250	375	500
7. Rs. 12 and above but below Rs. 16	175	350	525	700
8. Rs. 16 and above but below Rs. 24	275	550	825	1000
9. Rs. 24 and above	375	750	1125	1500".

9. Amendment of Act 45 of 1860.

In section 405 of the Indian Penal Code, the *Explanation* shall be numbered as *Explanation 1* thereof and after the *Explanation* as so numbered, the following *Explanation* shall be inserted, namely :—

"*Explanation 2.* — A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State

Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

THE CONSTITUTION (THIRTY-EIGHTH AMENDMENT)

Act, (1975)§§

[1st August, 1975]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows :—

1. Short title.

This Act may be called THE CONSTITUTION (THIRTY-EIGHTH AMENDMENT) ACT, 1975.

2. Amendment of article 123.

In article 123 of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted namely :—

"(4) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

3. Amendment of article 213.

In article 213 of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted, namely :—

"(4) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

4. Amendment of article 239B.

In article 239B of the Constitution, after clause (3), the following clause shall be inserted, and shall be deemed always to have been inserted, namely :—

"(4) Notwithstanding anything in this Constitution, the satisfaction of the Administrator mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

5. Amendment of article 352.

In article 352 of the Constitution, after clause (3), the following clauses shall be inserted, and shall be deemed always to have been inserted, namely :—

"(4) The power conferred on the President by this article shall include the power to issue

different Proclamations on different grounds, being war or external aggression or internal disturbance or imminent danger of war or external aggression or internal disturbance, whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

(5) Notwithstanding anything in this Constitution,—

(a) the satisfaction of the President mentioned in clause (1) and clause (3) shall be final and conclusive and shall not be questioned in any court on any ground;

(b) subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of—

(i) a declaration made by Proclamation by the President to the effect stated in clause (1); or

(ii) the continued operation of such Proclamation."

6. Amendment of article 356.

In article 356 of the Constitution, after clause (4), the following clause shall be inserted, and shall be deemed always to have been inserted, namely :—

"(5) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground."

7. Amendment of article 359.

In article 359 of the Constitution, after clause (1), the following clause shall be inserted, and shall be deemed always to have been inserted, namely :—

"(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

8. Amendment of article 360.

In article 360 of the Constitution, after clause (4), the following clause shall be inserted, and shall be deemed always to have been inserted, namely :—

[§§] Received the assent of the President on 1-8-1975 Act published in Gaz. of India; 1-8-1975, Part II-S. 1, Ext., p. 259.

For Statement of Objects and Reasons, see Gaz. of India, 22-7-1975, Part II-S. 2, Ext., p. 424

"(5) Notwithstanding anything in this Constitution,—

(a) the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground;

(b) subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of—

(i) a declaration made by Proclamation by the President to the effect stated in clause (1); or

(ii) the continued operation of such Proclamation."

THE MAINTENANCE OF INTERNAL SECURITY (AMENDMENT) ACT, 1975

(Act No. 39 of 1975)††

[5th August, 1975]

An Act further to amend the Maintenance of Internal Security Act, 1971.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE MAINTENANCE OF INTERNAL SECURITY (AMENDMENT) ACT, 1975.

(2) Section 7 shall be deemed to have come into force on the 25th day of June, 1975 and the remaining provisions of this Act shall be deemed to have come into force on the 29th day of June, 1975.

2. Amendment of section 4.

In section 4 of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the principal Act), for the words and figures "Code of Criminal Procedure, 1898", the words and figures "Code of Criminal Procedure, 1973" shall be substituted.

3. Amendment of section 7.

In section 7 of the principal Act,—

(a) in clause (a) of sub-section (1), for the words and figures "Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89 of the Code of Crimi-

nal Procedure, 1898", the words, figures and brackets "Metropolitan Magistrate or a Judicial Magistrate of the first class, having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82 to 86 (both inclusive) of the Code of Criminal Procedure, 1973" shall be substituted;

(b) in sub-section (2), for the words and figures "Code of Criminal Procedure, 1898", the words and figures "Code of Criminal Procedure, 1973" shall be substituted.

4. Amendment of section 14.

In section 14 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) The revocation of a detention order shall not bar the making of another detention order under section 3 against the same person."

5. Amendment of section 15.

In section 15 of the principal Act,—

(a) after sub-section (3), the following sub-section shall be inserted, namely:—

"(3A) If the appropriate Government has reason to believe that any person who has failed to surrender himself in the manner specified in sub-section (3) has absconded or is concealing himself, that Government may make a report in writing of the fact to a Metropolitan Magistrate or a Judicial Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides and thereupon the provisions of sections 82 to 86 (both inclusive) of the Code of Criminal Procedure, 1973, shall apply in relation to such person as they apply in relation to a person who has absconded or is concealing himself so that a warrant issued by the Magistrate cannot be executed."

(b) after sub-section (5), the following sub-section shall be inserted, namely:—

"(6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise."

6. Insertion of new section 16A.

After section 16 of the principal Act, the following section shall be inserted, namely:—
Special provisions for dealing with emergency.

"16A. (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the Proclamation of Emergency issued under

[††] Received the assent of the President on 5-8-1975, Act published in Gaz. of India, 5-8-1975, Part II-S. 1, Ext., p. 263.

For Statement of Objects and Reasons, see Gaz. of India, 23-7-1975, Part II, S. 2 Ext. p. 435.

clause (1) of article 352 of the Constitution on the 3rd day of December, 1971 or the Proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of twelve months from the 25th day of June, 1975, whichever period is the shortest.

(2) The case of every person (including a foreigner) against whom an order of detention was made under this Act on or after the 25th day of June, 1975, but before the commencement of this section, shall, unless such person is sooner released from detention, be reviewed within fifteen days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the emergency in respect of which the Proclamations referred to in sub-section (1) have been issued (hereafter in this section referred to as the emergency) and if, on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this Act against any person (including a foreigner) after the commencement of this section, the Central Government or the State Government or, as the case may be, the officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the emergency and if, on such consideration, the Central Government or the State Government or, as the case may be, the officer is satisfied that it is necessary to detain such person for effectively dealing with the emergency, that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned:

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within fifteen days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of fifteen days.

(4) The question whether detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (3) continues to be necessary for effectively dealing with the emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months and if, on such recon-

sideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the emergency that Government may revoke the declaration.

(5) In making any review, consideration or reconsideration under sub-sections (2), (3) or (4), the appropriate Government or officer may, if such Government or officer considers it to be against public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity of making a representation to the person concerned.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply, being a person the review of whose case is pending under that sub-section or in respect of whom a declaration has been made under that sub-section,—

(i) sections 8 to 12 shall not apply; and

(ii) sections 13 shall apply subject to the modification that the words and figures "which has been confirmed under section 12" shall be omitted.

(7) In the case of every person detained under a detention order to which the provisions of sub-section (3) apply, being a person in respect of whom a declaration has been made under that sub-section,

(i) section 3 shall apply subject to the modification that for sub-sections (3) and (4) thereof, the following sub-section shall be substituted, namely:—

"(3) When any order of detention is made by a State Government or by an officer subordinate to it, the State Government shall, within twenty days, forward to the Central Government a report in respect of the order;"

(ii) sections 8 to 12 shall not apply; and

(iii) section 13 shall apply subject to the modification that the words and figures "which has been confirmed under section 12" shall be omitted."

7. Insertion of new section 18.

Section 18 of the principal Act shall be re-numbered as section 19 thereof and before that section as so re-numbered, the following section shall be inserted, namely:—

Exclusion of common law or natural law rights, if any.

"18. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any."

3. Repeal and saving.

(1) The Maintenance of Internal Security (Amendment) Ordinance, 1975 and the Maintenance of Internal Security (Second Amendment) Ordinance, 1975 are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the said Ordinances shall be deemed to have been done or taken under the principal Act as amended by this Act.

THE ELECTION LAWS (AMENDMENT) ACT, 1975

(Act No. 40 of 1975)***

[6th August, 1975]

An Act further to amend the Representation of the People Act, 1951 and the Indian Penal Code.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

1. Short title.

This Act may be called THE ELECTION LAWS (AMENDMENT) ACT, 1975.

2. Substitution of new section for section 8A.

In the Representation of the People Act, 1951 (hereinafter referred to as the principal Act), for section 8A, the following section shall be substituted namely:—

Disqualification on ground of corrupt practices.

"8A. (1) The case of every person found guilty of a corrupt practice by an order under section 99 shall be submitted, as soon as may be, after such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under section 99 takes effect.

(2) Any person who stands disqualified under section 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975, may,

if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion."

3. Amendment of section 11.

In section 11 of the principal Act, after the words "under this Chapter," the brackets, words, figure and letter "(except under section 8A)" shall be inserted.

4. Amendment of section 11A.

Section 11A of the principal Act shall be re-numbered as sub-section (1) thereof and—

(a) in the sub-section as so re-numbered, clause (b) shall be omitted; and

(b) after the sub-section as so re-numbered, the following sub-sections shall be inserted, namely:—

"(2) Any person disqualified by a decision of the President under sub-section (1) of section 8A for any period shall be disqualified for the same period for voting at any election.

(3) The decision of the President on a petition submitted by any person under sub-section (2) of section 8A in respect of any disqualification for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State shall, so far as may be, apply in respect of the disqualification for voting at any election incurred by him under clause (b) of sub-section (1) of section 11A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975, as if such decision were a decision in respect of the said disqualification for voting also."

5. Amendment of section 11B.

In section 11B of the principal Act, for the words "any disqualification under this Chapter," the words, brackets, figures and letter "any disqualification under sub-section (1) of section 11A" shall be substituted.

6. Amendment of section 77.

In section 77 of the principal Act, in sub-section (1),—

(a) for the words "the date of publication of the notification calling the election," the words "the date on which he has been nominated" shall be substituted;

*** Received the assent of the President on 6-8-1975. Act published in Gaz., of India; 6-8-1975. Part II-S. 1, Ext. P. 267.

For Statement of Objects and Reasons, see Gaz. of India; 4-8-1975. Part II-S. 2, Ext. P. 674.

(b) after *Explanation 2*, the following *Explanation* shall be inserted, namely:—

"*Explanation 3*.—For the removal of doubt, it is hereby declared that any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorized by a candidate or by his election agent for the purposes of this sub-section."

7. Amendment of section 79.

In section 79 of the principal Act, for clause (b), the following clause shall be substituted, namely:—

"(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;"

8. Amendment of section 123.

In section 123 of the principal Act,—

(a) in clause (3) the following proviso shall be inserted at the end, namely:—

"Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.";

(b) in clause (7), the following proviso shall be inserted at the end, namely:—

"Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.";

(c) in the *Explanation* at the end, the following shall be added, namely:—

"(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connec-

tion with the administration of a Union territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date."

9. Amendment of section 171A of Act 45 of 1860.

In the Indian Penal Code, in section 171A, for clause (a), the following clause shall be substituted, namely:—

"(a) "candidate" means a person who has been nominated as a candidate at any election;"

10. Amendments to have retrospective effect.

The amendments made by sections 6, 7 and 8 of this Act in the principal Act shall also have retrospective operation so as to apply to and in relation to any election held before the commencement of this Act to either House of Parliament or to either House or the House of the Legislature of a State—

(i) in respect of which any election petition may be presented after the commencement of this Act; or

(ii) in respect of which any election petition is pending in any High Court immediately before such commencement; or

(iii) in respect of which any election petition has been decided by any High Court, before such commencement but no appeal has been preferred to the Supreme Court against the decision of the High Court before such commencement and the period of limitation for filing such appeal has not expired before such commencement; or

(iv) in respect of which appeal from any order of any High Court made in any election petition under section 98 or section 99 of the principal Act is pending before the Supreme Court immediately before such commencement.

THE TAXATION LAWS (AMENDMENT) ACT, 1975

(Act No. 41 of 1975)*

[7th August, 1975]

An Act further to amend the Income-tax Act, 1961, the Wealth-tax Act, 1957, the Gift-tax Act, 1958 and the Companies (Profits) Surtax Act, 1964.

Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY.

1. Short title and commencement.

(1) This Act may be called THE TAXATION LAWS (AMENDMENT) ACT, 1975.

(2) It shall come into force on such date* as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act; and any reference to "the commencement of the Taxation Laws (Amendment) Act, 1975" in any amendment made by any provision of this Act shall be construed as a reference to the coming into force of that provision.

[*] For such a notification see S. O. 475 (E) Gaz. of Ind., 1975, Pt. II, S. 3 (ii), Ext., p. 2007.

CHAPTER II

AMENDMENTS TO THE INCOME-TAX ACT, 1961

2. Amendment of section 2.

In section 2 of the Income-tax Act, 1961 (hereafter in this Chapter referred to as the Income-tax Act), after clause (15), the following clause shall be inserted, namely:—

(15A) "child", in relation to an individual, includes a step-child and an adopted child of that individual;".

3. Amendment of section 10.

In section 10 of the Income-tax Act,—

(i) in clause (6), after sub-clause (vi), the following sub-clause shall be inserted, namely:—

"(via) the remuneration received by him as an employee of, or a consultant to, an institution or association or a body established or formed outside India solely for philanthropic purposes, for services rendered by him in India in connection with such purposes; provided that such institution or association or body and the purposes for which his services

are rendered in India are approved by the Central Government;";

(ii) after clause (23B), the following clause shall be inserted, namely:—

"(23C) any income received by any person on behalf of—

(i) the Prime Minister's National Relief Fund; or

(ii) the Prime Minister's Fund (Promotion of Folk Art);

or

(iii) the Prime Minister's Aid to Students Fund; or

(iv) any other fund or institution established for charitable purposes which may be notified by the Central Government in the Official Gazette, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States; or

(v) any trust (including any other legal obligation) or institution, being a trust or institution wholly for public religious purposes or wholly for public religious and charitable purposes, which may be notified by the Central Government in the Official Gazette, having regard to the manner in which the affairs of the trust or institution are administered and supervised for ensuring that the income accruing thereto is properly applied for the purposes thereof:

Provided that any notification issued by the Central Government under sub-clause (iv) or sub-clause (v) shall have effect for such assessment year or years (including an assessment year or years commencing before the date on which such notification is issued) as may be specified in the notification;".

4. Amendment of section 11.

In section 11 of the Income-tax Act,—

(i) in sub-section (1),—

(a) for clauses (a) and (b), the following clauses shall be substituted, namely:—

"(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of twenty-five per cent. of the income from such property;

(b) income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India; and, where any such income is finally

[*] Act published in Gaz. of India, 7-8-1975, Part II-S. 1, Ext., p. 271.

For Statement of Objects and Reasons, see Gaz. of India, 9-5-1973, Part II-S. 2 Ext. p. 531.

For Select Committee Report, see Gaz. of Ind., 20-3-1975, Part II-S. 2, Ext., p. 266.

set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of twenty-five per cent. of the income from such property;"

(b) for the *Explanation*, the following *Explanation* shall be substituted, namely:—

Explanation.—For the purposes of clauses (a) and (b),—

(1) in computing the twenty-five per cent. of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in section 12 shall be deemed to be part of the income;

(2) if, in the previous year, the income applied to charitable or religious purposes in India falls short of seventy-five per cent. of the income derived during that year from property held under trust, or, as the case may be, held under trust in part, by any amount—

(i) for the reason that the whole or any part of the income has not been received during that year, or

(ii) for any other reason, then—

(a) in the case referred to in sub-clause (i), so much of the income applied to such purposes in India during the previous year in which the income is received or during the previous year immediately following as does not exceed the said amount; and

(b) in the case referred to in sub-clause (ii), so much of the income applied to such purposes in India during the previous year immediately following the previous year in which the income was derived as does not exceed the said amount,

may, at the option of the person in receipt of the income [such option to be exercised in writing before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139, whether fixed originally or on extension for furnishing the return of income] be deemed to be income applied to such purposes during the previous year in which the income was derived, and the income so deemed to have been applied shall not be taken into account in calculating the amount of income applied to such purposes, in the case referred to in sub-clause (i), during the previous year in which the income is received or during the previous year immediately following, as the case may be, and, in the case referred to in sub-clause (ii), during the previous year immediately following the previous year in which the income was derived;"

(ii) after sub-section (1A), the following sub-section shall be inserted, namely:—

"(1B) Where any income in respect of which an option is exercised under clause (2) of the *Explanation* to sub-section (1) is not ap-

plied to charitable or religious purposes in India during the period referred to in sub-clause (a) or, as the case may be, sub-clause (b), of the said clause, then, such income shall be deemed to be the income of the person in receipt thereof—

(a) in the case referred to in sub-clause (i) of the said clause, of the previous year immediately following the previous year in which the income was received, or

(b) in the case referred to in sub-clause (ii) of the said clause, of the previous year immediately following the previous year in which the income was derived;"

(iii) in sub-section (2), for the portion beginning with the words, brackets, letters and figure "Where any income referred to in clause (a) or clause (b) of sub-section (1)" and ending with the words "the following conditions are complied with namely:—", the following shall be substituted namely:—

"Where seventy-five per cent. of the income referred to in clause (a) or clause (b) of sub-section (1) read with the *Explanation* to that sub-section is not applied, or is not deemed to have been applied to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income provided the following conditions are complied with namely:—"

(iv) after sub-section (3), the following sub-section shall be inserted, namely:—

"(3A) Notwithstanding anything contained in sub-section (3), where due to circumstances beyond the control of the person in receipt of the income, any income invested or deposited in accordance with the provisions of clause (b) of sub-section (2) cannot be applied for the purpose for which it was accumulated or set apart the Income-tax Officer may, on an application made to him in this behalf, allow such person to apply such income for such other charitable or religious purpose in India as is specified in the application by such person and as is in conformity with the objects of the trust; and thereupon the provisions of sub-section (3) shall apply as if the purpose specified by such person in the application under this sub-section were a purpose specified in the notice given to the Income-tax Officer under clause (a) of sub-section (2)."

5. Amendment of section 13.

In section 13 of the Income-tax Act,—

(i) in sub-section (1),—

(a) after clause (b), the following clause shall be inserted, namely:—

"(bb) in the case of a charitable trust or institution for the relief of the poor, education or medical relief, which carries on any business, any income derived from such business, unless the business is carried on in the course of the actual carrying out of a primary purpose of the trust or institution;"

(b) after clause (c) and the provisos thereto, the following clause shall be inserted, namely :—

"(d) subject to the provisions of clause (bb), in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof assessable for any assessment year commencing on or after the 1st day of April, 1979, if any funds of the trust or institution are invested or deposited or continue to remain invested or deposited for any period during any previous year commencing on or after the 1st day of April, 1978, otherwise than in any of the forms or modes specified in sub-section (5)."

(ii) in sub-section (3), for clause (b), the following clause shall be substituted, namely :—

"(b) any person who has made a substantial contribution to the trust or institution, that is to say, any person whose total contribution up to the end of the relevant previous year exceeds five thousand rupees;"

(iii) after sub-section (4) and before *Explanation 1*, the following sub-sections shall be inserted, namely :—

'(5) The forms and modes of investing or depositing funds referred to in clause (d) of sub-section (1) shall be—

(a) subject to the provisions of clause (b), in a case where such funds represent the original corpus of the trust or institution or any contributions made to the trust or institution with a specific direction that they shall form part of the corpus of the trust or institution,—

(i) investment in savings certificates as defined in clause (c) of section 2 of the Government Savings Certificates Act, 1959, and any other securities or certificates issued by the Central Government under the small savings schemes of that Government;

(ii) deposit in any account with the Post Office Savings Bank;

(iii) deposit in any account with any nationalised bank, that is to say, any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;

(iv) investment in units in the Unit Trust of India established under the Unit Trust of India Act, 1963;

(v) investment in any security for money created and issued by the Central Government or a State Government;

(vi) investment in debentures issued by, or on behalf of, any company or corporation both the principal whereof and the interest whereon are fully and unconditionally guaranteed by the Central Government or by a State Government;

(vii) investment or deposit in any Government company as defined in section 617 of the Companies Act, 1956;

(b) in a case where such funds represent—

(i) the corpus of the trust or institution immediately before the 1st day of June, 1973; or

(ii) the original corpus (being assets other than cash) of any trust or institution created or established on or after the 1st day of June, 1973; or

(iii) any contributions (otherwise than in cash) made to any trust or institution on or after the 1st day of June, 1973, with a specific direction that they shall form part of the corpus of the trust or institution,

any form or mode, other than investment in shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) in a company (not being a Government company as defined in section 617 of the Companies Act, 1956 or a corporation established by or under a Central, State or Provincial Act);

(c) in any other case, the forms or modes referred to in sub-clause (i), sub-clause (ii), sub-clause (iii) and sub-clause (iv) of clause (a).

(6) Nothing contained in clause (d) of sub-section (1) shall apply in relation to any monies accumulated or finally set apart and invested or deposited in the manner referred to in clause (b) of sub-section (2) of section 11."

6. Amendment of section 23.

In section 23 of the Income-tax Act,—

(i) in sub-section (1),—

(a) for the opening paragraph, the following shall be substituted, namely :—

"(1) For the purposes of section 22, the annual value of any property shall be deemed to be—

(a) the sum for which the property might reasonably be expected to let from year to year; or

(b) where the property is let and the annual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable ;"

(b) the following *Explanation* shall be inserted at the end, namely :—

'Explanation. — For the purposes of sub-section, "annual rent" means—

(a) in a case where the property is let throughout the previous year, the actual rent received or receivable by the owner in respect of such year; and

(b) in any other case, the amount which bears the same proportion to the amount of the actual rent received or receivable by the owner for the period for which the property is let as the period of twelve months bears to such period;'

(ii) for sub-section (2), the following sub-sections shall be substituted, namely:—

"(2) Where the property consists of—

(i) a house in the occupation of the owner for the purposes of his own residence, the annual value of such house shall first be determined in the same manner as if the property had been let and further be reduced by one-half of the amount so determined or one thousand and eight hundred rupees, whichever is less;

(ii) more than one house in the occupation of the owner for the purposes of his own residence, the provisions of clause (i) shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf:

Provided that for the purposes of clauses (i) and (ii), where the sum so arrived at exceeds ten per cent. of the total income of the owner (the total income for this purpose being computed without including therein any income from such property and before making any deduction under Chapter VIA) the excess shall be disregarded.

Explanation. — Where any such residential unit as is referred to in the second proviso to sub-section (1) is in the occupation of the owner for the purposes of his own residence, nothing contained in that proviso shall apply in computing the annual value of that residential unit.

(2A) For the removal of doubt, it is hereby declared that, where the property consists of more than one house and such houses are in the occupation of the owner for the purposes of his own residence, the annual value of the houses, other than that the annual value of which is required to be determined under clause (ii) of sub-section (2), shall be determined under sub-section (1) as if such houses had been let."

7. Amendment of section 26.

In section 26 of the Income-tax Act, the following *Explanation* shall be inserted at the end, namely:—

"Explanation. — For the purposes of this section, in applying the provisions of sub-

section (2) of section 23 for computing the share of each such person as is referred to in this section, such share shall be computed, as if each such person is individually entitled to the relief provided in that sub-section."

8. Amendment of section 32.

In sub-section (1) of section 32 of the Income-tax Act, for clause (i), the following clause shall be substituted, namely:—

(i) in the case of ships other than ships ordinarily plying on inland waters, such percentage on the actual cost thereof to the assessee as may, in any case or class of cases or in respect of any period or periods, be prescribed:

Provided that different percentages may be prescribed for different periods having regard to the date of acquisition of the ship."

9. Amendment of section 35C.

In sub-section (1) of section 35C of the Income-tax Act,—

(i) in clause (a), after the words "Where any company", the words "or a co-operative society" shall be inserted;

(ii) for the words "the company", wherever they occur, the words "the company or co-operative society" shall be substituted.

10. Amendment of section 37.

In sub-section (1) of section 37 of the Income-tax Act, after the words and figures "sections 30 to 36", the words, figures and letters "and section 80VV" shall be inserted.

11. Insertion of new section 44AA.

In Chapter IV of the Income-tax Act, under the heading "*D. — Profits and gains of business or profession*", after section 44A, the following section shall be inserted, namely:—

Maintenance of accounts by certain persons carrying on profession or business.

"44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Income-tax Officer to compute his total income in accordance with the provisions of this Act.

(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—

(i) if his income from business or profession exceeds twenty-five thousand rupees or his

total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds two hundred and fifty thousand rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed twenty-five thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed two hundred and fifty thousand rupees, during such previous year, keep and maintain such books of account and other documents as may enable the Income-tax Officer to compute his total income in accordance with the provisions of this Act.

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained."

12. Amendment of section 49.

In sub-section (1) of section 49 of the Income-tax Act, —

(a) after clause (iii), the following clause shall be inserted, namely: —

"(iv) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,";

(b) in the *Explanation*, for the words, brackets and figures "clause (ii) or clause (iii)," the words, brackets and figures "clause (ii) or clause (iii) or clause (iv)" shall be substituted.

13. Amendment of section 64.

In section 64 of the Income-tax Act, —

(a) for sub-section (1), the following sub-section shall be substituted, namely: —

"(1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly —

(i) to the spouse of such individual from the membership of the spouse in a firm carrying on a business in which such individual is a partner;

(ii) to the spouse of such individual by way of salary, commission, fees or any other form

of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest:

Provided that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience;

(iii) to a minor child of such individual from the admission of the minor to the benefits of partnership in a firm;

(iv) subject to the provisions of clause (i) of section 27, in a case not falling under clause (i) of this sub-section, to the spouse of such individual from assets transferred directly or indirectly to the spouse by such individual otherwise than for adequate consideration or in connection with an agreement to live apart;

(v) subject to the provisions of clause (i) of section 27, in a case not falling under sub-clause (iii) of this sub-section, to a minor child (not being a married daughter) of such individual, from assets transferred directly or indirectly to the minor child by such individual otherwise than for adequate consideration;

(vi) to the son's wife, or son's minor child, of such individual, from assets transferred directly or indirectly on or after the 1st day of June, 1973, to the son's wife or son's minor child by such individual otherwise than for adequate consideration; and

(vii) to any person or association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his or her spouse or minor child (not being a married daughter) or both.

Explanation 1.—For the purposes of clause (i), the individual, in computing whose total income the income referred to in that clause is to be included, shall be the husband or wife whose total income (excluding the income referred to in that clause) is greater; and, for the purposes of clause (iii), the income of the minor child from the partnership shall be included in the income of that parent whose total income (excluding the income referred to in that clause) is greater; and where any such income is once included in the total income of either spouse or parent, any such income arising in any succeeding year shall not be included in the total income of the other spouse or parent unless the Income-tax Officer is satisfied, after giving that spouse or parent an opportunity of being heard, that it is necessary so to do.

Explanation 2.—For the purposes of clause (ii), an individual shall be deemed to have a substantial interest in a concern—

(i) in a case where the concern is a company, if its shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty per cent. of the voting power are, at any time during the previous year, owned beneficially by such person or partly by such person and partly by one or more of his relatives;

(ii) in any other case, if such person is entitled, or such person and one or more of his relatives are entitled in the aggregate, at any time during the previous year, to not less than twenty per cent. of the profits of such concern.

Explanation 3.—For the purposes of clauses (iv) and (v), where the assets transferred directly or indirectly by an individual to his spouse or minor child are invested by the spouse or minor child in any business, that part of the income arising out of the business to the spouse or minor child in any previous year, which bears the same proportion to the income of the spouse or minor child from the business as the value of the assets aforesaid as on the first day of the previous year bears to the total investment in the business by the spouse or the minor child as on the said day, shall be included in the total income of the individual in that previous year.”;

(b) in sub-section (2),—

(i) in clause (b), the words, “in so far as it is attributable to the interest of the individual in the property of the family,” shall be omitted;

(ii) for clause (c), the following clause shall be substituted namely :—

“(c) where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse or minor child on partition shall be deemed to arise to the spouse or minor child from assets transferred indirectly by the individual to the spouse or minor child and the provisions of sub-section (1) shall, so far as may be, apply accordingly.”;

(iii) in the proviso, for the words “minor son”, the words “minor child” shall be substituted;

(iv) in the Explanation,—

(A) the brackets and figure “(1)” shall be omitted;

(B) clause (2) shall be omitted.

14. Insertion of new sections 69C and 69D.

In Chapter VI of the Income-tax Act, under the heading “Aggregation of income”, after

section 69B, the following sections shall be inserted, namely :—

Unexplained expenditure, etc.

“69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Income-tax Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.

Amount borrowed or repaid on hundi.

69D. Where any amount is borrowed on a hundi from, or any amount due thereon is repaid to, any person otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the amount aforesaid for the previous year in which the amount was borrowed or repaid, as the case may be :

Provided that, if in any case any amount borrowed on a hundi has been deemed under the provisions of this section to be the income of any person, such person shall not be liable to be assessed again in respect of such amount under the provisions of this section on repayment of such amount.

Explanation.—For the purposes of this section, the amount repaid shall include the amount of interest paid on the amount borrowed.”.

15. Amendment of section 73.

In section 73 of the Income-tax Act, the following Explanation shall be inserted at the end, namely :—

“*Explanation.*—Where any part of the business of a company [other than an investment company, as defined in clause (ii) of section 109, or a company the principal business of which is the business of banking or the granting of loans and advances] consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.”.

16. Amendment of section 80A.

In section 80A of the Income-tax Act,—

(i) in sub-section (1), for the figures and letter “80U”, the figures and letters “80VV” shall be substituted;

(ii) in sub-section (3), the words, figures and letter "or section 80H" shall be omitted.

17. Amendment of section 80B.

In section 80B of the Income-tax Act, clauses (1) and (9) shall be omitted.

18. Amendment of section 80G.

In section 80G of the Income-tax Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely :—

"(1) In computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section, an amount equal to fifty per cent. of the aggregate of the sums specified in sub-section (2);"

(ii) in clause (i) of sub-section (5), after the words "brackets and figures" or clause (23)", the words, brackets, figures and letter "or clause (23C)" shall be inserted.

19. Insertion of new section 80GG.

In Chapter VIA of the Income-tax Act, under the heading "B. — Deductions in respect of certain payments", after section 80G, the following section shall be inserted, namely :—

Deduction in respect of rents paid.

"80GG. In computing the total income of an assessee, not being an assessee having any income falling within clause (13A) of section 10, there shall be deducted any expenditure incurred by him in excess of ten per cent. of his total income towards payment of rent (by whatever name called) in respect of any furnished or unfurnished accommodation occupied by him for the purposes of his own residence, to the extent to which such excess expenditure does not exceed three hundred rupees per month or fifteen per cent. of his total income for the year, whichever is less and subject to such other conditions or limitations as may be prescribed, having regard to the area or place in which such accommodation is situated and other relevant considerations :

Provided that nothing in this section shall apply to an assessee in any case where any residential accommodation is owned by him or by his spouse or minor child, or where such assessee is a member of a Hindu undivided family, by such family.

Explanation. — In this section, the expressions "ten per cent. of his total income" and "fifteen per cent. of his total income" shall mean ten per cent. or fifteen per cent., as the case may be, of the assessee's total income before allowing deduction for any expenditure under this section."

20. Omission of section 80H.

Section 80H of the Income-tax Act shall be omitted.

21. Amendment of section 80HH.

In section 80HH of the Income-tax Act, sub-section (8) shall be omitted.

22. Amendment of section 80J.

In section 80J of the Income-tax Act,—

(i) in sub-section (1), for the brackets, words, figures and letters "(reduced by the aggregate of the deductions, if any admissible to the assessee under section 80H and section 80HH", the brackets, words, figures and letters "reduced by the deduction, if any, admissible to the assessee under section 80HH)" shall be substituted;

(ii) in sub-section (3), the word, figures and letter "section 80H," shall be omitted.

23. Amendment of section 80L.

In sub-section (1) of section 80L of the Income-tax Act, after clause (vii), the following clause shall be inserted, namely :

"(viii) interest on deposits with any authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning development or improvement of cities, towns and villages, or for both;";

24. Amendment of section 80P.

In sub-section (3) of section 80P of the Income-tax Act,—

(i) the words, figures and letter "section 80H or" shall be omitted;

(ii) for the words, figures and letters "deductions under section 80H, section 80HH, section 80J and section 80JJ", the words, figures and letters "deductions under section 80HH, section 80J and section 80JJ" shall be substituted.

25. Amendment of section 80QQ.

In sub-section (2) of section 80QQ of the Income-tax Act,—

(i) the words, figures and letter "section 80H or shall be omitted;

(ii) the word, figures and letter "section 80H," shall be omitted.

26. Insertion of new sections 80V and 80VV.

In Chapter VIA of the Income-tax Act, under the heading "D.—Other deductions", after section 80U, the following sections shall be inserted, namely :—

Deduction of interest on moneys borrowed to pay taxes.

"80V. In computing the total income of an assessee, there shall be allowed by way of deduction any interest paid by him in the previous year on any money borrowed for the payment of any tax due from him under this Act.

Deduction in respect of expenses incurred in connection with certain proceedings under the Act.

80VV. In computing the total income of an assessee, there shall be allowed by way of deduction any expenditure incurred by him in the previous year in respect of any proceedings before any income-tax authority or the Appellate Tribunal or any court relating to the determination of any liability under this Act, by way of tax, penalty or interest :

Provided that no deduction under this section shall, in any case, exceed in the aggregate five thousand rupees."

27. Amendment of section 104.

In section 104 of the Income-tax Act, for sub-section (4), following sub-section shall be substituted, namely :—

"(4) Without prejudice to the provisions of section 108, nothing contained in this section shall apply to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India."

28. Amendment of section 109.

In section 109 of the Income-tax, Act,—

(a) after clause (i), the following clauses shall be inserted, namely :—

(ia) "industrial company" means an Indian company whose business consists wholly in the construction of ships or in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power;

(ib) "consultancy service company" means an Indian company whose business consists wholly in the provision of technical know-how, or in the rendering of services in connection with the provision of technical know-how, to other persons.

Explanation. — In this clause and in sub-clause (3) of clause (iii), the expression "provision of technical know-how" has the meaning assigned to it in sub-section (2) of section 80MM;";

(b) in clause (iii).—

(i) for sub-clause (1) the following sub-clauses shall be substituted, namely :—

"(1) in the case of an industrial company or a consultancy service company ... 45%;

(2) in the case of an investment company other than an investment company which falls under sub-clause (3) of this clause ... 90%";

(ii) in sub-clause (3), for the portion beginning with the words "in the case of an Indian company" and ending with the words attributable to such business ... Nil;";

the following shall be substituted, namely :—

"in the case of an Indian company, not being an industrial company or a consultancy service company, a part of whose gross total income consists of profits and gains attributable to the business of provision of technical know-how, or of rendering services in connection with the provision of technical know-how, to other persons, or of construction of ships or of manufacture or processing of goods or of mining or of generation or distribution of electricity or any other form of power—

(a) in relation to the said part of its gross total income ... 45%";

(iii) for the *Explanation* below sub-clause (3), the following *Explanation* shall be substituted, namely:—

"Explanation. — The provisions of this Chapter shall apply as if the aforesaid two parts of the gross total income of the company were respectively the gross total income of the company in relation to each such part and as if the amount of dividends actually distributed and the distributable income were also similarly apportioned for the purposes of section 104 and this section."

29. Amendment of section 124.

In sub-section (2) of section 124 of the Income-tax Act, for the portion beginning with the words "and shall perform such functions" and ending with the words "work to be performed.", the following shall be substituted, namely :—

"and shall perform their functions in relation to the said area, or persons or classes of persons, or incomes or classes of income, or cases or classes of cases, in accordance with such general or special orders in writing as the Commissioner or the Inspecting Assistant Commissioner authorised by the Commissioner in this behalf, may make for the purpose of facilitating the performance of such functions."

30. Amendment of section 125.

In sub-section (1) of section 125 of the Income-tax Act, in the proviso,—

(i) after the figures and letter "132A," the figures and letter "132B," shall be inserted;

(ii) for the words, figures and brackets "and 271 to 274 (both inclusive)", the figures, words and brackets ", 271 to 273 (both inclusive) and 274" shall be substituted.

31. Insertion of new section 125A.

After section 125 of the Income-tax Act, the following section shall be inserted namely :—

Concurrent jurisdiction of Inspecting Assistant Commissioner and Income-tax Officer.

"125A. (1) The Commissioner may, by general or special order in writing, direct that all or any of the powers or functions conferred on, or assigned to, the Income-tax Officer or Income-tax Officers by or under this Act in respect of any area, or persons or classes of persons, or incomes or classes of income, or cases or classes of cases, shall be exercised or performed concurrently by the Inspecting Assistant Commissioner.

(2) Where under sub-section (1), an Inspecting Assistant Commissioner exercises concurrent jurisdiction with one or more Income-tax Officers in respect of any area, or persons or classes of persons, or incomes or classes of income, or cases or classes of cases, the Income-tax Officer or Income-tax Officers shall exercise the powers and perform the functions under this Act in relation thereto as the Inspecting Assistant Commissioner may direct.

(3) Without prejudice to the generality of the provisions contained in sub-section (3) of section 119, every Income-tax Officer shall also observe and follow such instructions as may be issued to him for his guidance by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions in relation to any particular proceeding or the initiation of any proceeding under this Act:

Provided that no instructions, which are prejudicial to the assessee, shall be issued before an opportunity is given to the assessee to be heard.

Explanation.—For the purposes of this sub-section, no instruction as to the lines on which an investigation connected with the assessment should be made shall be deemed to be an instruction prejudicial to the assessee.

(4) Where an order is made under sub-section (1) and the Inspecting Assistant Commissioner exercises the powers or performs

the functions of an Income-tax Officer in relation to any area, or persons or classes of persons, or incomes or classes of income, or cases or classes of cases, references in this Act or in any rule made thereunder to the Income-tax Officer and the Appellate Assistant Commissioner shall be construed as references to the Inspecting Assistant Commissioner and the Commissioner respectively and, accordingly:—

(i) any provision of this Act requiring approval or sanction of the Inspecting Assistant Commissioner shall not apply;

(ii) any appeal which would otherwise have lain to the Appellate Assistant Commissioner shall lie to the Commissioner;

(iii) any appeal which would have lain from an order of the Appellate Assistant Commissioner to the Appellate Tribunal shall lie from the order of the Commissioner."

32. Amendment of section 127:

In section 127 of the Income-tax Act, for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more of the following officers subordinate to him, namely:—

(a) any Income-tax Officer or Income-tax Officers;

(b) any Income-tax Officer or Income-tax Officers having concurrent jurisdiction with the Inspecting Assistant Commissioner, to any other Income-tax Officer or Income-tax Officers (whether with or without concurrent jurisdiction with the Inspecting Assistant Commissioner) also subordinate to him and the Board may similarly transfer any case from—

(i) any Income-tax Officer or Income-tax Officers, or

(ii) any Income-tax Officer or Income-tax Officers having concurrent jurisdiction with the Inspecting Assistant Commissioner, to any other Income-tax Officer or Income-tax Officers (whether with or without concurrent jurisdiction with the Inspecting Assistant Commissioner):

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from any Income-tax Officer or Income-tax Officers (whether with or without concurrent jurisdiction with the Inspecting Assistant Commissioner) to any other Income-tax Officer or Income-tax Officers (whether with or without concurrent jurisdiction with the Inspecting

Assistant Commissioner) and the offices of all such officers are situated in the same city, locality or place :

Provided further that—

(a) where any case has been transferred from any Income-tax Officer or Income-tax Officers to two or more Income-tax Officers, the Income-tax Officers to whom the case is so transferred shall have concurrent jurisdiction over such case and shall perform their functions in accordance with such general or special orders in writing as the Board or the Commissioner or the Inspecting Assistant Commissioner authorised by the Commissioner in this behalf, may make for the purpose of facilitating the performance of such functions;

(b) where any case has been transferred from any Income-tax Officer or Income-tax Officers (whether with or without concurrent jurisdiction with the Inspecting Assistant Commissioner) to two or more Income-tax Officers with concurrent jurisdiction with the Inspecting Assistant Commissioner, the officers (including the Inspecting Assistant Commissioner) to whom the case is so transferred shall have concurrent jurisdiction over such case and shall perform their functions in accordance with such general or special orders in writing as the Board or the Commissioner may make for the purpose of facilitating the performance of such functions, and the Income-tax Officers shall perform their functions also in accordance with such orders or directions as the Inspecting Assistant Commissioner may make under sub-section (2) of section 124 or, as the case may be, under sub-section (2) of section 125A."

33. In section 130A of the Income-tax Act, after clause (b), the following clause shall be inserted, namely :—

"(c) in a case, where two or more Income-tax Officers have concurrent jurisdiction over such assessee in relation to any function, be the Income-tax Officers empowered to perform such function by the Board or, as the case may be, the Income-tax Officers to whom such function has been assigned by an order of the Commissioner or by an order or a direction of the Inspecting Assistant Commissioner under sub-section (2) of section 124 or, as the case may be, under sub-section (2) of section 125A."

34. In section 131 of the Income-tax Act,—

(i) "after sub-section (1), the following sub-section shall be inserted, namely :—

"(1A) If the Assistant Director of Inspection has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purpose of making any enquiry or investigation relating thereto,

it shall be competent for him to exercise the powers conferred under sub-section (1) on the Income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other Income-tax authority;"

(ii) in sub-section (3),—

(a) in the opening paragraph, after the word, brackets and figure "sub-section (1)", the words, brackets, figure and letter "or sub-section (1A)" shall be inserted;

(b) in the proviso, for the words "an Income-tax Officer", the words "an Income-tax Officer or an Assistant Director of Inspection" shall be substituted.

35. Amendment of section 132.

In section 132 of the Income-tax Act,—

(a) in sub-section (1),—

(i) in the opening paragraph, for the words "Where the Director of Inspection or the Commissioner," the following shall be substituted, namely :—

"Where the Director of Inspection or the Commissioner or any such Deputy Director of Inspection or Inspecting Assistant Commissioner as may be empowered in this behalf by the Board,";

(ii) in clause (a), for the words "which has not been disclosed", the words "which has not not been, or would not be, disclosed" shall be substituted;

(iii) for the portion beginning with the words "he may authorise" and ending with the brackets and words "(hereinafter referred to as the authorised officer) to—", the following shall be substituted, namely :—

"then,—

(A) the Director of Inspection or the Commissioner, as the case may be, may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer; or

(B) such Deputy Director of Inspection or Inspecting Assistant Commissioner, as the case may be, may authorise any Assistant Director of Inspection or Income-tax Officer, (the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—";

(iv) in clause (i), for the words "building or place", the words "building, place, vessel, vehicle or aircraft" shall be substituted;

(v) after clause (ii), the following clause shall be inserted, namely :—

"(iia) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such

books of account, other documents, money, bullion, jewellery or other valuable article or thing";

(vi) the following proviso shall be inserted at the end, namely:—

"Provided that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the area of jurisdiction of any Commissioner, but such Commissioner has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then notwithstanding anything contained in section 121, it shall be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the Commissioner having jurisdiction over such person may be prejudicial to the interests of the revenue.";

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Where any Commissioner, in consequence of information in his possession, has reason to suspect that any books of account, other documents, money, bullion, jewellery or other valuable article or thing in respect of which an officer has been authorised by the Director of Inspection or any other Commissioner or any such Deputy Director of Inspection or Inspecting Assistant Commissioner as may be empowered in this behalf by the Board to take action under clauses (i) to (v) of sub-section (1) are or is kept in any building, place, vessel, vehicle or aircraft not mentioned in the authorisation under sub-section (1), such Commissioner may, notwithstanding anything contained in section 121, authorise the said officer to take action under any of the clauses aforesaid in respect of such building, place, vessel, vehicle or aircraft.";

(c) in sub-section (2), after the word, brackets and figure "sub-section (1)", the words, brackets, figure and letter "or sub-section (1A)" shall be inserted;

(d) after sub-section (4), the following sub-section shall be inserted, namely:—

"(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting

of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.";

(e) in sub-section (5).—

(i) for the opening paragraph, the following shall be substituted, namely:—

"Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A), the Income-tax Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall within ninety days of the seizure, make an order, with the previous approval of the Inspecting Assistant Commissioner,—"

(ii) after clause (ii), the following clause shall be inserted, namely:—

"(iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian Income-tax Act, 1922 or this Act, as if the order had been the order of regular assessment";

(iii) for the words, brackets and figures "clauses (ii) and (iii)", at both the places where they occur, the words, brackets, figures and letter "clauses (ii), (iia) and (iii)" shall be substituted;

(iv) in the first proviso, after the words "the financial year in which the assets were seized", the words "and may also determine the interest or penalty, if any, payable or imposable accordingly" shall be inserted;

(f) in sub-section (6), for the word, figures and letter "section 132A", the word, figures and letter "section 132B" shall be substituted;

(g) in sub-section (8), after the word, brackets and figure "sub-section (1)", the words, brackets, figure and letter "or sub-section (1A)" shall be inserted;

(h) in sub-section (9), after the word, brackets and figure "sub-section (1)" the words, brackets, figure and letter "or sub-section (1A)" shall be inserted;

(i) after sub-section (9), the following sub-section shall be inserted, namely:—

"(9A) Where the authorised officer has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c) of sub-section (1), the books of account or other documents or assets seized under that sub-section shall be handed over by the authorised officer to the Income-tax Officer having juris-

diction over such person within a period of fifteen days of such seizure and thereupon the powers exercisable by the authorised officer under sub-section (8) or sub-section (9) shall be exercisable by such Income-tax Officer.”;

(j) in sub-section (10), after the word, brackets and figure “sub-section (1)”, the words, brackets, figure and letter “or sub-section (1A)” shall be inserted;

(k) for sub-section (13), the following sub-section shall be substituted, namely:—

“(13) The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1A).”;

(l) in sub-section (14), in clause (i), for the words “such building or place”, the words “any building, place, vessel, vehicle or aircraft” shall be substituted.

35. Amendment of section 132A.

Section 132A of the Income-tax Act shall be re-numbered as section 132B thereof, and—

(i) before that section as so re-numbered, the following section shall be inserted, namely:—

Powers to requisition books of account, etc.

‘132A. (1) Where the Director of Inspection or the Commissioner, in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922 or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents, as required by such summons or notice and the said books of account or other documents have been taken into custody by any officer or authority under any other law for the time being in force, or

(b) any books of account or other documents will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 or under this Act and any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, such books of account or other documents on the return of such books of account or other documents by any officer or authority by

whom or which such books of account or other documents have been taken into custody under any other law for the time being in force, or

(c) any assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purposes of the Indian Income-tax Act, 1922 or this Act by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force,

then, the Director of Inspection or the Commissioner may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer [hereafter in this section and in sub-section (2) of section 278D referred to as the requisitioning officer] to require the officer or authority referred to in clause (a) or clause (b) or clause (c) as the case may be, to deliver such books of account, other documents or assets to the requisitioning officer.

(2) On a requisition being made under sub-section (1), the officer or authority referred to in clause (a) or clause (b) or clause (c), as the case may be, of that sub-section shall deliver the books of account, other documents or assets to the requisitioning officer either forthwith or when such officer or authority is of the opinion that it is no longer necessary to retain the same in his or its custody.

(3) Where any books of account, other documents or assets have been delivered to the requisitioning officer, the provisions of sub-sections (4A) to (14) (both inclusive) of section 132 and section 132B shall, so far as may be, apply as if such books of account, other documents or assets had been seized under sub-section (1) of section 132 by the requisitioning officer from the custody of the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of this section and as if for the words “the authorised officer” occurring in any of the aforesaid sub-sections (4A) to (14), the words “the requisitioning officer” were substituted.”;

(ii) in section 132B as so re-numbered, in sub-section (1), in clause (i), after the word “relates”, the brackets and words “(including any penalty levied or interest payable in connection with such assessment or re-assessment)” shall be inserted.

37. Substitution of new section for section 133A.

For section 133A of the Income-tax Act, the following section shall be substituted, namely:—

Power of survey.

133A. (1) Notwithstanding anything contained in any other provision of this Act, an Income-tax authority may enter—

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction,

at which a business or profession is carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession—

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceedings under this Act.

Explanation.—For the purposes of this sub-section, a place where a business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

(2) An Income-tax authority may enter any place of business or profession referred to in sub-section (1) only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.

(3) An Income-tax authority acting under this section may,—

(i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom,

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

(4) An Income-tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any books of account or other

documents or any cash, stock or other valuable article or thing.

(5) Where, having regard to the nature and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, the Income-tax authority is of the opinion that it is necessary or expedient so to do, he may, at any time after such function, ceremony or event, require the assessee by whom such expenditure has been incurred or any person who, in the opinion of the Income-tax authority, is likely to possess information as respects the expenditure incurred, to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act and may have the statements of the assessee or any other person recorded and any statement so recorded may thereafter be used in evidence in any proceeding under this Act.

(6) If a person under this section is required to afford facility to the Income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or evades to do so, the Income-tax authority shall have all the powers under sub-sections (1) and (2) of section 131 for enforcing compliance with the requirement made.

Explanation.—In this section,—

(a) "Income-tax authority" means an Inspecting Assistant Commissioner, an Assistant Director of Inspection or an Income-tax Officer and for the purposes of clause (i) of sub-section (1), clause (i) of sub-section (3), and sub-section (5), includes an Inspector of Income-tax, if so authorised by the Income-tax Officer;

(b) "proceeding" means any proceeding under this Act in respect of any year which may be pending on the date on which the powers under this section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year."

38. Amendment of section 139.

In section 139 of the Income-tax Act,—

(i) in sub-section (2), for the words "serves a notice upon him", the words "Issue a notice to him and serve the same upon him" shall be substituted;

(ii) for sub-section (6), the following sub-sections shall be substituted, namely :—

"(6) The prescribed form of the returns referred to in sub-sections (1), (2) and (3) shall, in such cases as may be prescribed

require the assessee to furnish the particulars of income exempt from tax, assets of the prescribed nature and value and belonging to him, expenditure exceeding the prescribed limits incurred by him under prescribed heads and such other outgoings as may be prescribed.

(6A) Without prejudice to the provisions of sub-section (6), the prescribed form of the returns referred to in sub-sections (1), (2) and (3) shall, in the case of an assessee engaged in any business or profession, also require him to furnish particulars of the location and style of the principal place where he carries on the business or profession and all the branches thereof, the names and addresses of his partners, if any, in such business or profession and, if he is a member of an association or body of individuals, the names of the other members of the association or the body of individuals and the extent of the share of the assessee and the shares of all such partners or the members, as the case may be, in the profits of the business or profession and any branches thereof."

39. Insertion of new section 139A.

After section 139 of the Income-tax Act, the following section shall be inserted, namely:—

Permanent account numbers.

'139A. (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during any accounting year exceeded the maximum amount which is not chargeable to income-tax and he has not been allotted any permanent account number, shall, within such time as may be prescribed, apply to the Income-tax Officer for the allotment of a permanent account number.

(2) Notwithstanding anything contained in sub-section (1), every person not falling under that sub-section, but carrying on any business whose total sales, turnover or gross receipts are or is likely to exceed fifty thousand rupees in any accounting year and who has not been allotted any permanent account number, shall, within such time as may be prescribed, apply to the Income-tax Officer for the allotment of a permanent account number.

(3) The Income-tax Officer may also allot to any other person by whom tax is payable, a permanent account number.

(4) All permanent account numbers allotted to assessee before the commencement of the Taxation Laws (Amendment) Act, 1975 shall, with effect from such date as the Board may, by notification in the Official Gazette, specify, be deemed to have been allotted to them under the provisions of this section.

(5) Where a permanent account number has been allotted or is deemed to have been allotted to any person under this section, he shall—

(a) quote such number in all his returns to, or correspondence with, any Income-tax authority;

(b) quote such number in all challans for the payment of any sum due under this Act;

(c) quote such number in all documents pertaining to such transactions as may be prescribed by the Board in the interests of the revenue, and entered into by him;

(d) intimate the Income-tax Officer any change in his address or in the name and nature of his business.

(6) The Board may make rules providing for—

(a) the form and the manner in which an application may be made for the allotment of a permanent account number and the particulars which such application shall contain;

(b) the categories of transactions in relation to which permanent account numbers shall be quoted by the persons to whom such numbers have been allotted, in the documents pertaining to such transactions.

Explanation.—In this section,—

(a) "accounting year" means,—

(i) in relation to a person maintaining accounts, the year ending on the day on which such accounts are or are to be closed and balanced;

(ii) in relation to any other person, the financial year;

(b) "permanent account number" means a number which the Income-tax Officer may allot to any person for the purpose of identification.'

40. Amendment of section 140.

In section 140 of the Income-tax Act, for clauses (c) and (d), the following clauses shall be substituted, namely:—

"(c) in the case of a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no managing director, by any director thereof;

(cc) in the case of a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the return, or where there is no managing partner as such, by any partner thereof, not being a minor;

(d) in the case of a local authority, by the principal officer thereof;"

41. Amendment of section 140A.

In section 140A of the Income-tax Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) Where any tax is payable on the basis of any return required to be furnished under section 139 or section 148, after taking into account the amount of tax, if any, already paid under any provision of this Act, the assessee shall be liable to pay such tax before furnishing the return and the return shall be accompanied by proof of payment of such tax."

(2) for sub-section (3), the following sub-section shall be substituted, namely:—

"(3) If any assessee fails to pay the tax or any part thereof in accordance with the provisions of sub-section (1), the Income-tax Officer may direct that a sum equal to two per cent of such tax or part thereof, as the case may be, shall be recovered from him by way of penalty for every month during which the default continues:

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard."

42. Amendment of section 141A.

In section 141A of the Income-tax Act, for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) Where a return has been furnished under section 139 and the assessee claims that the tax paid or deemed to have been paid under the provisions of Chapter XVII-B, or Chapter XVII-C, exceeds the tax payable on the basis of the return and the accounts and documents accompanying it, the Income-tax Officer, if he is of the opinion that the regular assessment of the assessee is not likely to be made within six months from the date of furnishing of the return, shall make in a summary manner within the said six months a provisional assessment of the sum refundable to the assessee, after making such adjustments to the income or loss declared in the return as are required to be made under sub-section (2) with reference to such return, accounts and documents, and for the purposes of the adjustments referred to in clause (iv) of sub-section (2), also with reference to the records of the assessments, if any, of past years."

43. Amendment of section 142.

In section 142 of the Income-tax Act,—

(i) in sub-section (1), for the words, brackets and figures "or upon whom a notice has been served under sub-section (2) of section 139", the words, brackets and figures "or to whom a notice has been issued under sub-section (2) of section 139" shall be substituted;

(ii) after sub-section (2), the following sub-section shall be inserted, namely:—

"(2A) If, at any stage of the proceedings before him, the Income-tax Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Income-tax Officer may require.

(2B) The provisions of sub-section (2A) shall have effect notwithstanding that the accounts of the assessee have been audited under any other law for the time being in force or otherwise.

(2C) Every report under sub-section (2A) shall be furnished by the assessee to the Income-tax Officer within such period as may be specified by the Income-tax Officer:

Provided that the Income-tax Officer may, on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee.

(2D) The expenses of, and incidental to, any audit under sub-section (2A) (including the remuneration of the accountant) shall be determined by the Commissioner (which determination shall be final) and paid by the assessee and in default of such payment, shall be recoverable from the assessee in the manner provided in Chapter XVII-D for the recovery of arrears of tax."

(iii) in sub-section (3), after the words, brackets and figure "under sub-section (2)", the words, brackets, figure and letter "or any audit under sub-section (2A)" shall be inserted.

44. Amendment of section 144.

In section 144 of the Income-tax Act, in clause (b) after the words, brackets and figures "sub-section (1) of section 142", the words, brackets, figure and letter "or fails to comply with a direction issued under sub-section (2A) of that section" shall be inserted.

45. Insertion of new sections 144A and 144B.

After section 144 of the Income-tax Act, the following section shall be inserted, namely:—

Power of Inspecting Assistant Commissioner to issue directions in certain cases.

"144A. (1) An Inspecting Assistant Commissioner may, on his own motion or on a reference being made to him by the Income-tax Officer or on the application of an assessee call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment and such directions shall be binding on the Income-tax Officer.

Provided that no directions which are prejudicial to the assessee shall be issued before an opportunity is given to the assessee to be heard.

Explanation.—For the purposes of this sub-section, no direction as to the lines on which an investigation connected with the assessment should be made, shall be deemed to be a direction prejudicial to the assessee.

(2) The provisions of this section shall be in addition to, and not in derogation of, the provisions contained in sub-section (3) of section 119.

Reference to Inspecting Assistant Commissioner in certain cases.

144B. (1) Notwithstanding anything contained in this Act, where in an assessment to be made under sub-section (3) of section 143, the Income-tax Officer proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Income-tax Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or

the assessee intimates to the Income-tax Officer the acceptance of the variation the Income-tax Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Income-tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment:

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income-tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit:

Provided that different amounts may be fixed for different areas:

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the functions of an Income-tax Officer in pursuance of an order made under section 125 or section 125A."

46. Amendment of section 146.

Section 146 of the Income-tax Act shall be re-numbered as sub-section (1) thereof, and after that sub-section as so re-numbered, the following sub-section shall be inserted, namely:

"(2) Every application made under sub-section (1) shall be disposed of within ninety days from the date of receipt thereof by the Income-tax Officer:

Provided that in computing the period of ninety days aforesaid, any delay in disposing of the application which is attributable to the assessee shall be excluded."

47. Amendment of section 153.

In section 153 of the Income-tax Act, for *Explanation 1*, the following *Explanation* shall be substituted, namely:—

"*Explanation 1.*—In computing the period of limitation for the purposes of this section—

(i) the time taken in re-opening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129, or

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court, or

(iii) the period commencing from the date on which the Income-tax Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with the date on which the assessee furnishes a report of such audit under that sub-section, or

(iv) the period (not exceeding one hundred and eighty days) commencing from the date on which the Income-tax Officer forwards the draft order under sub-section (1) of section 144B to the assessee and ending with the date on which the Income-tax Officer receives the directions from the Inspecting Assistant Commissioner under sub-section (4) of that section, or, in a case where no objections to the draft order are received from the assessee, a period of thirty days, or

(v) in a case where an application made before the Income tax Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section, shall be excluded."

48. Amendment of section 154.

In sub-section (1) of section 154 of the Income-tax Act, clause (bb) shall be omitted.

49. Amendment of section 176.

In section 176 of the Income-tax Act, after sub-section (3), the following sub-section shall be inserted, namely :—

"(3A) Where any business is discontinued in any year, any sum received after the discontinuance shall be deemed to be the income of the recipient and charged to tax accordingly in the year of receipt, if such sum would have been included in the total income of the person who carried on the business had such sum been received before such discontinuance."

50. Amendment of section 179.

For the existing sub-heading "*M. Private company in liquidation*" before section 179 of the Income-tax Act, the sub-heading "*M. Private companies*" shall be substituted and

that section shall be re-numbered as sub-section (1) thereof and,—

(a) in sub-section (1) as so re-numbered, for the portion beginning with the word "Notwithstanding" and ending with the words "any previous year", the following shall be substituted, namely :—

"Notwithstanding anything contained in the Companies Act, 1956, where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company";

(b) after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely :—

"(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962."

51. Amendment of section 185.

In section 135 of the Income-tax Act, in sub-section (1), for the *Explanation*, the following *Explanation* shall be substituted, namely :—

"*Explanation.* — For the purposes of this section and section 186, a firm shall not be regarded as a genuine firm if any partner of the firm was, in relation to the whole or any part of his share in the income or property of the firm, at any time during the previous year, a benamidar—

(a) of any other partner to whom the first-mentioned partner does not stand in the relationship of a spouse or minor child, or

(b) of any person, not being a partner of the firm, and any of the other partners knew or had reason to believe that the first-mentioned partner was such benamidar and such knowledge or belief had not been communicated by such other partner to the Income-tax Officer in the prescribed manner."

52. Amendment of section 189.

In section 189 of the Income-tax Act, in sub-section (3) the following *Explanation* shall be inserted, namely :—

"*Explanation.* — The amount of tax referred to in this sub-section shall also include that part of the share of each partner in the income of the firm before its discontinuance

or dissolution which the firm could have retained under sub-section (4) of section 182 but which has not been so retained.”

53. Amendment of section 221.

In sub-section (1) of section 221 of the Income-tax Act, after the second proviso, the following *Explanation* shall be inserted, namely :—

“*Explanation.*— For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.”

54. Amendment of section 222.

In sub-section (1) of section 222 of the Income-tax Act, the following *Explanation* shall be inserted at the end, namely :—

“*Explanation.*— For the purposes of this sub-section, the assessee's movable or immovable property shall include any property which has been transferred, directly or indirectly on or after the 1st day of June, 1973, by the assessee to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the assessee's movable or immovable property for recovering any arrears due from the assessee in respect of any period prior to such date.”

55. Amendment of section 223.

In section 223 of the Income-tax Act, for sub-section (2), the following sub-section shall be substituted, namely :—

“(2) Where an assessee has property within the jurisdiction of more than one Tax Recovery Officer and the Tax Recovery Officer to whom a certificate is sent by an Income-tax Officer—

(a) is not able to recover the entire amount by the sale of the property, movable or immovable, within his jurisdiction, or

(b) is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount under this Chapter, it is necessary so to do,

he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate certified in the prescribed manner and specifying the amount to be recovered to a Tax Recovery Officer within

whose jurisdiction the assessee resides or has property, and thereupon that Tax Recovery Officer shall also proceed to recover the amount under this Chapter as if the certificate or the copy thereof had been the certificate sent to him by the income-tax Officer.”

56. Amendment of section 244.

In section 244 of the Income-tax Act, after sub-section (1), the following sub-section shall be inserted, namely :—

“(1A) Where the whole or any part of the refund referred to in sub-section (1) is due to the assessee, as a result of any amount having been paid by him after the 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in appeal or other proceeding under this Act to be in excess of the amount which such assessee is liable to pay as tax or penalty, as the case may be, under this Act, the Central Government shall pay to such assessee simple interest at the rate specified in sub-section (1) on the amount so found to be in excess from the date on which such amount was paid to the date on which the refund is granted :

Provided that, where the amount so found to be in excess was paid in instalments, such interest shall be payable on the amount of each such instalment or any part of such instalment, which was in excess, from the date on which such instalment was paid to the date on which the refund is granted :

Provided further that no interest under this sub-section shall be payable for a period of one month from the date of the passing of the order in appeal or other proceeding :

Provided also that where any interest is payable to an assessee under this sub-section, no interest under sub-section (1) shall be payable to him in respect of the amount so found to be in excess.”

57. Insertion of new Chapter XIXA.

After Chapter XIX of the Income-tax Act, the following Chapter shall be inserted, namely :—

‘CHAPTER XIXA

SETTLEMENT OF CASES

Definitions.

245A. In this Chapter, unless the context otherwise requires,—

(a) “case” means any proceeding under the Indian Income-tax Act, 1922, or under this Act for or in connection with the assessment or re-assessment of any person in respect of any year or years which may be pending before an Income-tax authority on the date

on which an application under sub-section (1) of section 245C is made;

(b) "Income-tax authority" means a Director of Inspection, a Commissioner, an Appellate Assistant Commissioner, an Inspecting Assistant Commissioner or an Income-tax Officer.

Income-tax Settlement Commission.

245B. (1) The Central Government shall constitute a commission to be called the Income-tax Settlement Commission (hereafter in this Chapter referred to as "the Settlement Commission") for the settlement of cases under this Chapter.

(2) The Settlement Commission shall consist of a Chairman and two other members and shall function within the Department of the Central Government dealing with direct taxes.

(3) The Chairman and other members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts:

Provided that, where a member of the Board is appointed as the Chairman or as a member of the Settlement Commission, he shall cease to be a member of the Board:

Provided further that, until the members are appointed under this sub-section, it shall be competent for the Central Government to require, from time to time, any two members of the Board to serve as members of the Settlement Commission for such period as the Central Government thinks fit, in addition to their duties as members of the Board.

Application for settlement of cases.

245C. (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner and containing such particulars as may be prescribed to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided.

(2) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

Procedure on receipt of an application under section 245C.

245D. (1) On receipt of an application under section 245C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the

nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application:

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard.

Provided further that an application shall not be proceeded with under this sub-section if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under the Indian Income-tax Act, 1922, or under this Act, has been established or is likely to be established by any Income-tax authority, in relation to the case.

(2) A copy of every order under sub-section (1) shall be sent to the applicant and to the Commissioner.

(3) Where an application is allowed to be proceeded with under sub-section (1), the Settlement Commission may call for the relevant records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case.

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under sub-section (1) or sub-section (3).

(5) The materials brought on record before the Settlement Commission shall be considered by all the members thereof before passing any order under sub-section (4) and, in the case of a difference of opinion among the members, the opinion of the majority shall

prevail and such order shall be expressed in terms of the views of the majority.

(6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(7) Where a settlement becomes void as provided under sub-section (6), the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the Income tax authority concerned, may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

Power of Settlement Commission to reopen completed proceedings.

245E. If the Settlement Commission is of the opinion (the reasons for such opinion to be recorded by it in writing) that, for the proper disposal of the case pending before it, it is necessary or expedient to reopen any proceeding connected with the case but which has been completed under the Indian Income-tax Act, 1922, or under this Act by any Income-tax authority before the application under section 245C was made, it may, with the concurrence of the applicant, reopen such proceeding and pass such order thereon as it thinks fit, as if the case in relation to which the application for settlement had been made by the applicant under that section covered such proceeding also.

Provided that no proceeding shall be reopened by the Settlement Commission under this section after the expiry of a period of eight years from the end of the assessment year to which such proceeding relates.

Powers and procedure of Settlement Commission.

245F. (1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an Income-tax authority under this Act.

(2) Where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed

under sub-section (4) of section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an Income-tax authority under this Act in relation to the case.

(3) Notwithstanding anything contained in sub-section (2) and in the absence of any express direction to the contrary by the Settlement Commission, nothing contained in this section shall affect the operation of any other provision of this Act requiring the applicant to pay tax on the basis of self-assessment or by way of advance tax in relation to the matters before the Settlement Commission.

(4) For the removal of doubt, it is hereby declared that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

(5) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure (including the fixation of places and times of its meetings) and may act notwithstanding that all the members of the Settlement Commission are not present at any of its meetings.

Inspection, etc., of reports.

245G. No person shall be entitled to inspect, or obtain copies of, any reports made by any Income-tax authority to the Settlement Commission; but the Settlement Commission may, in its discretion, furnish copies thereof to any such person on an application made to it in this behalf and on payment of the prescribed fee:

Provided that, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment of the prescribed fee by such person, furnish him with a certified copy of any such report or part thereof relevant for the purpose.

Power of Settlement Commission to grant immunity from prosecution and penalty.

245H. (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to

such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code or under any other Central Act for the time being in force and also from the imposition of any penalty under this Act, with respect to the case covered by the settlement.

(2) An immunity granted to a person under sub-section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person has not complied with the conditions subject to which the immunity was granted or that such person had, in the course of the settlement proceedings, concealed any particulars material to the settlement or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had not such immunity been granted.

Order of settlement to be conclusive.

245I. Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.

Recovery of sums due under order of settlement.

245J. Any sum specified in an order of settlement passed under sub-section (4) of section 245D may, subject to such conditions, if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered in accordance with the provisions of Chapter XVII, by the Income-tax Officer having jurisdiction over the person who made the application for settlement under section 245C.

Bar on subsequent application for settlement in certain cases.

245K. Where,—

(i) an order of settlement passed under sub-section (4) of section 245D provides for the imposition of a penalty on the person who made the application under section 245C for settlement, on the ground of concealment of particulars of his income; or

(ii) after the passing of an order of settlement under the said sub-section (4) in relation

to a case, such person is convicted of any offence under Chapter XXII in relation to that case.

then, he shall not be entitled to apply for settlement under section 245C in relation to any other matter.

Proceedings before Settlement Commission to be judicial proceedings.

245L. Any proceeding under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code.

Certain persons who have filed appeals to the Appellate Tribunal entitled to make applications to the Settlement Commission.

245M. (1) Notwithstanding anything contained in this Chapter, any assessee who has filed an appeal to the Appellate Tribunal under this Act which is pending before it shall, on withdrawing such appeal from the Appellate Tribunal, be entitled to make an application to the Settlement Commission to have his case settled under this Chapter :

Provided that no such assessee shall be entitled to make an application in a case where the Income-tax Officer has preferred an appeal under sub-section (2) of section 253 against the order to which the assessee's appeal relates.

(2) Any assessee referred to in sub-section (1) may make an application to the Appellate Tribunal for permission to withdraw the appeal.

(3) On receipt of an application under sub-section (2), the Appellate Tribunal shall grant permission to withdraw the appeal.

(4) Upon the withdrawal of the appeal, the proceeding in appeal immediately before such withdrawal shall, for the purposes of this Chapter, be deemed to be a proceeding pending before an Income-tax authority.

(5) An application to the Settlement Commission under this section shall be made within a period of thirty days from the date on which the order of the Appellate Tribunal permitting the withdrawal of the appeal is communicated to the assessee.

(6) An application made to the Settlement Commission under this section shall be deemed to be an application made under sub-section (1) of section 245C and the provisions of this Chapter [except sub-section (7) of section 245D] shall apply accordingly.

(7) Where an application made to the Settlement Commission under this section is not entertained by the Settlement Commission,

then, the assessee shall not be deemed to have withdrawn the appeal from the Appellate Tribunal and the provisions contained in section 253, section 254 and section 255 shall, so far as may be, apply accordingly.

58. Amendment of section 246.

In section 246 of the Income-tax Act, in clause (c).—

(i) after sub-clause (iii), the following sub-clause shall be inserted, namely :—

"(iii), section 271A, or";

(ii) after sub-clause (iv), the following sub-clause shall be inserted, namely :—

"(iva) section 272B, or".

59. Amendment of section 249.

In section 249 of the Income-tax Act.—

(i) in sub-section (2), for clause (b), the following clause shall be substituted, namely :—

"(b) where the appeal relates to any assessment or penalty, the date of service of the notice of demand relating to the assessment or penalty :

Provided that, where an application has been made under section 146 for reopening an assessment, the period from the date on which the application is made to the date on which the order passed on the application is served on the assessee shall be excluded, or";

(ii) after sub-section (3), the following sub-section shall be inserted, namely :—

"(4) No appeal under this Chapter shall be admitted unless at the time of filing of the appeal,—

(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him :

Provided that, on an application made by the appellant in this behalf, the Appellate Assistant Commissioner may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of this sub-section."

60. Amendment of section 253.

In section 253 of the Income-tax Act, in sub-section (1).—

(i) in clause (a), for the words and figures "or section 271", the words figures and letters ", section 271, section 271A or section 272A" shall be substituted;

(ii) in clause (b), for the words, brackets and figures "sub-section (2) of section 274",

the word, figures and letter "section 272A" shall be substituted;

(iii) in clause (c), after the words and figures "under section 263", where they occur for the first time, the words, figures and letter "or under section 272A" shall be inserted.

61. Amendment of section 271.

In section 271 of the Income-tax Act,—

(i) in sub-section (1).—

(a) in clause (b), after the words, brackets, and figures "sub-section (2) of section 143", the words, brackets, figures and letters "or fails to comply with a direction issued under sub-section (2A) of section 142" shall be inserted;

(b) for clause (i) (excluding the *Explanation* thereto), the following clause shall be substituted, namely :—

"(i) in the cases referred to in clause (a).—

(a) in the case of a person referred to in sub-section (4A) of section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax, a sum not exceeding one per cent. of the total income computed under this Act without giving effect to the provisions of sections 11 and 12, for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent. of the assessed tax for every month during which the default continued;"

(c) for clause (iii) and the *Explanation*, the following clause and *Explanations* shall be substituted, namely :—

"(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income:

Provided that, if in a case falling under clause (c), the amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income-tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A) such person fails to offer an explanation or offers an explanation which is found by the Income-tax Officer or the Appellate Assistant Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed :

Provided that nothing contained in this *Explanation* shall apply to a case referred to in clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is *bona fide* and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

Explanation 2.—Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this *Explanation* referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this *Explanation* referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3.—Where any person who has not previously been assessed under the Indian

Income-tax Act, 1922, or under this Act, fails, without reasonable cause, to furnish within the period specified in sub-clause (iii) of clause (a) of sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1974, and, until the expiry of the period aforesaid, no notice has been issued to him under sub-section (2) of section 139 or section 148 and the Income-tax Officer or the Appellate Assistant Commissioner is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

Explanation 4.—For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded",—

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income assessed, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) in any case to which *Explanation 3* applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished;

(ii) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Where any penalty is imposed by virtue of *Explanation 2* to sub-section (1), proceedings for the imposition of such penalty may be initiated notwithstanding that any proceedings under this Act in the course of which such penalty proceedings could have been initiated under sub-section (1) have been completed."

(iii) in sub-section (3), after clause (c), the following clause and proviso shall be inserted, namely:—

"(d) the penalty imposed under clause (i) of sub-section (1) and the penalty imposed under clause (iii) of that sub-section, read with Ex.

planation 3 thereto, shall not exceed in the aggregate twice the amount of the tax sought to be evaded;

Provided that nothing contained in clause (a) or clause (b) shall apply to a case referred to in sub-clause (a) of clause (i) of sub-section (1).";

(iv) sub-sections (4A) and (4B) shall be omitted.

62. Insertion of new section 271A.

After section 271 of the Income-tax Act, the following section shall be inserted, namely:—

Failure to keep, maintain or retain books of account, documents, etc.

"271A. Without prejudice to the provisions of section 271, if any person, without reasonable cause, fails to keep and maintain any such books of account and other documents as required by section 44AA or the rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the Income-tax Officer or the Appellate Assistant Commissioner may direct that such person shall pay, by way of penalty, a sum which shall not be less than ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any, which would have been avoided if the income returned by such a person had been accepted as the correct income."

63. Insertion of new sections 272A and 272B.

After section 272 of the Income-tax Act, the following sections shall be inserted, namely:—

Penalty for failure to answer questions, sign statements, allow inspections, etc.

"272A. (1) If a person,—

(a) being legally bound to state the truth of any matter touching the subject of his assessment, refuses to answer any question demanded of him by an Income-tax Officer or an Appellate Assistant Commissioner or an Inspecting Assistant Commissioner or a Commissioner in the exercise of his powers under this Act; or

(b) refuses to sign any statement made by him in the course of any proceeding under this Act which an Income-tax Officer or an Appellate Assistant Commissioner or an Inspecting Assistant Commissioner or a Commissioner may legally require him to sign, he shall pay, by way of penalty, a sum which may extend to one thousand rupees.

(2) If a person, without reasonable cause or excuse, fails,—

(a) to furnish in due time any of the returns or statements mentioned in section 133, section 206, section 285, section 285B or section 286; or

(b) to allow inspection of any register referred to in section 134 or of any entry in such register or to allow copies of such register or of any entry therein to be taken; or

(c) to furnish a certificate as required by section 203; or

(d) to deduct and pay tax as required by sub-section (2) of section 226,

he shall pay, by way of penalty, a sum which may extend to ten rupees for every day during which the failure continues.

(3) Any penalty imposable under sub-section (1) or sub-section (2) shall be imposed,—

(a) in a case where the contravention, failure or default in respect of which such penalty is imposable occurs in the course of any proceeding before the Commissioner or the Appellate Assistant Commissioner, by the Commissioner or, as the case may be, the Appellate Assistant Commissioner; and

(b) in any other case, by the Inspecting Assistant Commissioner.

(4) No order under this section shall be passed by any officer referred to in sub-section (3) unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such officer.

Penalty for failure to comply with the provisions of section 139A.

272B. (1) If a person, without reasonable cause, fails to comply with the provisions of section 139A, he shall, on an order passed by the Income-tax Officer, pay, by way of penalty, a sum which may extend to five hundred rupees.

(2) No order under sub-section (1) shall be passed unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter."

64. Insertion of new section 273A.

After section 273 of the Income-tax Act, the following section shall be inserted, namely:—

Power to reduce or waive penalty, etc., in certain cases.

"273A. (1) Notwithstanding anything contained in this Act, the Commissioner may, in his discretion, whether on his own motion or otherwise,—

from the obligation cast by sub-sections (1) and (4) of Section 19-B to declare and deliver excess lands. The thrust of Section 19-B is that even if the source of the excess area is inheritance, bequest or gift, the capacity to own is conditioned by the permissible limit. (Para 9)

Section 10-A does not militate against this mandate of Section 19-B. Sec. 10-A (a) is wide in its terms and encompasses all surplus area, however obtained. Under Sec. 10-A (b), lands acquired by an heir by inheritance are saved in so far as dispositions of such lands are concerned. Although in the hands of the propositus, it is surplus land, if among the heirs it is not, then their transfers will not be affected by the interdict of Section 10-A (a). There is no conflict between Section 10-A and Section 19-B. (Para 10)

A legislation which has provided for ignoring decree diminishing surplus lands and has otherwise prevented the escape of excess area by voluntary transfers, cannot conceivably be intended to permit inherited excesses. (Para 11)

Section 19-B directs the owner who, by inheritance, comes to own an excess area, to make a declaration of his lands within a prescribed time. This does not mean that the time lag is statutorily given for executing gifts and transfers to defeat the law itself. A processual facility cannot be converted into an opportunity to pervert and to thwart the substantive object of the law. (Para 12)

Cases Referred: Chronological Paras
AIR 1974 SC 994 = 1974 Cur LJ 490 6, 7
(1968) 3 WLR 714 = (1968) 2 All ER 1059 12

Mr. Naunit Lal, Advocate for Mr. R. N. Sachthey, Advocate, for Appellant (in both the Appeals); M/s. N. N. Goswamy and Arvind Minocha, Advocates (in C. A. No. 123 of 1969); Mr. O. P. Sharma, Advocate (for No. 1) In C. A. No. 2023 of 1972 and Ex parte (for No. 2) In C. A. No. 2023 of 1972, for Respondents.

Judgment of the Court was delivered by

V. R. KRISHNA IYER, J.:— These two appeals turn on the construction of Section 19-B of the Punjab Security of Land Tenures Act, 1953 (Act X of 1953) (for short, the Act). This legislation was enacted to bring about an agrarian re-ordering so pivotal to the progress of our rural economy. Haryana, happily a granary of our country, is one of the States where land reform laws are likely to generate great changes, by banishing big concentration of Nature's bounty in a few feudal hands, creating an enthusiastic sense of distributive justice and exploiting the productive potential of land by the possessive passion of the landless masses. So strategic is land reform that special

constitutional concern has been shown for this programme. Naturally, the State enacted the Act whereby ceiling on land-ownership was set, surplus lands were taken over for settling ejected tenants and others and peasant proprietorship created. The scheme of the Act with which we are concerned is fairly simple and somewhat scientific, although its language, what with frequent amendments dovetailed from time to time, has made for ambiguity, obscurity, marginal inconsistency and a rich crop of litigation. Indeed, the conflict of opinion at the High Court level and the bone of contention before us arise from this drafting deficiency.

Legal Preface:

2. A thumb-nail sketch of the Act is a prefatory necessity. The Act defines 'small land-owner' (S. 2 (2)) having in mind the optimum ownership in the given conditions. 'Permissible area' (S. 2 (3)) is a cognate concept limiting the maximum permissible extent a person may hold, and so long as he does not have any excess, he is a small land-holder. He can evict the tenants from his holding and be in actual enjoyment as provided by the Act. If, however, he has lands beyond the permissible area, he becomes a large land-owner and has to cough up the excess. However, he is given the option to choose the best area he desires to keep, called 'reserved area' (S. 2 (4)) and then he must make available to the State such excess called surplus area (S. 2 (5-a)). This creation of a surplus pool or reservoir is vital to the success of the statutory project since, by distribution of such lands, rehabilitation of ejected tenants and landless persons is to be accomplished. Maximisation of the surplus pool and suppression of evasion by large holders are of profound legislative concern.

3. Even if a person is a small holder, it is quite on the cards that, by inheritance or other operation of law, or by voluntary transfer, he may acquire lands in excess of the permissible limit. The law takes care to see that such excess is also made available for re-settlement of ejectees and their ilk. In short, the legislative mandate is that every agricultural holder in the State shall hold no more than the permissible area and the surplus in the hands of large holders, whether acquired by voluntary transactions or involuntary operation of law, will go to feed the surplus pool.

4. A semi-medieval set-up where considerable estates are cornered by a landed gentry, will naturally resist redistributive reform measures and try ingenious methodology to defeat the law. But the legislature has to be astute enough to outwit such devious devices and subtle subterfuges. With this end in

view, the Act has been amended to block all escape routes unearthed by the law-makers as often as the High Court has upheld certain patterns of alienations and oblique dealings by interpretative process. A study of the history of the Act and the provocation for and frequency of amendments thereto, suggests an unspoken criticism about judicial approach which we will refer to later. Suffice it to say that the law we are construing is a radical agrarian measure; its basic goals are to cut down large holdings and distribute lands to various landless people according to a design and to foster, according to legislative policy, an agrarian community of peasant proprietors. De-hoarding and defeating hide-outs are essential to make the twin objects successful and so Sections 10-A and 19-B among others, have been written into the Act. To explore the import and ambit of these two provisions, particularly the former, with a view to see whether it strikes at a gift made by the respondent in favour of his sons whereby he sought to stow away some of his lands, shed some of his excess lands and look slim as a small holder before the law, language permitting, the Court as interpreter, must fulfil, not frustrate, the legislative mission. Factual Silhouette.

5. At this stage it is appropriate to set out the facts in the two appeals which are not in dispute and speak for themselves.

C. A. 123 of 1969: One Sampuran Singh who owned 450 bighas and 9 biswas of land, acting with foresight, gifted half of it to his mother in 1951, perhaps with a premonition of coming restrictions by way of ceiling on ownership. We need not speculate on that point in the light of subsequent happenings. The Act came into force on April 15, 1953 but even before that date the owner (who was the petitioner before the High Court under Article 226 and respondent before us) executed a mortgage with possession over 12 bighas and 5 biswas. There was also some waste land included in his total holding which fell outside the scope of the Act. So much so, on the date when the Act came into force, he was the owner of about 178 bighas which, admittedly, fell safely short of the permissible area of 30 standard acres (vide S. 2 (3)). Having thus dwarfed himself into a small land owner as defined in Section 2 (2), the 'ceiling' provision held out no threat to him. Certain small extents of land which were legally deductible from his total holding brought down the area in his possession to 138 odd bighas. Unfortunately for him, his mother passed away in February 1958 and he being the heir, all that he had gifted to her earlier came back to him as successor. The unhappy

consequence was that his holding expanded to 363 odd bighas, far in excess of the permissible area as set out in Section 2 (3) of the Act. Necessarily, this spill-over became surplus area as in S. 2 (5-a) of the Act. Sensing the imminent peril to his property and manoeuvring to salvage it from the clutches of the legal ceiling, the petitioner executed a gift of 182 bighas of land to his son by deed, dated February 11, 1959. He also executed three mortgages with possession. The cumulative result of these shedding operations was to shrink the size of his holding to well within the permissible area. The Collector, however, investigated into the matter and declared an area of 117 bighas as surplus in his hands. He reached this conclusion by ignoring the tell-tale gift of February 1, 1959 (sic) in favour of the son and the three possessory mortgages executed in June 1958. The status of 'small land-owner' thus being forfeited, the threat to the surplus lands revived but was sought to be warded off by the petitioner moving an unsuccessful appeal to the Commissioner, and a further fruitless revision to the Financial Commissioner. Eventually, he challenged the Collector's order in a writ petition which met with success. There was disagreement between the two learned Judges on the Bench and the third learned Judge decided in favour of the petitioner holding that Section 19-B, read with Section 10-A, did not affect the petitioner's transfers. The two Judges, whose opinion upheld the claim of the petitioner, substantially concurred in their reasonings but the scope of the interpretative exercise is somewhat limited. We, therefore, propose straight to go into a study of the relevant provisions and may perhaps indicate our conclusion in advance. We wholly disagree with the High Court and hold that to accept the construction which has appealed to the learned Judges is to frustrate the agrarian reform scheme of the Act and the alternative reading gives life to the law, teeth to its provisions and fulfilment to its soul.

C. A. 2023 of 1972: The facts in this appeal are different but the point of law involved is identical. In both the cases the State of Harvana has come up to this Court in appeal, the former by certificate under Article 133 (1) (c) and the latter by special leave granted by this Court. Anyway, in C. A. 2023 of 1972, respondent No. 1 owned 86 odd ordinary acres of land on April 15, 1953 when the Act came into force. After the commencement of the Act he inherited nearly 30 ordinary acres and thus he held well above the permissible area and ceased to be a small land-owner. Around the year 1957 he transferred 167 bighas of land to respondents Nos. 3 to 6 pursuant to a Civil Court de-

cree passed in 1957 in favour of his sons and wife. We may mention here, parenthetically but pathetically, that the weapons in the armoury of large land owners to defeat the land reform law included securing simulacral decrees from Civil Courts against themselves in favour of their close relations, thus using the judicial process to have their excess lands sequestered in the names of their dear and near. This invited legislative attention and an amendment of the Act was made, viz., Section 10-A whereby decrees and orders of Courts were to be ignored in dealing with surplus lands. Thus, the Collector, ignoring the transfer of 167 bighas of land by respondent No. 1 (which resulted in Civil Court decrees of 1957 in favour of his sons and wife), declared 38.41 ordinary acres as surplus with respondent No. 1. The statutory remedies did not see the first respondent (writ petitioner) safe ashore and so he sought harbourage by moving the High Court under Article 226 where he urged that the land inherited by him and later transferred to his sons and wife were not hit by Section 10-A and Section 19-B of the Act. He succeeded in the Court in view of a certain strict construction adopted by the Court and the State has come up in appeal, challenging the soundness of the High Court's approach.

Statutory Construction:

6. The key thought that pervades our approach is that if the constitutionally envisioned socio-economic revolution is not to be a paper tiger, agrarian laws have to be meaningfully enacted, interpreted and executed and the Court is not the anti-hero in the drama of limping land reform. Much to the same effect this Court observed in *Amar Singh's* case AIR 1974 SC 994 at p. 996:

"We have to bear in mind the activist, though inarticulate, major premise of statutory construction that the rule of law must run close to the rule of life and the Court must read into an enactment, language permitting, that meaning which promotes the benignant intent of the legislation in preference to the one which perverts the scheme of the statute on imputed legislative presumptions and assumed social values valid in a prior era. An aware Court, informed of this adaptation in the rules of forensic interpretation, hesitates to nullify the plain object of a land reforms law unless compelled by its language, and the crux of this case is just that accent when double possibilities in the chemistry of construction crop up."

While dealing with a somewhat analogous set of provisions under the same Act. The emphatic importance of augmenting the

surplus pool for distribution by the State is brought out in *Amar Singh* thus:

"The triple objects of the agrarian reform projected by the Act appear to be (a) to impart security of tenure (b) to make the tiller the owner, and (c) to trim large land holdings, setting sober ceilings. To convert these political slogans into legal realities, to combat the evil of mass evictions, to create peasant proprietorships and to ensure even distribution of land ownerships a statutory scheme was fashioned, the cornerstone of which was the building up of a reservoir of land carved out of the large land-holdings and made available for utilisation by the State for re-settling ejected tenants."

(p. 998)

Unfortunately, judicial decisions construing the language of the law have resulted in stultifying the objectives of the enactment leading to further amendments. We are concerned in the present case with Sections 10-A and 19-B which, in their final form, appeared by an amendment of 1962 (Act XIV of 1962), but retrospective effect was given with effect from the commencement of the Act, viz., April 1953.

7. In this context it is convenient to excerpt the observations of this Court in *Amar Singh*, AIR 1974 SC 994 at p. 999:

"The objects and reasons of Punjab Act 14 of 1962, which brought in certain significant restrictions on alienations and acquisitions of large land-holders starts off in the statement of objects thus:

"Some of the recent judicial pronouncements have the effect of defeating the objectives with which the Punjab Security of Land Tenures Act, 1953, was enacted and amended from time to time. It was intended that the surplus area of every land-owner recorded as such in the revenue records should be made utilisable for the settlement of ejected tenants."

Certain specific decisions and their impact on the legislative operation were mentioned, and then the statement of objects proceeded:

"In order to evade the provisions of Section 10-A of the Parent Act interested persons, being relations, have obtained decrees of Courts for diminishing the surplus area. Clause (4) of the Bill seeks to provide that such decrees should be ignored in computing the surplus area."

The short point which confronts us in both these appeals is as to whether the gifts made by land-owners who exceeded their permissible area having come by additional lands by inheritance are to be ignored or taken into account when computing the surplus area in their hands, having regard to the specific provision in Section 19-B living in fellowship with Section 10-A,

8. It is appropriate to read Sections 10-A and 19-B here, before proceeding to the crucial discussion in the case:

"10-A (a) The State Government or any officer empowered by it in this behalf shall be competent to utilize any surplus area for the resettlement of tenants ejected, or to be ejected, under clause (i) of sub-section (1) of Section 9.

(b) Notwithstanding anything contained in any other law for the time being in force and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance no transfer or other disposition of land which is comprised in surplus area at the commencement of this Act, shall affect the utilization thereof in clause (a).

Explanation.— Such utilization of any surplus area will not affect the right of the land-owner to receive rent from the tenant so settled.

(c) For the purposes of determining the surplus area of any person under this section, any judgment, decree or order of a Court or other authority, obtained after the commencement of this Act and having the effect of diminishing the area of such person which could have been declared as his surplus area shall be ignored."

"19-B. Future acquisition of land by inheritance, in excess of permissible area.—

(1) Subject to the provisions of Section 10-A, if after the commencement of this Act, any person, whether as land-owner or tenant, acquires by inheritance or by bequest or gift from a person to whom he is an heir any land, or if after the commencement of this Act and before the 30th of July, 1958, any person acquires by transfer, exchange, lease, agreement or settlement any land, or if, after such commencement, any person acquires in any other manner any land and which with or without the lands already owned or held by him exceeds in the aggregate the permissible area, then he shall, within the period prescribed, furnish to the Collector, a return in the prescribed form and manner giving the particulars of all lands and selecting the land not exceeding in the aggregate the permissible area which he desires to retain, and if the land of such person is situated in more than one patwar circle, he shall also furnish a declaration required by Section 5-A.

(2) If he fails to furnish the return and select his land within the prescribed period, then the Collector may in respect of him obtain the information required to be shown in the return through such agency as he may deem fit and select the land for him in the manner prescribed in sub-section (2) of Section 5-B.

(3) If such person fails to furnish the declaration the provisions of Section 5-C shall apply.

(4) The excess land of such person shall be at the disposal of the State Government for utilization as surplus area under clause (a) of Section 10-A or for such other purposes as the State Government may by notification direct."

9. Unclouded by case law, we first study Section 19-B. Forgetting S. 10-A for a moment, we find that if, after the commencement of the Act, i.e., April 15, 1953, any person acquires any land by inheritance or bequest or gift which, with the lands already held by him exceed in the aggregate the permissible area, then he shall furnish to the Collector a return indicating the permissible area he desires to retain. This he shall do within the prescribed period (S. 19-B (1)). If he defaults to make the return, the Collector will select the land for him (S. 19-B (2)). He will suffer a penalty for failure to furnish the declaration (S. 19-B (3)). The excess land, i.e., the surplus area shall be at the disposal of Government for utilization under Section 10-A (19-B (4)). The surplus land will be used for re-settlement of tenants ejected or to be ejected under clause (i), sub-section (1) of Section 9 or other purpose notified by Government. The profound concern of the law to preserve the surplus stock is manifest from the obligation cast by sub-sections (1) and (4) of S. 19-B to declare and deliver excess lands. How you came to hold the excess is not the question. Why you should be permitted to keep more than what others can lawfully own is the query. A might have acquired by paying hard cash; B might have received by gift and C by bequest and D by settlement and E by partition. The agrarian policy is equitable ownership and the reform philosophy is redistributive justice, the rural goal being small peasant proprietorship. What difference does it make as to how you came by a large holding, from the standpoint above outlined? The thrust of Section 19-B is that even if the source of the excess area is inheritance, bequest or gift, the capacity to own is conditioned by the permissible limit.

10. Section 10-A does not militate against this mandate of Section 19-B. Indeed, Section 19-B had to be enacted because the High Court took the view that area which became surplus subsequent to April 15, 1953 was not hit by the ceiling set and land acquired by an heir by inheritance is saved from utilisation by the State. Section 10-A (a) is wide in its terms and encompasses all surplus area, howsoever obtained. Even Sec. 10-A (b) strikes no discordant note. All that it says and means is that lands acquired by

an heir by inheritance are saved in so far as dispositions of such lands are concerned. The drafting of the saving clause is cumbersome but the sense is and, having regard to the conspectus, can only be that although in the hands of the propositus, it is surplus land, if among the heirs it is not, then their transfers will not be affected by the interdict of Section 10-A (a). The sins of the father shall not set the teeth of the children on edge. If the heirs are otherwise small holders, the fact that their father was a large owner will not deprive the former of their heritage, if it is less than the permissible area. We see no conflict between Sections 10-A and 19-B. Assuming some inconsistency, primacy goes to Section 19-B which effectuates the primary object. It is settled law that Courts should favour an interpretation that promotes the general purpose of an Act rather than one that does not.

11. Counsel for the respondents adopted the arguments which found favour with the High Court and pressed two points. The scheme of the Act, according to the learned Judges, was to see that no one held in excess of the permissible area and since by the gift to the son or wife the latter had only lands within permissible limits, there was no frustration of the policy of the law. This reasoning is repugnant to the basic scheme because the surplus pool will be adversely affected if gifts and other transfers which will skim off surplus were to be allowed. Indeed, the flaw in the High Court's argument is that if it were allowed to prevail, there will be no surplus land at all, every large holder being free to screen his surplus in the names of his kith and kin or servants or reliable friends, by going through alienatory exercises. A legislation which has provided for ignoring decrees diminishing surplus lands and has otherwise prevented the escape of excess area by voluntary transfers, cannot conceivably be intended to permit inherited excesses.

12. The second argument which appealed to the High Court is a little curious, and somewhat difficult to follow. Section 19-B directs the owner who, by inheritance, comes to own an excess area, to make a declaration of his lands within a prescribed time. This does not mean that the time lag is statutorily given for executing gifts and transfers to defeat the law itself. Such a conclusion would be obviously absurd. What is intended is to give some time to the heir to ascertain the assets he has inherited, make the choice of his 'reserved area' which he likes to keep and make the necessary declaration. A processual facility cannot be converted into an opportunity to pervert and to thwart the substantive object of

the law. After all, Courts, faced with special case situations, have 'creatively' to interpret legislation. The Courts are 'finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing', said Donaldson, J., in *Corocraft Ltd. v. Pan American Airways Inc.*, (1968) 3 WLR 714 and indeed it is no secret that Courts constantly give their own shape to enactments (Says Harry Bloom in an article on 'Interpretation of Statutes'—(1970) Vol. 33 Mod. Law Rev pp. 197, 201.)

13. We feel that when economic legislation in the implementation of Part IV of the Constitution strikes new ground and takes liberties with old jurisprudence, there looms an interpretation problem of some dimensions which Indian jurists will have to tackle. The genre of agrarian reform laws, with special constitutional status, as it were, warrants interpretative skills which will stifle evasive attempts, specially by way of gifts and bequests and suspect transfers. Here Sections 10-A, 19-A and 19-B, inter alia, strike at these tactics.

14. Our conclusion, in conformity with the principles of statutory construction we have projected, is that the gifts in both the appeals fail in the face of Section 19-B. It follows that the appeals have to be allowed, which we hereby do without hesitation, without costs however to either party at any stage.

Appeals allowed.

AIR 1975 SUPREME COURT 1957

(From: Punjab & Haryana)*

A. N. RAY, C. J., K. K. MATHEW AND
Y. V. CHANDRACHUD, JJ.

Sulleh Singh and others, Appellants
v. Sohan Lal and another, Respondents.

Civil Appeal No. 496 of 1974. D/- 2-9-1975.

(A) Civil P. C. (1908), O. 20, R. 14 — Suit for possession by pre-emption — Direction of trial Court to deposit decretal amount by particular date — Extension of time by Lower Appellate Court — Validity — S. A. No. 1469 of 1969, D/- 2-5-1973 (Punj & Har), Reversed.

The directions given by the trial Court are mandatory under the provisions contained in Order 20, Rule 14. Mere filing of an appeal does not suspend the decree of the trial Court and unless that decree is altered in any manner by the Court of Appeal, the pre-emptor is bound to comply with that direction. The observations in AIR 1954 SC 50 that the pre-

*[S. A. No. 1469 of 1969, D/- 2-5-1973—(Punj & Har)].

IS/IS/D308/75/CWM

emtor is bound to comply with the directions of the trial Judge unless that decree is altered in any manner by a Court of Appeal do not mean that where the deposit is not made in accordance with the directions of the trial Court, the appellate Court can extend the time for payment. (Paras 11 and 13)

Where in the appeal filed by the plaintiffs-respondents against the trial Court's decree, the lower appellate Court did not grant any stay to the plaintiffs-respondents and the plaintiffs-respondents did not deposit the pre-emption price within the stipulated time as directed by the trial Court.

Held, that the lower appellate Court should have dismissed the suit. The lower appellate Court was wrong in extending the time for payment because the failure of the plaintiffs-respondents to deposit the amount in terms of the trial Court's decree would result in pre-emptors' suit standing dismissed by reason of their default in not depositing the pre-emption price. The High Court was wrong in not setting aside the order of extension of time passed by the lower appellate Court. It was only if the plaintiffs-respondents had paid the decretal amount within the time granted by the trial Court or if the plaintiffs-respondents had obtained another order from the lower appellate Court granting any order of stay that the lower appellate Court might have considered the passing of appropriate order in favour of pre-emptors. S. A. No. 1469 of 1969, D/- 2-5-1973 (Punj & Har), Reversed; AIR 1954 SC 50 and AIR 1970 SC 750, Rel. on. (Paras 13 and 15)

Cases Referred: Chronological Paras
AIR 1970 SC 750 = (1969) 2 SCR 514 2
AIR 1954 SC 50 = ILR (1953) Hyd 455
11, 13, 14

Mr. O. P. Sharma, Advocate, for Appellants; Mr. R. N. Dikshit (for No. 1) and Ex parte, (for No. 2), for Respondents.

Judgment of the Court was delivered by

RAY, C. J.:— This appeal is by special leave from the judgment dated 2nd May, 1973 of the Punjab and Haryana High Court.

2. The appellants are vendees of the land in suit. The vendors sold the land to the appellants for Rs. 43,000/- on 26th August, 1965. The transaction was by registered deed of sale.

3. The respondents filed this suit for possession by pre-emption of the land in payment of Rs. 30,000/- on allegations that the respondents were on the date of sale tenants of the land under the vendors. The respondents alleged that their right of pre-emption was superior to that of the vendees. They also alleged that the sale took place for Rs. 30,000/- only

and the remaining amount was fictitiously mentioned in the deed of sale. The suit was dismissed on the ground that one suit on behalf of the four plaintiffs, who were tenants of different parts of the land, was not maintainable.

3-A. On appeal the suit was remanded for re-trial.

4. At the trial on remand, two plaintiffs withdrew from the suit. The trial Court directed the remaining two plaintiffs-respondents Sohan Lal and Nathi to deposit Rs. 6,300/- and Rs. 5,670/- respectively on or before 1st April, 1969 less 1/5th of the pre-emption amount already deposited by them. The trial Court gave the respondent Sohan Lal a decree for possession by pre-emption in respect of Killas Nos. 14/1, 17 and 18/1 of Rectangle 37. The plaintiffs-respondents aggrieved by the order filed an appeal alleging that the respondent Sohan Lal was a tenant of Killa No. 24 under the vendors and the decree should have been passed in their favour for the whole of the land and that decree should have been passed in favour of Sohan Lal in respect of Killa No. 24 of Rectangle 37. The other ground in the appeal was that the decree should have been passed in favour of the plaintiffs-respondents for whole of the land.

5. The Additional District Judge on 29th July, 1969 passed a decree for possession by pre-emption in favour of respondent Sohan Lal on payment of Rs. 9,100/- and he was directed to deposit this amount in Court on or before 20th August, 1969. The Additional District Judge passed a decree for possession by pre-emption in favour of respondent Sohan Lal of Killa No. 24 of Rectangle 37. The decree in favour of respondent Nathi was maintained without change.

6. Thereafter, the appellants preferred an appeal in the High Court alleging that the decision that plaintiff-respondent Sohan Lal was also a tenant of Killa No. 24 was incorrect and should be set aside and the decree of the trial Court should be restored. The appellants also prayed that the decrees in favour of the two plaintiffs-respondents Sohan Lal and Nathi were liable to be set aside.

7. The appellants contended before the High Court that respondents Sohan Lal and Nathi did not deposit the decretal amount by 1st April, 1969 as directed by the trial Court and, therefore, the suit was liable to be dismissed under the provisions contained in Order 20, Rule 14 of the Code of Civil Procedure.

8. The other contention of the appellants before the High Court was that the plaintiff-respondent Sohan Lal should not have been granted pre-emption rights in respect of Killa No. 24.

9. The High Court on 2nd May, 1973 accepted the appeal of the appellants against the plaintiff Nathi and dismissed the appeal against the plaintiff-respondent Sohan Lal. The High Court said that since the lower appellate Court granted Sohan Lal decree for one more Killa and directed that the amount would be Rs. 9,100/-, the respondent was to comply with the appellate decree and not the decree of the trial Court.

10. The appellants contended that neither Sohan Lal nor Nathi deposited the amount in accordance with the decree of the trial Court on or before 1st April, 1969 and the suit should have been dismissed on that ground alone and the appeal should have been allowed. The appellants contended that the lower appellate Court had no power and jurisdiction to give further time to Sohan Lal to deposit the pre-emption amount by an extended date.

11. This Court in Naguba Appa v. Namdev reported in AIR 1954 SC 50 held that the directions given by the trial Court are mandatory under the provisions contained in Order 20, Rule 14 of the Code of Civil Procedure. This Court in Naguba Appa's case (supra) said that "mere filing of an appeal does not suspend the decree of the trial Court and unless that decree is altered in any manner by the Court of appeal the pre-emptor is bound to comply with that direction."

12. In Dattaraya v. Shaikh Mahboob Shaikh Ali, (1969) 2 SCR 514 = (AIR 1970 SC 750) this Court said that a decree in terms of Order 20, Rule 14, imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To illustrate, if the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree-holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues.

13. In the present case, the lower appellate Court did not grant any stay to the plaintiffs-respondents. In view of the fact that the plaintiffs-respondents did not deposit the amount as directed by the trial Court on or before 1st April, 1969, it became mandatory on the lower appellate Court by reason of the ruling of this Court in Naguba Appa's case AIR 1954 SC 50 (supra) to dismiss the suit. The observations of this Court in Naguba Appa's case (supra) that the pre-emptor is bound to comply with the directions of the trial Judge unless that decree is altered in any manner by a Court of Appeal do not mean that where the deposit is not made in accordance with the directions of the trial Court, the appellate Court can extend the

time for payment. Thereafter, the lower appellate Court was in error in extending the time for payment till 20th August, 1969.

14. In Naguba Appa's case AIR 1954 SC 50 the pre-emption money was not deposited within the time fixed in the decree. The pre-emptor made an application to the Court for making the deposit without disclosing that the time fixed by the decree had elapsed. The application was allowed. The defendant, when apprised of the situation, made an application to the Court to the effect that the plaintiff's suit stood dismissed on account of his failure in making the deposit in time. The trial Judge held that the pre-emption money not having been paid within the time fixed in the decree the suit stood dismissed. On appeal the decision was set aside. On second appeal it was restored and it was held that the suit stood dismissed under Order 20, Rule 14, Civil Procedure Code. An appeal was preferred against the judgment of the High Court. This Court held that the High Court was right in holding that the pre-emptor's suit stood dismissed by reason of his default in not depositing the pre-emption price within the time fixed in the trial Court's decree.

15. The contention of the appellants that the lower appellate Court was wrong in extending the time for payment is correct because the failure of the plaintiffs-respondents to deposit the amount in terms of the trial Court's decree would result in pre-emptors' suit standing dismissed by reason of their default in not depositing the pre-emption price. The contention of the appellants that the High Court was wrong in not setting aside the order of extension of time passed by the lower appellate Court is correct. It is only if the plaintiffs-respondents had paid the decretal amount within the time granted by the trial Court or if the plaintiffs-respondents had obtained another order from the lower appellate Court granting any order of stay that the lower appellate Court might have considered the passing of appropriate order in favour of pre-emptors. The High Court should have allowed the appellants' appeal and not made any distinction in dismissing plaintiff-respondent Nathi's suit and allowing plaintiff-respondent Sohan Lal any extension of time to make the payment. Further, it appears that the plaintiff-respondent Sohan Lal did not pay the amount.

16. For these reasons the appeal is accepted. Suit of the plaintiffs-respondents is dismissed. The appellants are entitled to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 1960

(From: Delhi)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Duli Chand, Appellant v. Delhi Administration, Respondent.

Criminal Appeal No. 94 of 1971. D/6-8-1975.

(A) Constitution of India, Art. 136 — Jurisdiction — Nature of — Supreme Court does not function as Regular Court of Appeal in every criminal case — No practice to re-appreciate evidence to determine correctness of finding — Evidence re-appreciated only in exceptional cases where there is grave and serious miscarriage of justice.

The Supreme Court is not a regular Court of Appeal to which every judgment of the High Court in criminal case may be brought up for scrutinising its correctness. It is not the practice of the Supreme Court to re-appreciate the evidence for the purpose of examining whether this finding of fact recorded by the High Court and the subordinate Courts is correct or not. It is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that the Court, under Article 136 of the Constitution, would interfere with the finding of fact. Where not only is the appreciation of evidence by the three Courts viz. the Magistrate, the appellate Court and the High Court was eminently correct but there were certain tell-tale circumstances which clearly supported the findings of fact, the Court refused to interfere. (Para 5)

(B) Criminal P. C. (1974), Section 401 — Revisional jurisdiction — Nature of — Re-appreciation of evidence not permissible — Death due to rash and negligent driving — Concurrent finding of fact — High Court though justified in not re-appreciating evidence, doing so — Supreme Court refused to interfere — (Penal Code (1860), S. 304-A).

The jurisdiction of the High Court in a criminal revision application is severely restricted and it cannot embark upon a re-appreciation of evidence. (Para 4)

The question whether the accused was guilty of negligence in driving the bus and death of the deceased was caused due to negligent driving is a question of fact which depends for its determination on appreciation of the evidence. Where the Magistrate, and the Additional Sessions Judge arrived, on assessment of the evidence, at a concurrent finding of fact that

the death of the deceased was caused by negligent driving of bus by the accused and the High Court even though justified in refusing to re-appreciate the evidence, reviewed the same in order to satisfy itself that there was evidence in support of the finding and that the finding was not perverse, came to the conclusion that the evidence established the death of the deceased was caused by negligent driving of bus by the accused, the Supreme Court on an appeal under Article 136 refused to interfere. (Para 5)

(C) Penal Code (1860), Section 304-A — Rash or negligent driving — Death resultant — Accused driving a bus on cross road knocking down deceased on cycle — Accused failed to look on right while approaching cross road — Bus though driven at moderate speed of 20 miles, accused, held, was negligent. (Para 6)

M/s. V. S. Sawhney, U. K. Jha and U. P. Singh Advocates, for Appellant; Mr. S. N. Prasad and Mr. M. N. Shroff, Advocates, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— This appeal by special leave is directed against an order made by the High Court of Delhi rejecting a Revision Application preferred against an appellate order passed by the Additional Sessions Judge Delhi confirming the conviction and sentence recorded against the appellant under Section 304-A of the Indian Penal Code.

2. One Dass Singh (hereinafter referred to as 'the deceased'), according to the prosecution case as unfolded in the evidence of three witnesses, viz., Mukhtiar Singh, P. W. 2, Om Parkash, P. W. 3 and Jagir Singh, P. W. 5, who were eye-witnesses to the incident, was going on a cycle along the Rohtak Road from west to east at about 10 a.m. on 16th June 1966. When the deceased came near Liberty Cinema which is situate on the southern side of the Rohtak Road, he turned to the right in order to enter Road No. 6 after giving signal with his hand. It may be mentioned that here at this point Road No. 6 coming from the south meets Rohtak Road so that the Liberty Cinema on its north abuts on the Rohtak Road and on its east abuts on Road No. 6. The deceased had almost crossed Rohtak Road after turning to his right when suddenly D. T. U. bus bearing number DLP 46 driven by the appellant came at a fast and excessive speed from the opposite direction and struck against the cycle of the deceased and ran over him causing multiple injuries resulting in his death. This incident was witnessed by Mukhtiar Singh P. W. 2 who was following on a cycle just behind the deceased. There were also two other eye-witnesses

*(Criminal Revn. No. 222 of 1968, D/16-11-1970—Delhi).

to this incident, viz., Om Parkash P. W. 3 who was standing on the foot-path in front of Liberty Cinema at the time of the incident and Jagir Singh P. W. 5 who was also standing near the site of the incident.

3. The appellant was prosecuted for an offence under Section 304-A of the Indian Penal Code for causing the death of the deceased by rash or negligent driving, in the Court of the first class Magistrate, Delhi. Mukhtiar Singh P. W. 2, Om Parkash P. W. 3 and Jagir Singh P. W. 5 were examined as witnesses on behalf of the prosecution and they deposed to the incident as narrated above. The prosecution also examined Sub-Inspector Bishanpal P. W. 10 who investigated the case and this witness produced the site-plan, Exhibit P. W. 10/8 prepared by him. The appellant in his defence examined three witnesses who were alleged to be passengers travelling in the bus at the time of the incident and these three witnesses stated that the cyclist who was coming from the opposite direction suddenly turned towards the right and struck against the bus and consequently he was dragged with the bus for some distance and the appellant brought the bus to a halt on the passengers raising an alarm. The appellant was examined under Section 342 of the Code of Criminal Procedure and what is stated in his examination is rather important. He stated in answer to question put to him by the learned Magistrate: "when I heard an alarm to the effect 'stop' stop'. I stopped the bus. I did not see any cyclist being knocked down by the bus." Then in answer to another question, he added "I did not see the deceased being dragged. When I heard the alarm I stopped the bus immediately." The Learned Magistrate on this evidence held that the appellant was negligent in driving the bus and that the death of the deceased was caused on account of such negligent driving and the appellant was, therefore, guilty of the offence under Section 304-A. The appellant was accordingly convicted and sentenced to suffer imprisonment for 18 months and to pay a fine of Rs. 1,000/- or in default of payment of fine, to suffer further imprisonment for three months.

4. The appellant preferred an appeal against the order of conviction and sentence to the Sessions Court, Delhi. The learned Additional Sessions Judge who heard the appeal, on re-assessment of the evidence, came to the same conclusion as the learned Magistrate and confirmed the conviction of the appellant under Section 304-A but taking into account the fact that the appellant might have lapsed into absentmindedness at the critical moment, the learned Additional Sessions

Judge reduced the sentence to six months' imprisonment. The appellant, dissatisfied with the order, preferred a Revision Application in the High Court. Now the jurisdiction of the High Court in a Criminal Revision Application is severely restricted and it cannot embark upon a re-appreciation of the evidence, but even so, the learned Single Judge of the High Court who heard the revision application, examined the evidence afresh at the instance of the appellant. This was, however, of no avail, as the learned single Judge found that the conclusion reached by the lower Courts that the appellant was guilty of gross negligence, was correct and there was no reason to interfere with the conviction of the appellant. The learned single Judge accordingly confirmed the conviction and sentence recorded against the appellant and dismissed the revision application. Hence the present appeal by special leave obtained from this Court.

5. Now it is obvious that the question whether the appellant was guilty of negligence in driving the bus and the death of the deceased was caused on account of his negligent driving is a question of fact which depends for its determination on an appreciation of the evidence. Both the learned Magistrate trying the case at the original stage and the learned Additional Sessions Judge hearing the appeal arrived, on an assessment of the evidence, at a concurrent finding of fact that the death of the deceased was caused by negligent driving of the bus by the appellant. The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to re-appreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate Courts and that the finding of fact was not unreasonable or perverse. The High Court came to the conclusion that the evidence clearly established that the death of the deceased was caused on account of the negligent driving of the bus by the appellant. When three Courts have, on an appreciation of the evidence, arrived at a concurrent finding of fact in regard to the guilt of the appellant, it is difficult to see how this Court can, in the exercise of its extraordinary jurisdiction under Article 136 of the Constitution, interfere with such finding of fact. We have had occasion to say before and we may emphasise it once again, that this Court is not a regular

Court of Appeal to which every judgment of the High Court in criminal case may be brought up for scrutinising its correctness. It is not the practice of this Court to re-appreciate the evidence for the purpose of examining whether the finding of fact concurrently arrived at by the High Court and the subordinate Courts is correct or not. It is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that this Court would interfere with such finding of fact. Here, not only is the appreciation of the oral evidence by the learned Magistrate, the learned Additional Sessions Judge and the High Court eminently correct, but there are certain tell-tale circumstances which clearly support the finding of fact reached by them.

6. We will assume for the purpose of argument that the appellant was driving the bus at a speed not exceeding 20 miles per hour. That appears to be so, because the site-plan Ex. P. W. 10/8 shows that when the bus came to a halt, the rear portion of the bus was at a distance of about 42 feet from the point of impact with the deceased and taking the length of the bus at about 18 feet, it would appear that the bus came to a stop after travelling 60 feet from the point of impact. That accords fairly with a speed of about 20 miles per hour. Now a speed of 20 miles per hour on a road like Roh-tak Road which is 42' wide, cannot be said to be fast or excessive. But there can be no doubt that the appellant was grossly negligent in that he did not look at his right even though he was approaching a cross-road and failed to notice the deceased who was coming from his right and crossing the road. The statement of the appellant under Section 342 clearly shows that he did not see the deceased crossing the road and it was only when he heard an alarm to the effect: "stop, stop" that he stopped the bus. That is also substantially the evidence of the three defence witnesses. It is indeed difficult to imagine how the appellant could have possibly failed to notice the deceased coming from his right. It was main road 42 feet wide and if the appellant was reasonably alert and careful, he would have seen the deceased coming from his right and trying to cross the road and in that event, he could have immediately applied the brake and brought the bus to a grinding halt. But it was the case of the defence that the appellant did not notice the deceased at all and it was only when the bus struck against the cycle of the deceased and knocked him down and an alarm was raised, that the appellant applied the brake and brought the bus to a stop. This was culpable negligence on the part of the appellant.

We are, therefore, satisfied beyond doubt that the death of the deceased was caused on account of negligent driving of the bus by the appellant and the learned Magistrate, the learned Additional Sessions Judge and the High Court were right in reaching that conclusion.

7. The appeal, therefore, fails and is dismissed. The appellant will surrender to his bail.

Appeal dismissed.

AIR 1975 SUPREME COURT 1962

(From: Punjab & Haryana)*

N. L. UNTWALIA AND
S. MURTAZA FAZL ALL. JJ.

Balaka Singh and others, Appellants
v. The State of Punjab, Respondent.

Criminal Appeal No. 133 of 1970, D/-
16-4-1975.

(A) Criminal P. C. (1898), Section 367 — Appreciation of evidence — Court must make attempt to separate grain from chaff — Exception to this principle — Murder case — Acquittal of four out of nine accused — Case of convicted accused not severable from that of acquitted accused — Entire prosecution must be discarded. Criminal Appeal No. 318 of 1967, D/- 21-1-1970 (Punj & Har), Reversed. (i) Evidence Act (1872), S. 3; (ii) Penal Code (1860), Section 302).

It is true that the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this can only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court will have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. AIR 1954 SC 15, Referred. (Para 8)

In appeal by nine accused persons against their conviction and sentence for offence of riot with murder, the High Court acquitted four accused persons because of the omission of their names in the body of the inquest report. The delay in sending copy of F. I. R. to Ilacqua Magistrate also remained unexplained. Prosecution party were inimical to accused. F. I. R. was found to have been written after the inquest report was prepared by the A. S. I. The prosecution

*(Criminal Appeal No. 318 of 1967, D/- 21-1-1970 (Punj. & Har.)).

HS/HS/B717/75/SSG

witnesses in their parrot like version implicated even the four acquitted accused equally with the other five convicted accused making absolutely no distinction between one and the other. On appeal by special leave by these five convicted accused persons:

Held (1) that the prosecution case against the convicted accused and the acquitted accused was so inextricably mixed up that it was not possible to sever one from the other. Having regard to the partisan and interested prosecution evidence, it was not possible to reject the prosecution case with respect to the four acquitted accused and accept it with respect to the five convicted accused. If the case against the four accused failed, then the entire prosecution would have to be discarded and it would not be possible for Supreme Court to make out a new case to convict the appellants as had been done by the High Court. (Para 8)

And, (2) that the prosecution case against the five appellants had also not been proved beyond reasonable doubt and the manner in which the F. I. R. and the inquest report had been made threw considerable doubt on the complicity of the five appellants in the crime. Criminal Appeal No. 318 of 1967, D/- 21-1-1970 (Punj. & Har), Reversed. (Para 10)

(B) Criminal P. C. (1898), Ss. 174, 154 — Murder case — Inquest report — Names of four out of nine accused missing in body of the inquest report — Omission not explained — Prosecution party inimical to accused — Omission, held threw doubt on complicity of four accused — F. I. R. found to have been written, after inquest report was prepared by A. S. I. — F. I. R., held lost its authenticity. (Paras 5, 7)

Cases Referred: Chronological Paras AIR 1954 SC 15 = 1954 Cri LJ 230 8

Mr. R. L. Kohli Advocate, Amicus Curiae, for Appellants; Mr. M. S. Dhillon, Advocate, for Respondent.

Judgment of the Court was delivered by

S. M. FAZL ALI, J.:— This is an appeal by special leave preferred by the appellants Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh. The appellant Balaka Singh has been convicted under Section 302, I. P. C. and sentenced to imprisonment for life. The other appellants have been convicted under Section 302 read with Section 149 and sentenced to life imprisonment and a fine of Rs. 1,000/- each or in default further rigorous imprisonment for one year. All the appellants have also been convicted under Section 143, I. P. C. and sentenced to rigorous imprisonment for four months each and under Section 148 to rigorous imprisonment for one year

each. Balaka Singh has also been convicted under Section 325, I. P. C. for having caused grievous hurt to Gurmei Kaur and Harnam Kaur and sentenced to two years rigorous imprisonment and fine of Rs. 100. The other accused have also been convicted under Section 325 read with Section 149, I. P. C. and awarded the same sentence as Balaka Singh. Apart from these five appellants there were four other accused who were prosecuted before the trial Court of the Additional Sessions Judge, Patiala, namely, Makhan Singh, Sucha Singh s/o Inder Singh, Teja Singh and Inder Singh but these accused persons were acquitted on appeal by the High Court of Punjab and Haryana. The High Court has, however, confirmed the conviction and sentences passed on the appellants and has dismissed the appeal and hence this appeal before us.

2. Put briefly the prosecution case is as follows. About seven years before the occurrence one Gurnam Singh alias Karnail Singh was murdered and Balaka Singh accused and his brother Asa Singh were tried for the murder of Gurnam Singh and convicted and sentenced under Section 302, I. P. C. to imprisonment for life by the Sessions Judge. Balaka Singh and Asa Singh, however, went up in appeal to the High Court and were acquitted. Banta Singh P. W. 3 who is informant in the instant case was the chief prosecution witness in the murder case in which Gurnam Singh was killed. It is also the admitted case of the prosecution that Balaka Singh and his people were on inimical terms with Banta Singh and the deceased Gurnam Singh. It was further alleged that Dharam Singh the deceased in the present case was the cousin of Banta Singh and was used by him as a sort of his body-guard to protect him from his enemies. Shortly before the occurrence the appellant Balaka Singh and his brother Asa Singh had filed an application under Section 107 of the Code of Criminal Procedure against Banta Singh, Dharam Singh, Budha Singh and Kashmir Singh and in those proceedings the licenced gun of the deceased Dharam Singh was also deposited and this gave rise to a fresh grouse on the part of the prosecution party against the accused. Banta Singh and Dharam Singh also had made a counter-application for taking security proceedings against the present appellants but no action thereupon appears to have been taken. The actual occurrence took place on September 1, 1966, when Banta Singh P. W. 3 the informant and Dharam Singh the deceased had gone to see their fields. They returned from their fields at about 6 P. M. and Dharam Singh had entered his house while Banta Singh took his leave and went to his own house. While Banta Singh was going to

his house he saw the nine accused persons including the five appellants variously armed with spears, gandasis and laihis proceeding towards the house of Dharam Singh. The party of the accused is said to have entered the house of Dharam Singh and Makhan Singh. Sucha Singh s/o Inder Singh, Inder Singh and Teja Singh — hereinafter referred to as 'the four accused' (since acquitted by the High Court) are said to have incited and exhorted their companions to finish off Dharam Singh and not to spare any member of his family. Dharam Singh was busy in tying the rope of his ox which was tethered in his court-yard. The accused after entering the court-yard opened attack on the deceased Dharam Singh in which Balaka Singh took a main part and gave a spear blow on the chest of Dharam Singh as a result of which he fell down on the ground. Thereafter Banta Singh raised a hue and cry to the effect that Dharam Singh had been murdered. Not content with giving one spear blow to Dharam Singh even after he fell down, Joginder Singh is said to have given a barchha blow on his right knee and Pritam Singh a gandasi blow in the right shoulder of Dharam Singh. Just at that moment Smt. Gurmei Kaur the wife of Dharam Singh, his mother, Waryam Singh his father and his brothers who were in the house tried to intervene and fell on the body of Dharam Singh. But they were also assaulted by Joginder Singh, Balaka Singh and others. It is said that other inmates of the house were also assaulted. On hearing the cries of Banta Singh the informant, Harnam Singh and Kapur Singh reached the spot and they saw Joginder Singh accused catching Dharam Singh by his long hair, while Balaka Singh had caught him by the legs and were trying to drag the deceased towards the entrance gate of the house. Kapur Singh who was armed with a gun fired a shot in the air which dispersed the accused party who ran away. In the aforesaid occurrence apart from the deceased Dharam Singh Mst. Gurmei Kaur, Harnam Singh, Waryam Singh, Sucha Singh and Budha Singh also received injuries on their person.

3. Banta Singh P. W. 3 went to the police station Julkan and lodged the F. I. R. the police station being 6/7 miles away from the place of occurrence. The report was lodged at about 10 P. M. Accordingly a case under Sections 302, 307 and other sections of the Indian Penal Code was registered by the police. Assistant Sub-Inspector Teja Singh reached the spot along with Banta Singh and some constables. After reaching there at about 2 or 2-30 A. M. he prepared the inquest report and the injury statement of the injured persons. The dead body was sent

to the mortuary at Patiala for post-mortem examination. The A. S. I. also took blood-stained earth from the spot and the blood-stained clothes of the deceased were also taken. After completion of the usual investigations the nine accused persons were challaned in the Court of the Judicial Magistrate, Patiala who committed them for trial to the Court of Session which resulted in the ultimate conviction and sentence against the accused as mentioned above. The accused pleaded innocence and averred that they had been falsely implicated due to previous enmity.

4. In support of the prosecution 19 witnesses were examined but the defence did not give any evidence at all. The learned Sessions Judge after considering the evidence came to the conclusion that the prosecution case against all the accused persons was fully proved and he accordingly convicted and sentenced the accused persons as mentioned in his judgment. The accused persons then filed an appeal in the High Court, which, while accepting the prosecution case against the five appellants in this Court, acquitted the four accused namely, Makhan Singh, Sucha Singh s/o Inder Singh, Teja Singh and Inder Singh. The High Court has given cogent and substantial reasons for acquitting the aforesaid accused, but in that process they have given the finding which, in our opinion, is completely destructive of the entire prosecution case itself.

5. We may now refer to the reasons given by the High Court for acquitting the four accused mentioned above. The first and foremost reason given by the High Court was that although the inquest report was prepared by the A. S. I. at about 2-30 A. M. in the morning yet the names of the four accused did not find place in the body of the inquest report which was made on the basis of report made to the police by the informant Banta Singh. It is true that the names of all the nine accused were mentioned at the top of the inquest report but the High Court found that this appears to have been an addition made by the Assistant Sub-Inspector to help the prosecution and to bring the inquest report in conformity with the F. I. R. In this connection the High Court observed as follows:

"The first thing to be noted in this connection is that the names of these four appellants do not figure in the body of the inquest report although they are mentioned in the heading thereof as well as in the first information report. The circumstance leads clearly to the inference that throughout the preparation of the inquest report these appellants were not named as members of the party of the

culprits and that their names were added in the said heading as well as in the first information report later."

We have perused Ext. P. H. inquest report ourselves and find that in the brief facts of the case which were made to the Investigating Officer by Banta Singh only the names of Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh are mentioned. There is no reference at all to Makhan Singh, Sucha Singh s/o Inder Singh, Teja Singh and Inder Singh in the report nor is it mentioned that Teja Singh and Inder Singh incited or exhorted the other accused persons to open the assault on the deceased which appears to be the starting point of the occurrence. The prosecution has not been able to give any reasonable explanation for this important omission in the inquest report. The A. S. I. Teja Singh was questioned on this point and he stated thus:

"The brief statements of the facts of the case mentioned in the inquest report are based on the report lodged by Banta Singh. In this brief statement, however, the names of Inder Singh, Sucha Singh, Teja Singh and Makhan Singh accused are not mentioned as culprits, specifically. It is correct that in the brief facts mentioned in the body, there is no reference of the names of these four men."

Thus even the A. S. I. while admitting that the names of the four accused were not mentioned by Banta Singh has not chosen to give any explanation for this deliberate omission to that effect. According to the prosecution the names of the four accused who have been acquitted by the High Court had already been mentioned in the F. I. R. which was lodged 4/5 hours before the inquest report was prepared. Any Investigating Officer possessing some intelligence would have at once questioned Banta Singh as to how it is that while he had named the four accused in the F. I. R. he had not referred to them in his brief statement in the inquest report. In these circumstances, therefore, the High Court was fully justified in holding that the omission of the names of the four accused acquitted by the High Court in the inquest report was a very important circumstance which went in favour of the four accused. This omission has a twofold reaction. In the first place it throws doubt on the complicity of the four accused acquitted by the High Court and secondly it casts serious doubt on the veracity and authenticity of the F. I. R. itself. It is not understandable as to why the four accused who are alleged to have taken an active part in the assault on the deceased were not at all mentioned in the inquest report and in the brief statement of the very per-

son who had lodged the F. I. R. four hours before. Counsel for the State tried to justify this omission on the ground that in the inquest report Ext. P. H. the names of all the nine accused appear to have been mentioned at the top of that document. There is, however, no column for mentioning the names of the accused and, therefore, there was no occasion for the Investigating Officer to have mentioned the names of the accused in that particular place.

6. Finally the Investigating Officer P. W. 23 Teja Singh admitted in his evidence that he had prepared the inquest report and that he had read out the same to Banta Singh and Harnam Singh P. Ws. but later tried to say that he did not recollect whether he had read out the inquest report to Banta Singh and Harnam Singh before getting their thumb impressions on the inquest report. This circumstance speaks volumes against the prosecution case. If, therefore, it is once established that the names of the four accused were deliberately added in the inquest report at the instance of the prosecution there is no guarantee regarding the truth about the participation in the assault on the deceased by the appellants.

7. Another finding which demolishes the entire edifice and fabric of the prosecution case is that the F. I. R. itself was not written at 10 P. M. as alleged by the informant Banta Singh but it was written out after the inquest report was prepared by the A. S. I. and after the names of the four accused acquitted by the High Court were inserted in the inquest report. If this is true then the entire case of the prosecution becomes extremely doubtful. The High Court has also derived support from another important circumstance to come to the conclusion that the F. I. R. was not written at 10 P. M. as alleged by the prosecution but after the preparation of the inquest report at about 2-30 A. M. The High Court points out that according to the prosecution the special report reached the Ilaka Magistrate at 11 A. M. on September 2, 1966 i. e. more than 12 hours after the F. I. R. was lodged at the police station, whereas it should have been delivered to the Ilaka Magistrate during the night or at least in the early morning. Counsel appearing for the appellants submitted that under the High Court Circulars and the Police Rules it was incumbent upon the Inspector who recorded the F. I. R. to send a copy of the F. I. R. to the Ilaka Magistrate immediately without any loss of time and the delay in sending the F. I. R. has not been properly explained by the prosecution as rightly held by the High Court. It is, therefore, clear that the F. I. R. itself was a belated docu-

ment and came into existence during the small hours of September 2, 1966. Indeed if this was so, then there was sufficient time for the prosecution party who are undoubtedly inimical to the accused to deliberate and prepare a false case not only against the four accused who have been acquitted, but against the other five appellants also. The High Court also found that the best person to explain the delay in sending the special report to the Ilaka Magistrate was the Police Constable who had carried the F. I. R. to the Ilaka Magistrate but the Constable has not been examined by the prosecution. On this point the High Court observed as follows:

"The delay with which the special report was made available to the Ilaka Magistrate is indicative of the fact that the first information report did not come into existence probably till about sunrise by when the dead body had already been despatched for the purpose of post-mortem examination to Patiala along with the inquest report, so that the Investigating Officer was no longer in a position to make alterations in the body of that report and all that he could do was to add later on the names of the said four appellants to its heading."

This finding of the High Court is based on cogent materials and convincing reasons, but unfortunately the High Court has not considered the effect of this finding on the truth of the prosecution case with regard to the participation of the appellants. In our opinion, in view of the finding given by the High Court it has been clearly established that the F. I. R. was lodged not at 10 P. M. as alleged by the prosecution but some time in the early morning of September 2, 1966. If this was so, then the F. I. R. lost its authenticity. If the prosecution could go to the extent of implicating four innocent persons by inserting their names in the inquest report and in the F. I. R. which was written subsequent to the inquest report they could very well have put in the names of the other five appellants also because they were equally inimical to the prosecution party, and there could be no difficulty in doing so because it is found by the High Court that all the prosecution witnesses belonged to one party who are on inimical terms with the accused.

8. The suggestion of the appellants is that they were falsely implicated because the prosecution could not succeed in convicting Balaka Singh for the murder of Gurnam Singh in the previous murder case. It was to wreak fresh vengeance on the accused that they had been falsely implicated in the present case. It is true that there are as many as eight witnesses who are alleged to have seen the occur-

rence and they have given a parrot-like version of the entire case regarding the assault on the deceased by the various accused persons. All these witnesses have with one voice and with complete unanimity implicated even the four accused persons, acquitted by the High Court, equally with the appellants making absolutely no distinction between one and the other. A perusal of the evidence of the prosecution witnesses would show that the prosecution case against the appellants and the four accused is so inextricably mixed up that it is not possible to sever one from the other. It is true that, as laid down by this Court in *Zwinglee Ariel v. State of Madhya Pradesh*, AIR 1954 SC 15 = (1954 Cri LJ 230) and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. We are satisfied that in the facts of the present case, having regard to the partisan and interested evidence of the prosecution witnesses who can implicate the appellants and the four accused equally with regard to the assault on the deceased it is not possible to reject the prosecution case with respect to the four accused and accept it with respect to the other five appellants. If all the witnesses could in one breath implicate the four accused who appear to be innocent, then one cannot vouchsafe for the fact that even the acts attributed to Balaka Singh, Joginder Singh, Pritam Singh, Darbara Singh and Jarnail Singh may have been conveniently made to suit the needs of the prosecution case having regard to the animus which the witnesses as also Banta Singh bore against the appellants. In these circumstances, therefore, we are satisfied that in view of the finding of the High Court that the F. I. R. was a belated document having come into existence much later than the time it is said to have been recorded and which adds the names of the four accused against whom the prosecution case is absolutely identical with the appellants, the case of the appellants cannot at all be distinguished from that of the four accused in any respect. If the case against the four accused fails, then the entire prosecution will have to be discarded and it will not be possible for this Court to make out a

new case to convict the appellants as has been done by the High Court.

9. In order to test the veracity of the prosecution witnesses we find that one of the eye witnesses, namely, Waryam Singh has deposed that Gurmej Kaur, the wife of the deceased, who was drawing water from the hand pump when the accused came, ran towards Dharam Singh and fell upon his body in order to protect him from receiving further injuries. At this the appellant Balaka Singh is alleged to have given her a barchha blow on her right hand and the appellant Joginder Singh gave a barchha blow on the left buttock of Gurmej Kaur. According to the evidence of this witness the two appellants Balaka Singh and Joginder Singh appear to have assaulted Gurmej Kaur with a sharp-cutting instrument, namely, barchha and spear. This version is completely falsified by the medical evidence of Dr. Mohinder Singh who examined Gurmej Kaur and who stated in his evidence that all the injuries on Gurmej Kaur were caused by blunt weapon. Moreover out of the six injuries which Gurmej Kaur received on her body not a single one could be caused by a sharp-cutting instrument because there were no penetrating or incised wounds. The injuries were either contusions, abrasions or lacerated wounds. While the witness Waryam Singh says that the accused Joginder Singh had given a barchha blow on the left buttock of Gurmej Kaur, according to the medical evidence it was a lacerated wound deep on the upper and outer part of the left buttock. This, therefore, clearly demonstrates the extent to which the witnesses could have gone in order to implicate all the accused.

10. In view of these circumstances and the evidence discussed above, we are clearly of the opinion that the prosecution case against the five appellants has also not been proved beyond reasonable doubt and the manner in which the F.I.R. and the inquest report have been made throws considerable doubt on the complicity of the five appellants in the crime.

11. The result is that the appeal is allowed and the order of conviction and sentence passed on all the appellants is set aside. The appellants are acquitted of the charges framed against them and are directed to be released forthwith.

Appeal allowed.

AIR 1975 SUPREME COURT 1967
(From: AIR 1972 Ker, 206 and AIR 1975 Orissa 100)

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

Civil Appeals Nos. 1457 and 1642 of 1971: Indian Aluminium Company (In C. A. 1451/71); Comince Binani Zinc Ltd. (In C. A. 1642/71), Appellants v. Kerala State Electricity Board, Respondent.

Civ. Appeals Nos. 1652-1654 of 1974: Orissa State Electricity Board and another (In C.A. No. 1652/74) M/s. Titagarh Paper Mills Ltd. (In C.A. No. 1653/74); Orissa Textiles Mills Ltd. (In C.A. No. 1654/74) Appellants v. M/s. Indian Aluminium Co. Ltd. (In C.A. No. 1952/74); Orissa State Electricity Board and another (In C. As. 1653-1654/74), Respondents.

Civil Appeals Nos. 1457 and 1642 of 1971 and Civil Appeals Nos. 1652-1654 of 1974, D/- 23-7-1975

(A) Electricity (Supply) Act (1948), Sections 49, 59 and 79 (j) — Board fixing special tariffs under agreements with consumers — Charges cannot be enhanced by Board unilaterally in breach of stipulations — AIR 1972 Ker 206, Reversed — Board cannot confer upon itself power to revise rates in such cases by making rules under Section 79 (j). — Observations to the contrary in AIR 1975 Orissa 100 Reversed. (Interpretation of Statutes — Marginal note).

Neither of the two sections viz. Sections 49 and 59, confer any authority on the Board to override a contractual stipulation as to rates and unilaterally enhance the rates in derogation of such contractual stipulation even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of production and supply of electricity and it is incurring operational loss. AIR 1972 Ker 206 Reversed. (Para 28)

Section 49 (3) confers power on the Board to fix special tariff for a consumer if the geographical position of the area, the nature of the supply, the purpose for which supply is required and other relevant factors so warrant. Now, fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not, it would be the result of negotiations between the Board and the consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49. Now, when the power to fix special tariff for a consumer is given to the

Board, the possibility cannot be ruled out that the Board may in exercising this power show undue preference to one consumer as against the other. Sub-section (4) of Sec. 49, therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is fixed by the Board under sub-section (3) of Section 49. When uniform tariffs are fixed by the Board under sub-sections (1) and (3) of Section 49, there could be no question of the Board showing undue preference to any one consumer against another because every consumer falling within the category would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that sub-section (4) of Section 49 controls the action of the Board in fixing tariff under sub-section (3) of Section 49 and it has no application where uniform tariffs are fixed under sub-sections (1) and (2) of Section 49. (Para 9)

Since the stipulations contained in the agreements were made in exercise of the statutory power to fix special tariffs conferred under sub-section (3) of Section 49 there could be no question of such stipulations being void as fettering or hindering the exercise of the statutory power under that provision. These stipulations did not divest the Board of this statutory power or fetter or hinder its exercise; in fact, they represented the exercise of this statutory power. Once the agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding-as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-section (3) of Section 49 to fix the charges for a specific period of time, which would be contrary to the plain meaning and intent of the section. The Board was also not competent to enhance the charges under the guise of fixing uniform tariffs under sub-section (1) of Section 49, because sub-section (1) is, on its plain language, subject to sub-section (3) of Section 49 and once special tariffs were fixed under sub-section (3) of Section 49, there could be no question of fixing uniform tariffs under sub-section (1) of Section 49. The power to fix uniform tariffs under sub-section (1) of Section 49 could not be exercised in derogation of the stipulations fixing special tariffs made under sub-section (3) of Section 49. (Para 17)

It is true that the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied

upon as indicating the drift of the section, or to show what the section was dealing with. It is apparent from the marginal note that Section 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. The Board is directed, as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the co-ordinated development of generation, supply and distribution of electricity within the State, with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the State, even though such special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. Thus it cannot be held that Section 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49. (Para 18)

It was not correct to say that by making regulations under Section 79 (j) the Board could confer upon itself power to unilaterally revise the rates for supply of electricity. Section 79 (j) empowers the Board to make regulations not inconsistent with the Act to provide for "principles governing the supply of electricity by the Board to persons other than the licensee under Section 49." This power to make regulations must obviously be exercised consistently with the provisions of the Act and the regulations made in exercise of this power cannot go beyond the Act. If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Act, it cannot be created by regulations made under the Supply Act. Either this power can be found in some provision of the Act or it is not there at all. Regulations in the nature of subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations, unless specified power to make such regulations is vested in the Board by some provision in the Statute, expressly or by necessary implication. No such power is to be found in Section 79 (j) or in any other provision of the Act. It does not, therefore,

make any difference whether regulations under Section 79 (j) were made or not at the date when a surcharge was levied. Even if they were made, they could not have conferred authority on the Board to unilaterally exonerate itself from the stipulation contained in the contracts and enhance the rates, notwithstanding such contractual stipulation. Observations to the contrary in AIR 1975 Orissa 100, Reversed. (Para 28)

Cases	Referred:	Chronological	Paras
(1971) 2 All ER 277 =	(1971) 1 WLR 204		15
AIR 1968 SC 991 =	(1968) 3 SCR 137		18
(1961) 2 All ER 46 =	(1961) 2 WLR 306		13
(1960) 2 All ER 726 =	(1960) 3 WLR 446		15
(1925) 1 Ch. 794 =	94 LJ Ch 371		14
(1924) 1 Ch 557 =	131 LT 127	8, 12, 14,	
(1904) 2 KB 563 =	73 LKJB 1005		18
(1883) 8 App Cas 623		8, 11, 12, 14	
1866 LR 1 HL 254 =	148 R. R. 424		12

Mr. S. V. Gupte, Sr. Advocate (in C. A. No. 1457 of 1971) and Mr. G. B. Pai, Sr. Advocate (in C. A. No. 1642 of 1971), M/s. Ajay Ray and P. Mathai, Advocates (in C. A. No. 1457 of 1971) (and M/s. O. C. Mathur, K. J. John and J. B. Dadachanji, Advocates of M/s. J. B. Dadachanji and Co., with them) for Appellants; Mr. Lal Narain Sinha, Solicitor-General (in C. A. No. 1457 of 1971) and Mr. A. G. Pudissery, Advocate, with him, for Respondents in C. As. Nos. 1457 and 1642 of 1971; Mr. G. Rath, Advocate-General, for State of Orissa, Miss Sumitra Chakravarty (in C. A. No. 1652 of 1974) and Mr. B. Parthasarthy, Advocate with them, for Appellants in C. A. Nos. 1652 of 1974 and for Respondents (in C. A. S. Nos. 1653-1654 of 1974); M/s. A. K. Sen and B. Sen, Sr. Advocates, and M/s. Ranjit Mohanty, Ajay Ray, O. C. Mathur, K. J. John and J. B. Dadachanji, (Advocates of M/s. J. B. Dadachanji and Co., with them), for Respondent in C. A. No. 1652 of 1974; M/s. K. R. Chowdhry and K. Rajendra Chowdhry, Advocates, for Intervener — Andhra Pradesh Electricity Board. Mr. G. L. Sanghi, Sr. Advocate and M/s. P. V. Kapur, U. K. Khaitan, Advocates with him, for the Applicant-intervener — Ferro Alloys Corp. Mr. Vinoo Bhagat, Advocate, for Appellant in C. As. Nos. 1653-1654 of 1974.

The Judgment of the Court was delivered by:

BHAGWATI, J.:— (Civil appeal No. 1457 of 1971) The short but important question which arises for determination in this appeal is whether a State Electricity Board has power to enhance the rates for supply of electricity notwithstanding an agreement binding it to supply electricity at certain rates where it finds that the contractual rates are less than the cost of generation, distribution and supply of electricity and in the result there is loss to the State

Electricity Board in its operations? In order to appreciate how the question arises, it is necessary to state a few facts giving rise of the appeal.

2. The petitioner is a limited liability company which carries on business of manufacturing aluminium. The manufacture of aluminium involves three processes, viz., mining of bauxite ore, dressing it and converting it into alumina and reduction of alumina into aluminium. The petitioner carried on bauxite mining at the quarries in Bihar and also set up its factory in Bihar for dressing Bauxite ore and converting it into alumina. So far as the process of reducing alumina into aluminium is concerned, it involves the application of the method of electrolysis in which electrical energy is a primary raw material and, therefore, the petitioner was anxious to set up a factory for this purpose at a place where electric power would be cheap. The Government of the then native State of Travancore offered to supply electric power to the petitioner at reasonable rates for a long period of time if the petitioner established its factory for reducing alumina into aluminium within its territory. An agreement dated 30-7-1941 was accordingly entered into between the petitioner and the Government of the State of Travancore for supply of electrical energy at certain rates for a period of 34 years from 1-7-1941 with an option of renewal in favour of the petitioner for a further period of 20 years. In view of this agreement, the petitioner established a factory at Alupuram near Alwaye for reducing alumina and converting it into aluminium, though alumina for this purpose had to be brought all the way from Bihar and the aluminium produced at the factory had to be transported outside the State of Travancore for the purpose of sale.

3. On the integration of the States of Travancore and Cochin, a new State of Travancore-Cochin was formed in 1948 and the agreement dated 30-7-1941 (hereinafter referred to as the principal Agreement) was accepted by the new State as binding upon it. The terms and conditions of supply of electrical energy laid down in the Principal Agreement were, however, varied and modified by a supplemental agreement (hereinafter referred to as the first Supplemental Agreement) dated 16-8-1955 entered into between the petitioner and the State of Travancore Cochin. On 1-11-1956 a new State of Kerala was formed comprising inter alia the territories of the existing State of Travancore Cochin, barring a small portion transferred to the State of Madras under the States Reorganization Act, 1956, and by reason of Section 87 of that Act, the Principal Agreement as modified by the First Supplemental Agreement was deemed to have been made in the exercise of executive power of the State of Kerala and all rights and obligations under it became the rights and obligations of the State of Kerala.

The Kerala Government thereafter by a notification issued under Section 5, sub-section (1) of the Electricity Supply Act, 1948 (hereinafter referred to as the Supply Act), constituted the Kerala State Electricity Board (hereinafter referred to as the Board) with effect from 1-4-1957. Section 60 of the Supply Act provides, inter alia, that all the contracts entered into by or with the State Government for any of the purposes of the Act before the first constitution of the Board shall be deemed to have been entered into by or with the Board. The principal Agreement as modified by the first Supplemental Agreement was, therefore, deemed to have been entered into with the petitioner by the Board. The terms and conditions of Agreement were subsequently modified under another supplemental agreement (hereinafter referred to as the Second Supplemental Agreement) dated 4-4-1963 entered into between the petitioner and the Board. This modification did not affect either the rates or the duration of the Principal Agreement.

4. It appears that the petitioner required additional electric power for expansion of the operations of its alumina reducing factory and an agreement dated 30-3-1963 (hereinafter referred to as the Second Agreement) was, therefore, entered into between the petitioner and the Board whereby the Board agreed to supply to the petitioner from 1-1-1965 a total of 12500 Kilowatts of electric power at the rates and on the terms and conditions set out in the agreement. The duration of this agreement was 25 years from 1-1-1965 with an option to the petitioner to renew it for a further period of 25 years. Another agreement (hereinafter referred to as the Third Agreement) was entered into between the petitioner and the Board on 18-9-65 for supply of further 12500 K. W. of electric power at certain rates for a period of 25 years from 1-1-1966 with an option of renewal in favour of the petitioner for a further period of 25 years on the same terms and conditions.

5. Whilst these agreements were in force, the Board framed the Kerala State Electricity Board (General Tariffs) Regulations 1966 in exercise of the powers conferred under Section 79 (j) read with Sections 49 and 59 of the Supply Act. Regulation 4 empowered the Board to prescribe different terms and conditions for different classes of consumers and Regulation 6 provided that the Board may fix different tariffs for different classes of services under various heads. The Board was conferred power under Regulation 10 by Notification or otherwise to fix special terms and conditions for supply for special purposes and under Regulation 11, the Board could amend the terms and conditions of supply from time to time. These Regulations were amended by the Board by making the Kerala Electricity Board (General Tariffs) (Amendment) Regulations, 1969. By the amendment Regu-

lations 6 and 8 were substituted by a new Regulation 6 which empowered the Board to fix different tariffs for different classes of services under the broad heads, low tension supply, high tension supply and extra high tension supply. Now it appears that since September 1965, when the last revision of tariffs was made by the Board, there was a steep rise in "prices of all commodities including plant and equipment, construction materials, etc., salary and wages of employees" thereby increasing the operation and maintenance cost of the Board with the result that the Board found itself in a position where it was working at a loss. Section 59 of the Supply Act enjoins the Board that "it shall not as far as possible carry on its operations under this Act at a loss and shall adjust its rates accordingly from time to time". The Board, therefore, in exercise of the power conferred under Section 49 of the Supply Act and the Regulations, "and other enabling provisions in the Statute" issued an Order dated 28-11-1969 called "Kerala State Electricity Board Extra High Tension Tariff Order 1969" fixing the rates or tariffs for supply of electric power to all extra high tension consumers—a category which included the petitioner. Clause (6) of this Order provided that the rates or tariffs fixed by it shall apply "to all extra high tension consumers" notwithstanding anything to the contrary contained in any agreement "entered into with any extra high tension consumer either by the Government or by the Board or anything the tariff Regulations or Rules previously issued". The result was that despite the Principal Agreement, the Second Agreement and the Third Agreement, which were in force, the Board claimed to be entitled to recover from the petitioner the rates or tariffs fixed by this Order, though they were manifestly higher than the rates or tariffs stipulated in these respective agreements. The petitioner thereupon filed a writ petition in the High Court of Kerala challenging the validity of this order but the challenge failed. The High Court sustained the order on the ground that it was within the competence of the Board under Sections 49 and 59 of the Supply Act. This view is assailed in the present appeal brought with certificate obtained from the High Court.

6. Before we proceed to consider the question which arises for determination in this appeal, it will be convenient at this stage to refer to a few relevant provisions of the Supply Act for this is the Statute with which we are concerned in this appeal. The Supply Act, as its preamble and long title show, is enacted "to provide for the rationalisation of the production and supply of electricity and generally for taking measures conducive to electrical development." That is the object and purpose of the Statute and this object and purpose is sought to be achieved by the establishment of the Central Electricity Authority and State Electricity Boards charged with certain functions,

powers and duties. Section 5 (1) provides that the State Government shall as soon as may be after the issue of the notification under Section 1 (4) bringing into force the various provisions of the Act, "constitute by notification in the Official Gazette, a State Electricity Board under such name as shall be specified in the notification". Chapter IV sets out the powers and duties of the State Electricity Board. Section 18, which is the first section in that Chapter, enumerates duties, which also represent the functions, of the State Electricity Board. It says, to quote the words of the section: "Subject to the provisions of this Act the Board shall be charged with the general duty of promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by any licensee, and without prejudice to the generality of the foregoing provisions it shall be the duty of the Board— (a) to prepare and carry out schemes sanctioned under Chapter V; (b) to supply electricity to owners of controlled stations and to licensees whose stations are closed down under this Act; (c) to supply electricity as soon as practicable to any other licensees or persons requiring such supply and whom the Board may be competent under this Act so to supply." Then follow other sections in that Chapter which deal with the powers of the State Electricity Board. They are not material and we need not refer to them. Chapter V is headed "The Board's Works and Trading Procedure". It contains the fasciculus of sections dealing with making of a scheme for an area "with a view to rationalising the production and supply of electricity" in that area. Then there are other sections, not relevant for our purpose, which speak of controlled stations and generating stations, provide for supply of electricity by the State Electricity Board to a licensee and lay down the mode of fixation of grid tariff. Section 49 enacts a provision for sale of electricity by the State Electricity Board to a person other than a licensee. It reads:

"(1) Subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

(2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely—

(a) the nature of the supply and the purposes for which it is required;

(b) the co-ordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed areas.

(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

Chapter VI deals with "The Board's Finance, Accounts and Audit." The first section in this Chapter, which is material, is Section 59 which is in the following terms:

"The Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under this Act at a loss, and shall adjust its charges accordingly from time to time."

Then comes Section 60 which provides inter alia that "all agreements entered into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board". Lastly, Section 63 empowers the State Government, with the approval of the State Legislature, from time to time to "make subventions to the Board for the purposes of this Act on such terms and conditions as the State Government may determine."

7. Now, in the present case, as we have already seen, there are three main agreements entered into by the appellant for purchase of electricity. True, the Principal Agreement, as modified by the First Supplemental Agreement, was not entered into with the Board, but, as pointed out above, by reason of Section 60 of the Supply Act, it must be deemed to have been entered into by the appellant with the Board and in view of the legal fiction, all the consequences and incidents must follow as if it were an agreement

made with the Board. The learned Solicitor General, appearing on behalf of the Board, contested the applicability of Section 60 on the ground that the Principal Agreement as modified by the First Supplemental Agreement, was not an agreement entered into by the State Government "for any of the purposes of this Act", but we do not think this contention is sound. One of the primary purposes of the Supply Act is to provide inter alia for the supply of electricity: in fact, the Supply Act empowers the Board to supply electricity to any person other than a licensee. An agreement for supply of electricity to a consumer is, therefore, plainly and indubitably an agreement for one of the purposes of the Supply Act and Section 60 has clearly application to such an agreement. The Principal Agreement, as modified by the First Supplemental Agreement, must, therefore, for all the purposes of the Supply Act, be treated as an agreement entered into with the Board. So far as the second and the third agreements are concerned, there is no question of invoking Section 60, as they have been entered into by the appellant with the Board from the very beginning. The question is whether the Board is entitled to override the stipulation as to charges contained in these agreements and enhance the charges by unilateral action as it has purported to do.

8. The Board relied principally on two provisions of the Supply Act, namely, Sections 49 and 59, in support of its claim to increase the charges unilaterally despite the stipulation as to charges contained in the three agreements. Taking firstly its stand on Section 49, the Board contended that under this section the Legislature has entrusted to it the power to fix charges — described in the section as tariffs — for supply of electricity to any person other than a licensee. Now this power is exercisable not once and for all, but from time to time as action requires or circumstances justify. It was urged that the exercise of this power is conditioned by the statutory obligation of "promoting the co-ordinated development of the generation, supply and distribution of electricity within the State in the most efficient and economical manner" and in order to run its undertaking economically, that is without loss, the Board is entitled to refix the charges in exercise of this power — indeed, it is statutorily bound to do so. In any event, contended the Board, the powers and duties created by the Supply Act, the power to fix charges under Section 49 being one of them, are for public good and they are intended to further the object of promoting the production and supply of electricity which is a matter of public utility and hence in public interest. It is, there-

fore, not competent to the Board to enter into a stipulation with the consumer binding it not to charge anything more than a specific rate and thereby divest itself of the power to fix and refix charges entrusted to it under Section 49, or fetter or hinder its future exercise. Such a stipulation is void and it does not, ran the argument, stand in the way of the Board enhancing unilaterally the charges for supply of electricity. This argument was sought to be supported by the Board by relying on two decisions of English Courts, namely, *Ayer Harbour Trustees v. Oswald*, (1883) 8 App Cas 623 and *York Corporation v. Henry Leatham and Sons*, (1924) 1 Ch 557. Simultaneously, Section 59 was also invoked in aid by the Board. It was pointed out that the opening words of Section 49 (1) made the power to fix charges conferred on the Board subject to Section 59, and therefore, the mandate of the Legislature contained in Section 59 must prevail over anything that is done by the Board in exercise of this power. Section 59 enjoins that the Board shall not, as far as practicable, carry on its operations at a loss and shall adjust its charges accordingly from time to time. Notwithstanding the fixation of charges under Section 49, therefore, the Board is entitled to enhance the charges if it finds that it is necessary to do so in order to avoid operating at a loss. In any event, the Board cannot, by stipulation in a contract, bind itself to refrain from exercising the statutory power which it possesses under Section 59 to enhance the charges in case of operational loss. The statutory power cannot be bartered away by a contractual stipulation. If it were held permissible to the Board to bind itself by a contractual stipulation not to enhance the charges even though such charges result in operational loss, public interest would suffer since the production, distribution and supply of electricity would be prejudicially affected and electrical development in the State would receive a serious set back. On these two grounds the Board urged that, since it was incurring loss in its operations, it was entitled unilaterally to revise the charges so as to avoid such loss, notwithstanding that under the stipulation contained in the three agreements it was bound to supply electricity to the appellant at certain fixed charges. Let us examine whether either of these two grounds is well founded.

9. Turning first to Section 49, we may point out that prior to its amendment by the Electricity (Supply) Amendment Act, 1966, this section was in a different form. On an interpretation of the unamended section, the High Court of Bombay took the view, in a case relating to the Kalyan Municipality, that it did not give power to the Board to fix uniform

tariffs so as to cast a higher burden on the consumer in a compact area where the cost of supply was less than on the consumers in a sparse area where the cost of supply was more owing to higher distribution cost. This case was taken in appeal by the Maharashtra State Electricity Board, but before the appeal could be decided by this Court, the Parliament enacted the Amending Act substituting the present Section 49 for the old one with retrospective effect. The appeal had, therefore, to be decided by reference to the amended Section 49 and having regard to that section, as amended, this Court held that the Board had power to fix uniform tariffs both for consumers in compact areas as well as consumers in sparse areas. This Court, interpreting the amended Section 49, pointed out:

"In Section 49 as it now stands, the Legislature has empowered the Board to frame uniform tariffs and it has also indicated the factors to be taken into account in fixing uniform tariffs. These two aspects are contained in sub-sections (1) and (2). The Legislature has also made it clear in sub-section (3) that the Board, in the special circumstances mentioned therein, has got power to fix different tariffs for the supply of electricity. Sub-section (4) directs the Board not to show undue preference to any person for fixing the tariffs and the terms and conditions for the supply of electricity. Though prima facie it would appear that sub-section (4) will govern sub-sections (1) to (3) in Section 49, the proper way to interpret sub-section (4) will be to read it along with sub-section (3).

The question of the Board showing undue preference to any person in fixing the tariffs and terms and conditions for supply of electricity will not arise when the Board frames uniform tariffs under sub-sections (1) and (2). When the entire tariff is uniform for every consumer, there is no question of any undue preference as every customer will pay the same amount for the same benefit received by him. Sub-section (3) of Section 49 recognises the power of the Board to fix different tariffs for the supply of electricity and it is really here, if at all, that an occasion for any undue preference being shown, may arise. Therefore, in our opinion, sub-section (4) will control the action of the Board under sub-section (3) of Section 49."

It would be seen that sub-section (1) of Section 49 empowers the Board to fix uniform tariffs. The fixation of uniform tariffs need not necessarily be regionwise or areawise, nor need it be only in respect of particular classes of consumers. There is no limitation on the exercise of the power of fixing uniform tariffs save

that certain factors are laid down in sub-section (2) of Section 49 which have to be taken into account by the Board in fixing uniform tariffs. These factors guide and control the exercise of the power of the Board. But, even where uniform tariffs are fixed for a particular category of consumers, the application of uniform tariffs to all consumers falling within the category, irrespective of their distinctive features, may sometime defeat the object of promotion of electrical development and industrial growth and progress. There may arise individual cases where, having regard to special circumstances, it may be found necessary to make departure from the uniform tariffs and to fix special tariffs for them. Sub-section (3) of Section 49, therefore, provides that the Board shall have the power, "if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors". This sub-section confers power on the Board to fix special tariff for a consumer if the geographical position of the area, the nature of the supply, the purpose for which supply is required and other relevant factors so warrant. Now, fixation of special tariffs can be a unilateral act on the part of the Board, but more often than not, it would be the result of negotiations between the Board and the consumer and hence a matter of agreement between them. It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-section (3) of Section 49. Indeed, if the power to fix special tariff through the modality of an agreement with the consumer were not there in sub-section (3) of Section 49, it cannot be found in any other provision of the Supply Act and in such a case it would be impossible for the Board to enter into any agreement with a consumer binding itself to supply electricity at a special rate for a certain period of time. Such an agreement would be wholly ultra vires the power of the Board and that would cause considerable mischief and inconvenience as no industry would be able to enter into an agreement ensuring supply of electricity which would be binding on the Board. Tariff is the most important element in such an agreement and if no binding stipulation can be made in regard to tariff, the agreement itself would

be meaningless and would be no more than a mere rope of sand. The power to enter into an agreement fixing a special tariff for supply of electricity for a specified period of time is, therefore, relatable to sub-section (3) of Section 49 and such an agreement entered into by the Board would be in exercise of the power under that sub-section. The three agreements for supply of electricity to the appellant must, in the circumstances, be regarded as having been entered into by the Board in exercise of the statutory power conferred under sub-section (3) of Section 49. Now, when the power to fix special tariff for a consumer is given to the Board, the possibility cannot be ruled out that the Board may in exercising this power show undue preference to one consumer as against the other. Sub-section (4) of Section 49 therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is fixed by the Board under sub-section (3) of Section 49. When uniform tariffs are fixed by the Board under sub-sections (1) and (3) of Section 49, there could be no question of the Board showing undue preference to any one consumer against another because every consumer falling within the category, would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that sub-section (4) of Section 49 controls the action of the Board in fixing tariff under sub-section (3) of Section 49 and it has no application where uniform tariffs are fixed under sub-sections (1) and (2) of Section 49.

10. Having analysed the provisions of Section 49, we may now turn to consider the argument advanced on behalf of the Board that a stipulation binding the Board not to charge anything more than a specific rate would be void as it would have the effect of divesting the Board of the power to fix and re-fix charges entrusted to it under Section 49, or hindering or fettering its future exercise. Now, if there is one principle more well settled than any other, it is that when a public authority is entrusted by statute with a discretionary power to be exercised for the public good, it cannot, when making a private contract in general terms, fetter itself in the use of that power or in the exercise of such discretion. There are a number of decisions which would establish this principle beyond doubt. We may refer to a few of them in order to appreciate the true scope and ambit of this principle — what is its area of operation and what are its limitations.

11. The first case where this principle was enunciated is (1883) 8 App Cas 623. In this case the Harbour Trustees, whose statutory power and duty were to acquire land, to be used as need might arise for the construction of works on the coast line of the Harbour, sought to save money in respect of severance on the compulsory acquisition of a particular owner's land by offering him a perpetual covenant not to construct their works on the land acquired, so as to cut off from access to the waters of the Harbour, or otherwise to affect him injuriously in respect of the land not taken but from which the acquired land was severed. It was held that such a covenant was ultra vires. Lord Blackburn stated the principle in these terms:

"I think that where the legislature confer power on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in entrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void."

12. This case was followed by Russell J., in (1924) 1 Ch 557. There, the Plaintiff-Corporation was entrusted by statute with the control of navigation in part of the rivers Ouse and Foss with power to charge such tolls within limits, as the Corporation deemed necessary to carry on the two navigations in which the public had an interest. The Corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, a regular annual payment of £. 600/- per annum in place of the authorised tolls. The contract in regard to navigation of the Foss was on similar lines. It was held by Russell J., that the contracts were ultra vires and void because under them the Corporation had disabled itself, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary. The learned Judge, after citing Ayr Harbour's case (1883) 8 App Cas 623 (supra) and another case *Staffordshire and Worcestershire Canal Navigation v. Birmingham Canal Navigation*, (1866 LR 1 HL 254) observed: "the

same principle underlies many other cases which show the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers."

13. Finally Lord Parker, C. J., said in *Southend-on-Sea Corporation v. Hodson (Wickford) Ltd.* (1961) 2 All ER 46: "There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion."

14. The principle laid down in these cases is unexceptionable and cannot be doubted. But the question is: does it apply in the present case. We do not think so. The principle is attracted when an attempt is made to fetter in advance the future exercise of statutory powers otherwise than by the valid exercise of a statutory power. The covenant in *Ayr Harbour's case* (1883) 8 App Cas 623 (supra) tied the hands of the Harbour Trustees and prevented them from constructing works on the land acquired, however necessary they might become for the proper management of the undertaking and thus fettered the Harbour Trustees in the exercise of the statutory power entrusted to them by the Legislature for the purpose of the undertaking. But this covenant was entered into by the Harbour Trustees as a 'private contract' with the owner of the land acquired in order to save money in respect of severance and not in exercise of a statutory power and hence the principle was invoked to invalidate the covenant. So far as *York Corporation case* (1924) 1 Ch 557 (supra) is concerned, it came to be severely criticised by Sargant, L. J. in *Southport Corporation v. Birkdale District Electric Supply Co.* (1925) 1 Ch 794 and the learned Lord Justice pointed out that the decision in *York Corporation's case* (supra) could hardly stand with the judgment of the Court in *Southport Corporation's case* (supra). This criticism of the decision in *York Corporation's case* (supra) was adopted by Earl of Berkenhead when the *Southport Corporation case* (supra) was taken in appeal to the House of Lords. Lord Sumner also observed in that case that he did not think that there was a true analogy between *Ayr Harbour's case* (supra) and *York Corporation's case* (supra). The House of Lords as well as the Court of Appeal in the *Southport Corporation's case* (supra) seemed to be of the view that the *York Corporation's case* (supra) was wrongly decided. Of course, they did not doubt the validity of the principle enunciated by Russell, J., but questioned its applicability to the facts of the *York Corporation's case* (supra). They appeared to think that the

discharge of their statutory duties by the Harbour Trustees would be facilitated rather than fettered by a reasonable latitude of discretion in fixing tolls and both Ouse and Foss agreements must, therefore, be regarded as having been entered into by the Harbour Trustees in exercise of the statutory power of fixing tolls and hence they would be valid. But they pointed out that there were certain peculiar features in the *York Corporation's case* (supra) on which the actual decision of Russell, J., holding Ouse and Foss agreements to be void could be sustained. The discussion of these two cases shows that the principle that a public authority cannot by contract fetter the exercise of the statutory power, which is conferred upon it for the public good, is limited in its application to those cases where the attempt to do so is otherwise than by the valid exercise of a statutory power.

15. The position is different where a statutory power is exercised to enter into a stipulation with a third party which fetters the future exercise of other statutory powers where such stipulation is made not as part of "private contract in general terms" as Devlin, L. J. calls it in *Commissioners of Crown Lands v. Page*, (1960) 2 All ER 726 but in exercise of a statutory power. In such a case it is difficult to see how the exercise of the statutory power could be held to be invalid as a fetter on the future exercise of other statutory powers. If it were so held, it would render the statutory power meaningless and futile. It would nullify the existence of the statutory power and that would be contrary to all canons of construction. If the statutory power is to have any meaning and content, the stipulation made in exercise of the statutory power must be valid and binding and it would, as pointed out by Pennycuik V. C. in *Dowty Boulton v. Wolverhampton Corporation*, (1971) 2 All ER 277, "exclude the exercise of other statutory powers in respect of the same subject-matter." To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would pro tanto stand restricted. That would follow on the principle of harmonious construction. The public authority would not, in such a case, be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it. If that were permissible, it would mean that the stipulation has no binding force and the public authority has no statutory power to enter into such stipulation. But that would be

plainly contradictory of the premise on which the argument is based.

16. The distinction must always, therefore, be borne in mind whether the stipulation by which the public authority is alleged to have fettered in advance the future exercise of the statutory power is one which is entered into as part of 'private contract in general terms', or in exercise of a statutory power. If it is the former, the stipulation would be bad on the principle that a public authority cannot by contract fetter the exercise of a statutory power which is conferred upon it for the public good. But if it is the latter, the stipulation being in exercise of a statutory power would be valid and it would not be open to the public authority to disregard the stipulation and exercise the statutory power inhibited or fettered by it. This last statement, must, however, be qualified by making it clear that a case may conceivably arise where there may be an overriding statutory provision which expressly or by necessary implication authorises the public authority to set at naught, in certain given circumstances, a stipulation though made in exercise of a statutory power. Where there is such a statutory provision, the stipulation should certainly be binding, but when the specified circumstances arise, the public authority would have the power to override the stipulation and act in derogation of it. But that again would be a matter of construction.

17. Now, in the present case, as we have already pointed out above, the stipulations as to charges contained in the agreements entered into with the appellant were made in exercise of the statutory power to fix special tariffs conferred under sub-section (3) of Section 49, and, therefore, there could be no question of such stipulations being void as fettering or hindering the exercise of the statutory power under that provision. These stipulations did not divest the Board of this statutory power or fetter or hinder its exercise; in fact, they represented the exercise of this statutory power. Once the agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under sub-s. (3) of S. 49 to fix the charges for a specific period of time, which would

be contrary to the plain meaning and intentment of the section. The Board was also not competent to enhance the charges under the guise of fixing uniform tariffs for all high tension consumers, including the appellant under sub-section (1) of Section 49 because sub-section (1) is, on its plain language, subject to sub-section (3) of Section 49 and once special tariffs were fixed for the appellant under sub-sec. (3) of Section 49, there could be no question of fixing uniform tariffs applicable to the appellant under sub-section (1) of Section 49. The power to fix uniform tariffs under sub-section (1) of S. 49 could not be exercised in derogation of the stipulations fixing special tariffs made under sub-section (3) of Section 49. Moreover, if the stipulations as to charges were not binding and the Board could enhance the charges unilaterally in disregard of them, it is difficult to see how the agreements, of which the stipulations formed a term as well as consideration, could be sustained. We can understand an argument that the whole of the agreements were void. But strangely, the claim of the Board was that the appellant should be held to the agreements, though, at the same time the Board should be free to repudiate the stipulations which formed the consideration or part of the consideration. That is a claim which is highly illogical and we find it difficult to appreciate it. The stipulations as to charges are inseverable from the rest of the agreements and if these stipulations are disturbed and the charges are revised unilaterally by the Board, how could the agreements continue to bind the appellant? On the view contended on behalf of the Board, it would be impossible for a consumer to enter into an agreement with the Board for supply of electricity at a certain specified tariff. That surely could not have been intended by the Legislature. Far from promoting the object of electrical development and industrial growth in the State, it would act as a regressive factor. It may be pointed out that the Board also did not contend that the agreements entered into with the appellant were wholly void. The attack was only against the validity of the stipulations as to charges and that attack must, for reasons which we have given, fail in so far as it is based on Section 49.

18. We then turn to consider the argument based on Section 59. That section provides that the Board shall not, as far as practicable and after taking credit for any subventions from the State Government under Section 63, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. The contention of the Board was that since it was operating at a loss, it was bound under Section 59 to

readjust its charges in order to avoid the loss and hence it was within its power to enhance the charges notwithstanding the stipulations contained in the agreements. This contention, plausible though it may seem at first blush, is, on closer scrutiny, not well founded. It ignores the true object and purpose of the enactment of Section 59 and fails to give due effect to the words "as far as practicable". The marginal note to Section 59 reads "General Principles for Board's Finance." It is true that the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the words of Collins M.R. in *Bushell v. Hammond*, (1904) 2 KB 563 "to show what the section was dealing with." It is apparent from the marginal note that Section 59 is intended to do no more than lay down general principles for the finance of the Board. It merely enunciates certain guidelines which the Board must follow in managing its finance. The Board is directed, as far as practicable, not to carry on its operations at a loss and to adjust its charges accordingly from time to time. The Legislature has deliberately and advisedly used the words "as far as practicable" as the Legislature was well aware that since the Board is a statutory authority charged with the general duty of promoting the co-ordinated development of generation, supply and distribution of electricity within the State with particular reference to such development in areas not for the time being served or adequately served by any licensee, it might run into loss in carrying on its operations and it might not always be possible for it to avoid carrying on its operations at a loss. Sometimes the Board might have to give special tariffs to consumers in undeveloped or sparsely developed areas and sometimes special tariffs might have to be given to industrial consumers with a view to accelerating the rate of industrial growth and development in the State, even though such special tariffs might not be sufficient to meet the cost of generation, supply and distribution of electricity. The Legislature, therefore, did not issue a rigid directive to the Board that it shall on no account carry on its operations at a loss, and if there is a loss for any reason whatsoever, it shall adjust its charges so as to wipe off such loss. But it merely administered a caution to the Board that 'as far as practicable' it shall not carry on its operations at a loss, that is, if it is 'practicable' for it to avoid operating at a loss by adjusting its charges, it should try to do so. That is why this Court pointed out in *Maharashtra State Electricity Board v. Kalyan Borough Municipality*, (1968) 3 SCR 137 = (AIR 1968 SC 991) that "cost

..... is not the sole or only criterion for fixing the tariff". Now, obviously, where, by a stipulation validly made under sub-section (3) of Section 49, the Board is under a contractual obligation not to charge any thing more than a specified tariff, it would not be 'practicable' for it to enhance its charges, even if it finds that it is incurring operational loss. To do something contrary to law — in violation of a contractual obligation — can never be regarded as 'practicable'. Section 59 does not give a charter to the Board to enhance its charges in breach of contractual stipulation. The Board can adjust its charges under the section only in so far as the law permits it to do so. If there is a contractual obligation which binds the Board not to charge anything more than a certain tariff, the Board cannot claim to override it under Section 59. It is significant to note the difference in language between Section 59 on the one hand and Section 57 read with clause (I) of the Sixth Schedule on the other. Section 57 clearly and in so many terms provides that the provisions of "any other law, agreement or instrument applicable to the licensee" shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of the Sixth Schedule and clause (I) of the Sixth Schedule provides that the licensee shall so adjust its charges for the sale of electricity, whether by enhancing or reducing them, that its clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. The licensee can, therefore, notwithstanding any agreement entered into with the consumer, enhance the charges for sale of electricity in order to earn the amount of reasonable return by way of clear profit. But no such language is to be found in Section 59 and, on the contrary, the words there used are "as far as practicable." We do not, therefore, think that Section 59 confers any power on the Board to enhance the charges for supply of electricity in disregard of a contractual stipulation entered into by it under sub-section (3) of Section 49.

19. There is also one other circumstance which supports this view. If, under Section 59, charges have to be adjusted for the purpose of avoiding operational loss, what is the basis on which such adjustment would be made? Obviously, it cannot be on the basis of cost of production, distribution and supply of electricity to each consumer or class of consumers, for there may be certain consumers or classes of consumers who may have to be supplied electricity at special tariff less than the cost, having regard to the geographical area or the nature or purpose of the supply. That means that the adjustment of the charges

would have to be left to the discretion of the Board to be made in such manner as it thinks fit and proper in the light of relevant circumstances and since "cost is not the sole or only criterion for fixing tariff," the Board would be free not to enhance the charges in case of some consumers or classes of consumers even though such charges may be less than the cost and in case of others, enhance them even beyond the cost, provided, of course, the relevant factors are taken into account and there is no undue preference of one consumer as against another. If that be so, it must follow a fortiori that there is nothing in Section 59 which requires the Board to enhance the charges in a case where it has bound itself by a contractual stipulation not to claim anything more than certain specified charges.

20. We are, therefore, of the view that the Board was not entitled to enhance the charges in derogation of the stipulations as to charges contained in the agreements with the appellant and the notification dated 28th November, 1969 fixing tariffs for extra high tension consumers was not enforceable against the appellant. We accordingly issue a writ quashing and setting aside the notification dated 28th November, 1969 in so far as it seeks to make the tariffs specified in it applicable to the appellant and declare that the Board is not entitled to claim from the appellant anything more than the charges specified in the agreements. We also issue a writ restraining the Board from enforcing the notification dated 28th November, 1969 against the appellant or claiming from the appellant anything more than the charges specified in the agreements. The appeal is accordingly allowed. The 1st respondent will pay the costs of the appeal to the appellant.

Civil Appeal No. 1642 of 1971

21. The facts and circumstances giving rise to the present appeal are in material respects identical with those in *Indian Aluminium Company v. Kerala State Electricity Board*, C. A. No. 1457 of 1971, decided on 23-7-1975 which we have disposed of by a judgment delivered this morning. The judgment in *Indian Aluminium Company v. Kerala State Electricity Board* (supra) will, therefore, govern the decision of the present appeal as well.

22. We accordingly issue a writ quashing and setting aside the notification dated 28th November, 1969 in so far as it seeks to make the tariffs specified in it applicable to the appellant and declare that the Board is not entitled to claim from the appellant anything more than the charges specified in the agreement dated 26th October, 1964. We also issue a writ restraining the Board from enforcing the notification dated 28th November,

1969 against the appellant or claiming from the appellant anything more than the charges specified in the agreement dated 26th October, 1964. The appeal is accordingly allowed. The 1st respondent will pay the costs of the appeal to the appellant.

Civil Appeal No. 1652 of 1974

23. This appeal, by special leave, is directed against the order of the High Court of Orissa allowing a writ petition filed by the first respondent for quashing a Press Note dated 1st February, 1971 levying a coal surcharge at 0.62 p. per unit of electricity supplied by the Orissa State Electricity Board to the 1st respondent. The writ petition came to be filed by the 1st respondent in the following circumstances.

24. The 1st respondent is a limited liability company carrying on business of manufacturing aluminium. It has several factories at different places in the country where it carries on one or the other processes involved in the manufacture of aluminium. It was desirous of setting up another factory and for that purpose it was looking for a place where it would be able to secure at reasonable rates electrical energy which is a primary raw material in the method of electrolysis employed for the purpose of converting alumina into aluminium. The State of Orissa had, about this time, commissioned hydro electric station at the site of Hirakud Dam with a view to step up the production of electricity and making it available for industrial purposes. It offered to supply electricity to the 1st respondent at reasonable rates if the 1st respondent set up its factory at Hirakud in the District of Sambhalpur within the territories of the State. A contract dated 3rd June, 1957 was accordingly entered into between the 1st respondent and the State of Orissa for supply of electricity at certain mutually agreed rates for a period of 25 years with an option of renewal in favour of the 1st respondent for a further period of 25 years. In view of this contract, the 1st respondent established a factory at Hirakud for the manufacture of aluminium and the State of Orissa supplied electricity to the 1st respondent from the Hirakud Hydro Power Station at the rates stipulated in the contract. Some time after the factory of the 1st respondent had been in production, it was found that additional electric power was necessary for expansion of its operations. Another contract dated 11th February, 1960 was, therefore, entered into between the 1st respondent and the State of Orissa whereby the State agreed to supply to the 1st respondent additional electric power at the rates and on the terms and conditions set out in this con-

tract. The duration of this contract was also co-extensive with that of the earlier contract. Thus there were two contracts between the 1st respondent and the State of Orissa under which the State supplied electricity to the 1st respondent.

25. In or about 1962, the State Government, had by a notification issued under Section 5, sub-section (1) of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) constituted Orissa State Electricity Board (for shortness called the Board). Section 60 of the Supply Act provides inter alia that "all contracts entered into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board." Therefore, as soon as the Board was constituted, the two contracts, dated 3rd June, 1957 and 11th February, 1960 were deemed to have been entered into by the 1st respondent with the Board and for all the purposes of the Supply Act, they were to be treated as contracts entered into with the Board. The Board in its turn supplied electricity to the 1st respondent from the Hirakud Hydro Power Station at the rates and in accordance with the terms and conditions set out in these contracts.

26. In 1968, the State Government set up a Thermal Power Station at Talcher and the transmission lines from the Hirakud Hydro Power Station were integrated with those from the Talcher Thermal Power Station. The Thermal project was thereafter in June 1970, transferred from the State Government to the Board. Both the Hirakud Hydel Project and the Thermal project were then operated by the Board. Now, in a thermal project, coal is an essential raw material as it constitutes the fuel necessary for generation of electricity and the cost of generation of electricity is, therefore, directly linked with the price of coal. The Board, after it had taken over the Talcher Thermal Project, found that, owing to steep rise in price of coal, the cost of generation of electricity at Talcher Thermal Power Station had gone up considerably and in order to off-set this rise in the cost of generation, it was necessary to levy a coal surcharge on consumers receiving electricity from the Talcher-Hirakud Grid. The Board accordingly, after obtaining the approval of the Government, decided to levy a coal surcharge at the rate of 0.62 p. per unit of the electricity supplied from the Talcher-Hirakud Grid and notified its decision in a Press Note issued on 1st February, 1971. The relevant part of Press Note was in the following terms:

"Owing to steep rise in the price of coal which is necessary for generation of

thermal power at Talcher, the cost of generation has gone up considerably and the Board felt that the additional cost could be off-set only by the levy of a coal surcharge on consumers receiving power supply from Talcher Hirakud Grid, as is levied by other Electricity Boards who have Thermal Generation. As per the provisions of Sections 49 and 59 and the 6th Schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.

The quantum of coal surcharge is, however, dependent on the rise or fall in the cost of coal delivered at the Talcher Thermal Power Station and on the basis of the present cost of coal supplied to the Power Station the Board proposes to levy coal surcharge at 0.62 paise per unit provisionally. This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumer fed from the Talcher Hirakud Grid and is also exclusive of the Electricity Duty and other charges, if any, levied by Government from time to time. The coal surcharge will, however, not apply to the consumers getting supply of power from Diesel Power Stations run by the Board. The coal surcharge at the above mentioned rate of 0.62 paise per unit will be levied on all supplies of energy from the Talcher Hirakud Grid with effect from 1-2-1971. As the Machkund Power System is not integrated with the Hirakud Talcher Grid, consumers receiving power from Machkund Power System are exempted from the above levy for the present."

It would be seen that the Press Note excluded from the coal surcharge consumers of electricity supplied from diesel power stations as also Machkund Power Station. The only consumers subjected to the coal surcharge were those receiving electricity from the Talcher-Hirakud Grid. Relying on the Press Note, the Board claimed to recover the coal surcharge from the 1st respondent, but the 1st respondent disputed this liability and filed writ petition No. 357 of 1971 in the High Court of Orissa challenging the validity of the Press Note and praying for quashing the demand for coal surcharge. The High Court allowed the writ petition and quashed the decision of the Board to levy the coal surcharge so far as the 1st respondent is concerned. The Board thereupon brought the present appeal with special leave obtained from this Court.

27. There were in the main three grounds on which the High Court declared the levy of the coal surcharge invalid. Firstly, the High Court held that since electricity to be supplied to the 1st

respondent under the two contracts was to be from the Hirakud Hydro Power Station, rise in the price of coal, which is not an essential raw material in the generation of hydro electric power, was irrelevant and that could not furnish any valid or legitimate reason for applying coal surcharge to the 1st respondent. Secondly, the High Court said that the levy of the coal surcharge could not be justified under Section 49, as it was imposed only on consumers of electricity from Talcher Hirakud Grid and consumers of electricity from diesel power stations and Machkund Hydro Power Station were not touched and it did not form part of a measure to fix uniform tariffs. S. 59 also, according to the High Court, did not help the Board. In the first place, no positive material was placed before the High Court by the Board which would show that the Board was running at a loss and the coal surcharge had been levied for the purpose of avoiding such loss and secondly to quote the words of the High Court, if the coal surcharge were imposed to meet the purposes of Section 59, there could have been no "justification to exempt the consumers of energy from diesel stations and Machkund Hydro Project" for "Section 59 makes provision for a comprehensive view of the matter and not with reference to a particular undertaking of the Board". Lastly, the High Court felt that no regulations having been made under Section 79 (i) conferring power on the Board to unilaterally revise the charges, it was not competent to the Board to ignore the stipulation contained in the two contracts and enhance the charges in violation of such contractual stipulation. The High Court observed that if regulations made under Section 79 (i) conferred "unilateral power on the Board of revising the tariffs, the position would be very different": in such a case, "since regulations are law and such law would provide for unilateral exercise of power, agreements cannot stand in the way and deter the authority of the law enabling unilateral exercise of power from being so exercised". The High Court accordingly quashed the decision to levy the coal surcharge contained in the Press Note and declared that the 1st respondent shall not be subject to the coal surcharge on the basis of the Press Note. The question is whether the view taken by the High Court is correct.

28. We will take up the second and the third grounds together for consideration. We do not think that the High Court was right in saying that by making regulations under Section 79 (i) the Board could confer upon itself power to unilaterally revise the rates for supply of electricity. Section 79 (i) empowers the

Board to make regulations not inconsistent with the Supply Act to provide for "principles governing the supply of electricity by the Board to persons other than the licensees under Section 49." This power to make regulations must obviously be exercised consistently with the provisions of the Supply Act and the regulations made in exercise of this power cannot go beyond the Supply Act. If the power to enhance the rates unilaterally in derogation of the contractual stipulation does not reside in any provision of the Supply Act, it cannot be created by regulations made under the Supply Act. Either this power can be found in some provision of the Supply Act or it is not there at all. Regulations in the nature of subordinate legislation cannot confer authority on the Board to interfere with the contractual rights and obligations, unless specified power to make such regulations is vested in the Board by some provision in the Statute, expressly or by necessary implication. No such power is to be found in Section 79 (i) or in any other provision of the Supply Act. It does not, therefore, make any difference whether regulations under Section 79 (i) were made or not, at the date when the coal surcharge was levied. Even if they were made, they could not have conferred authority on the Board to unilaterally exonerate itself from the stipulation contained in the two contracts and enhance the rates, notwithstanding such contractual stipulation. The only question could be whether the Board had any such authority under Sections 49 and 59, these being the only two sections relied on for the purpose of spelling out such authority in the Board. This question stands concluded against the Board by the decision given by us this morning in *Indian Aluminium Company v. Kerala State Electricity Board*, Civil Appeal No. 1457 of 1971, decided on 23-7-1975. We have analysed the provisions of Sections 49 and 59 and held that, on a true interpretation, neither of these two sections confers any authority on the Board to override a contractual stipulation as to rates and to enhance the rates in derogation of such contractual stipulation, even if it finds that the rates stipulated in the contract are not sufficient to meet the cost of production and supply of electricity and it is incurring operational loss. This decision clearly negatives the claim of the Board to enhance the rates by the levy of coal surcharge under Section 49 or Section 59. The Board must be held bound by the stipulation as to rates contained in the two contracts solemnly entered into by the State of Orissa with the first respondent. On this view, it becomes unnecessary to consider whether the levy of the coal surcharge could not be justified

under Section 49 because it was imposed only on consumers of electricity from Talcher-Hirakud Grid and not on the other consumers, and it did not form part of a measure to fix uniform tariffs, or whether there was any material before the High Court showing that the Board was running its operations at a loss so as to justify readjustment of the charges under Section 59. It is immaterial to consider these questions because, whatever view be taken in regard to them, it is clear from our decision that neither under Section 49 nor under Section 59 can be Board, even if it is running at a loss, interfere with a contractual stipulation as to rates solemnly agreed upon with the consumer. It may readjust the rates in order to avoid the operational loss, where it is not fettered by a contractual stipulation from doing so. The High Court was, therefore, right in taking the view that the Board was not entitled to levy coal surcharge on the 1st respondent in enhancement of the rates for supply of electricity stipulated in the two contracts between the parties. We need not, on this view, consider the first ground on which also the High Court held the levy of coal surcharge to be invalid, namely, that electricity to be supplied to the 1st respondent under the two contracts was to be from Hirakud Hydro Power Station and, therefore, rise in the price of coal was irrelevant and it could not furnish any justification for imposing coal surcharge on the 1st respondent. We do not express any opinion on this point as it is unnecessary to do so.

29. There is, in the circumstances, no reason to interfere with the decision of the High Court. We accordingly dismiss the appeal with costs.

Civil Appeal No. 1653 of 1974

30. This appeal, by special leave, is brought against an order of the High Court of Orissa dismissing a writ petition filed by the appellant for quashing a Press Note dated 1st February, 1971 levying a coal surcharge at the rate of 0.62 p per unit on electricity supplied by the Orissa State Electricity Board from the Talcher-Hirakud Grid. The writ petition came to be filed by the appellant in the following circumstances.

31. The appellant is a limited liability company carrying on business of manufacture of board and paper. The appellant wanted to set up its factory at a place which would be convenient from the point of view of availability of facilities such as electric power. The State of Orissa had, about this time, commissioned Hydro Electric Station at the site of Hirakud Dam with a view to stepping up the production of electricity and making it available for industrial purposes. It offered

to supply electricity to the appellant at reasonable rates as also to make other facilities available to the appellant if the appellant set up its factory at Choudwar in Cuttack district. An agreement dated 3rd Dec, 1960 was accordingly entered into between the appellant and the State of Orissa for supply of electricity of certain mutually agreed rates and on the terms and conditions set out in the agreement. Clause (1) of the agreement provided that it shall be deemed to be in force for a period of five years from the date of supply of Hydro Power, i.e. 1st February, 1958 and thereafter shall so continue unless and until the same shall be determined by either party giving to the other six calendar months' notice in writing of his intention to terminate the agreement. It was common ground between the parties that neither had given notice terminating the agreement as contemplated in clause (1) and in the circumstances, the agreement continued to be in force. Clauses (7), (14) and (22) specified the charges payable by the appellant for the electricity supplied by the State Electricity Board under the agreement. Clause (13) provided that: "the tariff and conditions of supply mentioned in this agreement shall be subject to any revision that may be made by the supplier from time to time". Clause (23) laid down the machinery of arbitration. It said: "any dispute or difference arising between the consumers and the supplier or their respective Electrical Engineer as to the supply of electrical energy hereunder or the pressure thereof or as to..... the Supplier or the Consumer respectively to determine the same or any question, matter or thing arising hereunder shall be referred to a single arbitration who shall be mutually agreed upon by both parties." And lastly, clause (24) declared that "the supply of electrical energy under this agreement shall be subject to the provisions of all Acts of the Union Parliament and the rules made thereunder and the special orders of the Government of Orissa for the time being in force with reference to the supply of electrical energy from the Hirakud Hydro Electric Station and the provisions of such Acts of the Union Parliament and the rules made thereunder and Special Orders of the Government of Orissa shall be deemed to be incorporated with and form part of this agreement so far as they are not inconsistent therewith." This last mentioned clause clearly posited that under the agreement electricity was to be supplied by the State from the Hirakud Hydro Electric Station a position reinforced by the use of the words "Hydro Power" in clause (1). In view of this agreement, the appellant set up its factory for manufacture of board and paper

at Choudwar, a backward area, even though it is situated far from the source of raw materials and the consumer market and the State supplied electricity to the appellant at the rates stipulated in the agreement.

32. In or about 1962 the State Government, by a notification issued under Section 5, sub-section (1) of the Electricity (Supply) Act, 1948 (hereinafter referred to as the Supply Act) constituted the Orissa State Electricity Board (for shortness called the Board). Section 60 of the Supply Act provides inter alia that all contracts entered into by, with the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been entered into by, with the Board." Therefore, as soon as the Board was constituted, the agreement dated 3rd December, 1960 was deemed to have been entered into by the appellant with the Board and for all the purposes of the Supply Act it was to be treated as an agreement entered into with the Board. The Board in its turn supplied electricity to the appellant from the Hirakud Hydro power station at the rates and in accordance with the terms and conditions set out in the said agreement.

33. In 1966, the State Government set up a Thermal Power Station at Talcher and the transmission lines from the Hirakud Hydro Power Station were integrated with those from the Talcher Thermal Power Station. The Thermal project thereafter in June 1970, was transferred from the State Government to the Board. Both the Hirakud Hydel Project and the Talcher Thermal Project were then operated by the Board. Now, in a thermal project, coal is an essential raw material as it constitutes the fuel necessary for generation of electricity and the cost of generation of electricity is, therefore, directly linked with the price of coal. The Board, after it had taken over Talcher Thermal Project, found that, owing to steep rise in the price of coal, the cost of generation of electricity at Talcher Thermal Power Station had gone up considerably and in order to off-set this rise in the cost of generation, it was necessary to levy a coal surcharge on consumers receiving electricity from the Talcher-Hirakud Grid. The Board accordingly, after obtaining the approval of the Government, decided to levy a coal surcharge at the rate of 0.62 p. per unit of the electricity supplied from the Talcher-Hirakud Grid and notified its decision in a Press Note issued on 1st February, 1971. The relevant part of the Press Note was in the following terms:

"Owing to steep rise in the price of coal which is necessary for generation of

thermal power at Talcher, the cost of generation has gone up considerably and the Board felt that the additional cost could be off-set only by the levy of a coal surcharge on consumers receiving power supply from Talcher Hirakud Grid, as is levied by other Electricity Boards who have Thermal Generation. As per the provisions of Sections 49 and 59 and the 6th Schedule of the Indian Electricity (Supply) Act, 1948, the levy of coal surcharge is permissible under the aforesaid circumstances.

The quantum of coal surcharge is, however, dependent on the rise or fall in the cost of coal delivered at the Talcher Thermal Power Station and on the basis of the present cost of coal supplied to the Power Station the Board proposes to levy coal surcharge at 0.62 paise per unit provisionally. This coal surcharge will be in addition to the present tariff at which the power is being supplied to the consumer fed from the Talcher Hirakud Grid and is also exclusive of the Electricity Duty and other charges, if any, levied by Government from time to time. The Coal surcharge will, however, not apply to the consumers getting supply of power from Diesel Power Stations run by the Board.

The coal surcharge at the above mentioned rate of 0.62 paise per unit will be levied on all supplies of energy from the Talcher Hirakud Grid with effect from 1-2-1971. As the Machkund Power System is not integrated with the Hirakud Talcher Grid, consumers receiving power from Machkund Power System are exempted from the above levy for the present."

It would be seen that the Press Note excluded from the coal surcharge consumers of electricity supplied from diesel power stations as also Machkund Power Station. The only consumers subjected to the coal surcharge were those receiving electricity from the Talcher-Hirakud Grid. Relying on the Press Note, the Board claimed to recover the coal surcharge from the appellant, but the appellant disputed its liability and filed Writ Petition No. 605 of 1971 challenging the validity of the Press Note and praying for quashing the demand for coal surcharge.

34. There were various contentions raised on behalf of the appellant in support of the writ petition. Since, according to the Press Note, the coal surcharge was sought to be imposed by the Board under Sections 49 and 59 and the Sixth Schedule to the Supply Act, the principal contention of the appellant was directed towards showing that none of these provisions authorised the Board to levy the coal surcharge and thereby enhance the rates for supply of electricity

unilaterally, in derogation of the stipulation as to rates contained in the agreement. It was also urged on behalf of the appellant that in any event the coal surcharge could not be levied on the appellant, since electricity to be supplied to the appellant under the agreement was to be from the Hirakud Hydro Power Station as clearly indicated in clauses (1) and (24) of the agreement and rise in the price of coal was, therefore, irrelevant so far as the cost of supply of electricity to the appellant was concerned. Even if the electric supply from the Talcher Thermal Power Station was integrated with that from the Hirakud Hydro Power Station — a position seriously disputed by the appellant — it did not, according to the appellant, make any difference to the position because, in the first place, the Talcher Thermal Power Station was not established and inter-connected with the Hirakud Hydro Power Station pursuant to any scheme under the Supply Act, and secondly, there was sufficient electricity generated in the Hirakud Hydro Power Station which would meet the requirements of the appellant under the agreement and it was not necessary for the Board to draw upon the electricity generated at the Talcher Thermal Power Station for the purpose of discharging its obligations under the agreement. Though the Press Note referred only to Ss. 49 and 59 and the Sixth Schedule to the Supply Act as the source of the power to levy the coal surcharge, the Board also sought to justify its claim by reference to cl. (13) of the agreement and it, therefore, became necessary for the appellant to repel this contention of the Board. The appellant urged that clause (13) of the agreement could not clothe the Board with the authority to levy the coal surcharge, when it had no such authority under the provisions of the Supply Act. It was also contended on behalf of the appellant that, in any event, the power conferred under clause (13) of the agreement could not be exercised by the Board arbitrarily or unreasonably, or on an extraneous or irrelevant ground, and since electricity to be supplied to the appellant under the agreement was to be from the Hirakud Hydro Power Station, levy of coal surcharge on the appellant on the ground that there was steep rise in the price of coal, when coal is not at all a necessary raw material in the generation of Hydro electric power, was arbitrary and unreasonable and, to say the least, founded on a wholly irrelevant ground. The appellant also contended that there was nothing to show that the cost of generation of electricity at the Hirakud Hydro Power Station was more than the rates for the supply of electricity stipulated in the agreement. Even if the combined

cost of generation of electricity at the Hirakud Hydro Power Station and the Talcher Thermal Power Station were taken into account, there was no material, said the appellant, to show that the rates for the supply of electricity provided in the agreement were not sufficient to meet the cost of generation so as to justify revision of such rates under clause (13) of the agreement.

35. Though these contentions were pressed on behalf of the appellant at the hearing of the writ petition, the Division Bench of the High Court of Orissa, which heard the writ petition, declined to entertain the merits of these contentions and dismissed the writ petition on a short preliminary ground. That ground may be stated as follows in the words of the Division Bench: "Clause 23 of the agreement provides for arbitration in the event of any dispute arising out of it. We are of the view that the petitioner must avail of the specific remedy provided in the agreement, if so advised, to resolve its dispute with the Board as in our opinion, even if on an examination of the several contentions advanced before us it turns out that adequate power under the statute is wanting, the Board may yet justify its action relying upon the contractual provision. Whether the levy is justified under the agreement is a matter well within the scope of the arbitration proceeding. If the petitioner disputed the levy in a civil action, Section 34 of the Arbitration Act, 1940, could have been relied upon by the Board to divert the action to the private forum chosen by the parties. The petitioner should not be permitted to invoke our extraordinary jurisdiction", and on this view the Division Bench dismissed the writ petition "without examination of the merits of the several contentions." The appellant applied to the High Court for leave to appeal to this Court, but the application was refused and hence the appellant brought the present appeal with special leave obtained from this Court.

36. It is apparent from the Press note that when the Board decided to levy the coal surcharge on the consumers receiving electricity from the Talcher Hirakud Grid, it claimed to do so under Sections 49 and 59 and the Sixth Schedule to the Supply Act. We must, therefore, first examine whether any of these provisions of the Supply Act empowered the Board to levy the coal surcharge. We fail to see how the machinery of arbitration contained in clause (23) of the agreement can possibly cover such a question. The arbitration agreement in that clause applies only to a dispute or difference "as to the supply of electrical energy hereunder or the pressure thereof or as to the

interpretation of this Agreement or the right of the supplier or the consumer respectively to determine the same or any other question, matter or thing arising hereunder." The question as to whether the Board had the power under Ss. 49 and 59 and the Sixth Schedule to the Supply Act to levy the coal surcharge is not a question, matter or thing arising under the agreement. It is a claim founded on the provisions of the Supply Act to impose the coal surcharge in addition to the rates payable by the appellant to the Board under the agreement. Such a claim clearly falls outside the ambit and coverage of the arbitration provision contained in clause (23) of the agreement. The arbitration agreement cannot therefore, be regarded as a relevant factor which should legitimately influence the discretion of the Court in declining to entertain the writ petition on merits. So we proceed to consider how far Sections 49 and 59 and the Sixth Schedule to the Supply Act could be regarded as providing statutory authority to the Board to levy coal surcharge on the appellant.

37. We have already had occasion to consider the true scope and ambit of Sections 49 and 59 of the Supply Act in *Indian Aluminium Company v. Kerala State Electricity Board*, C. A. No. 1457 of 1971, decided on 23-7-1975 in which we have pronounced our judgment this morning. It is clear from our judgment in that case that neither Section 49 nor Section 59 confers any authority on the Board to enhance the rates for supply of electricity where they are fixed under stipulation made in an agreement. The Board has no authority under either of these two sections to override a contractual obligation and enhance unilaterally the rates for the supply of electricity. Now, the effect of the levy of coal surcharge would be to enhance the rates for the supply of electricity stipulated under the agreement. It would, therefore, appear to us clear that the Board cannot claim to justify the levy of coal surcharge on the appellant by resort to Section 49 or 59. It is futile for the Board to rely on either of those two sections. Equally futile is the reliance placed by the Board on the Sixth Schedule to the Supply Act. The Sixth Schedule is, by a fiction enacted in Section 57, deemed to be incorporated in the licence of every licensee and if the Board were a licensee for the purpose of this section, the provisions of the Sixth Schedule would also apply to it and it would be entitled under clause (1) of the Sixth Schedule to so adjust its charges for the sale of electricity by enhancing them that its clear profit in any year of account does not, as far as possible, exceed the amount of reasonable return. But the definition of 'licensee'

given in Section 2, sub-section (6) says that, the provisions of Section 26 of the Supply Act notwithstanding, 'licensee' does not include the Board. The Board is, therefore, by express enactment taken out of the category of licensee for the purpose of the Supply Act. Section 57 cannot, in the circumstances, have any application to the Board and if that be so, the provisions of the Sixth Schedule cannot be invoked by the Board in support of its claim to enhance the rates by the addition of the coal surcharge.

38. But that does not put an end to the controversy between the parties. It is true that in the Press Note the Board relied only on Sections 49 and 59 and the Sixth Schedule of the Supply Act as the source of the power under which it claimed to levy the coal surcharge and these provisions have been found not to contain the power sought in them. But, if there is one principle more well settled than any other, it is that, when an authority takes action which is within its competence, it cannot be held to be invalid, merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power — a mere wrong label — cannot invalidate the action of an authority, if it is otherwise within its power. The Board claimed that, in any event, even if Sections 49 and 59 and the Sixth Schedule to the Supply Act could not be construed as authorising the Board to enhance unilaterally the rates for supply of electricity, the Board had the power under clause (13) of the agreement to levy the coal surcharge on the appellant and the decision to levy the coal surcharge could be justified by reference to this power. Now, if this claim of the Board were well founded, it would afford a complete answer to the challenge made on behalf of the appellant. But the appellant raised various contentions in answer to this plea based on clause (13) of the agreement. We have referred to some of these contentions in an earlier part of the judgment. It is here that the case of the appellant founders on the rock of the preliminary objection. Clause (23) of the agreement provides that any dispute or difference relating to a question, thing or matter arising under the agreement shall be referred to the arbitration of a single arbitrator. Questions such as: whether the Board had power under clause (13) of the agreement to levy any coal surcharge at all when no such power was conferred on it by the Act, whether the action of the Board in levying the coal surcharge on the appellant under clause (13) of the agreement was arbitrary and unreasonable

or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case, the Board was justified under clause (13) of the agreement to levy the coal surcharge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in clause (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to clause (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why the appellant should not pursue the remedy of arbitration which it has solemnly accepted under clause (23) of the agreement and instead invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement. We are, therefore, of the view that the High Court was right in exercising its discretion against entertaining the writ petition on merits, in so far as it was directed against the validity of the levy of the coal surcharge under clause (13) of the agreement. The merits of the contentions raised by the appellant would have to be decided by arbitration as provided in clause (23) of the agreement.

39. We, therefore, dismiss the appeal, but, in the peculiar circumstances of the case, make no order as to costs. Civil Appeal No. 1654 of 1974

40. This appeal, by special leave, is directed against the order of the High Court of Orissa dismissing Writ Petition No. 527 of 1971 filed by the appellant against the Orissa State Electricity Board (hereinafter referred to as the Board). Writ Petition No. 527 of 1971 challenged the validity of the same Press Note dated 1st February, 1971 which also formed the subject-matter of challenge in Writ Petition No. 605 of 1971 leading to Civil Appeal No. 1653 of 1974. The facts giving rise to Writ Petition No. 527 of 1971 are identical with those of Writ Petition No. 605 of 1971 barring only the difference that whereas the appellant in Writ Petition No. 605 of 1971 carried on the business of manufacture of board and paper, the appellant in Writ Petition No. 527 of 1971 carried on the business of running a textile mill and while the agreement between the appellant and the State of Orissa for supply of electricity in Writ Petition No. 605 of 1971 was dated 8th December, 1960, the agreement in Writ Petition No. 527 of 1971 was dated 12th May, 1960. The material terms and conditions of both the agreements were, however, the same. The judgment given by

us in *Titagarh Paper Mills Co. Ltd. v. Orissa State Electricity Board*, (Civil Appeal 1653 of 1974) must also, therefore, govern the decision of this appeal and whatever we have said in *Titagarh Paper Mills Co. Ltd. v. Orissa State Electricity Board*, (Civil Appeal 1653 of 1974) must apply equally in the present case.

41. We, therefore, dismiss the appeal with no order as to costs.

Order accordingly.

AIR 1975 SUPREME COURT 1985

(From Allahabad)*

Y. V. CHANDRACHUD,
P. N. BHAGWATI AND
R. S. SARKARIA JJ.

Badri and others, Appellants v.
The State of U. P., Respondent.

Criminal Appeal No. 39 of 1972
D/- 29-7-1975.

(A) Criminal Trial — Appreciation of evidence — Rival village factions — Partisan witnesses alone Natural and probable witnesses to incident — Evidentiary value — Evidence can not be rejected — (Evidence Act (1872), Section 3).

In case where a murder takes place in a village where there are two factions bitterly opposed to each other, it would be idle to expect independent persons to come forward to give evidence and only partisan witnesses would be natural and probable witnesses to the incident. In such a case it would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. Their evidence has to be assessed on its own merits AIR 1971 SC 2156 Rel. on. (Para 6) Cases Referred: Chronological Paras AIR 1971 SC 2156=1971 Cri LJ 1468 6

Mr. D. Mukherjee, Sr. Advocate (Mr. D. Goverdhan, Advocate with him), for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by BHAGWATI, J.:— The appellants and one Tulsi Das were charged for offences under Sections 302 and 201 read with Section 149 of the Indian Penal Code. The appellants were also charged for offence under Section 148 and Tulsi Das for offence under

*(Govt. Appeal No. 1705 of 1968, D/- 1-12-1971 — All.)

HS/HS/C868/75/GGM

Section 147. The Sessions Judges, Hamirpur acquitted the appellants and Tulsi Das of all the offences charged against them. The State preferred an appeal against the order of acquittal and the High Court partly allowed the appeal so far as the appellants were concerned, and, setting aside the order of acquittal, convicted the appellants of offences under Section 302 read with Section 149 as well as Section 148 and sentenced each of them to suffer life imprisonment for the offence under Section 302 read with Section 149 and two years' rigorous imprisonment for the offence under Section 148 with a direction that both sentences should run concurrently. The acquittal of the appellants for offence under Section 201 read with Section 149 was confirmed by the High Court and so also was the acquittal of Tulsi Das in respect of the charges preferred against him. Since the acquittal of the appellants in respect of offences under Section 302 read with Section 149 and Sec. 148 was reversed and the appellants were sentenced to rigorous imprisonment by the High Court, the appellants preferred the present appeal under Section 2 (a) of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1970.

2. The incident giving rise to the prosecution in the present case took place in Village Aunta within the jurisdiction of Police Station Rath in Hamirpur District. It is clear from the evidence on record, and that was not disputed by either party, that there were at the material time two factions in this village, one consisting of followers of the previous Pradhan Bindaban and the other consisting of the followers of Ram Sevak who was Pradhan then in the office. There was considerable bitterness and enmity between these two factions and their mutual enmity had already taken twelve lives. The appellants belonged to the faction of Bindaban, while the deceased Chet Ram, who was also known as Karia, and his companions owed allegiance to the faction of Ram Sevak. The prosecution case was that an incident took place on 26th March, 1967 between appellants 1 and 2 and Tulsi Das on the one hand and one Maddu on the other in which the deceased Chet Ram and one Ram Das assisted Maddu by taking him to the Police Station and lodging a report against appellants Nos. 1 and 2 and Tulsi Das. This incident, according to the prosecution, roused the ire of the appellants and Tulsi Das which culminated in the attack on the deceased Chet Ram on the next day, that is 27th March, 1967. On that day at about 3 p. m. the deceased Chet Ram was returning from the house of one Vishwa Nath where he had gone for applying 'Holi Tilak'. He was accompanied by Ram Das, Ganga Din, Balli and Ghanshyam. On the way there was the house of one Laxmi with a courtyard. When these persons were near the house of Laxmi, the appellants and Tulsi Das appeared from the northern side. Appellants Nos. 1 and 2

were armed with guns, appellants Nos. 3 to 6 with spears, appellant No. 5 with a pharsa, appellant No. 4 with an axe and Tulsi Das with a lathi. The deceased Chet Ram was, at this point of time, a few paces ahead of his companions. Appellant No. 1 accosted the deceased Chet Ram and said that he would not let him escape and with these words he fired his gun. The shot hit the deceased Chet Ram whereupon he immediately ran into the court yard (Bakhri) of the house of Laxmi. The appellants and Tulsi Das chased him into the courtyard and appellants Nos. 1 and 2 fired their guns at him. The shot hit the deceased Chet Ram and he fell down. The other appellants then attacked him and gave him blows with the respective weapons in their hands. This was witnessed by Ram Das, Ganga Din, Balli and Ghanshyam who had followed the appellants and were standing at the entrance (pauri). Appellants Nos. 1 and 2 thereafter dragged the dead body of the deceased Chet Ram along the lane and dropped it in front of the house of one Buddhu carpenter. The other appellants also went along with them. Ram Das, Ganga Din, Balli and Ghanshyam too followed the appellants and they saw that after the dead body of the deceased Chet Ram was dropped in front of the house of Buddhu carpenter, appellant No. 5 gave two blows on the neck with his pharsa in order to make sure that Chet Ram was dead. In the meantime, one Khem Raj also arrived at the scene. Appellants Nos. 1 and 2 thereafter again removed the dead body and dragged it to village Tola where one Chaitu saw them and from village Tola they dragged the dead body to village Amgaon where, it appears, the dead body was thrown into the Bhaira Nala. Appellants Nos. 1 and 2 were, throughout this operation, accompanied by other appellants. Ram Das, according to the prosecution, went and informed Ram Dayal, father of the deceased Chet Ram, about this incident. Ram Dayal immediately left in search of the dead body of his son, but not finding it he returned disappointed. Thereafter he got a report of the incident written by one Mansa Ram and went to the Police Station Rath and lodged it at 5.30 p. m. on the same day. On receiving the First Information Report the investigating officer Agnihotri proceeded to village Aunta and started investigation. He recorded the statements of the witnesses. He noticed that there was a lot of blood in the court yard of Laxmi and there were also some pieces of broken teeth at that place. He also recovered nine pellets and three wads of cartridges from the place of the incident and found two pellets embedded in the door of Laxmi's house. He also noticed that there was a good deal of blood in front of the house of Buddhu carpenter. The dead body could not be traced on that day, but on the next day, Agnihotri, following the stains of blood and marks of dragging, reached Bhajra Nala and found the dead body submerged in water held by two heavy stones. The Post-mortem

examination of the dead body was thereafter performed by Dr. K. P. Mittal and after the report of the post-mortem examination was received, a charge-sheet was submitted against the appellants and Tulsi Das.

3. The case was tried by the Sessions Judge, Hamirpur. Before the learned Sessions Judge the prosecution examined several witnesses to prove the case against the appellants. Out of these witnesses, we need refer only to three, namely, Ghanshyam, Ram Das and Chandan, wife of Laxmi, who, according to the prosecution, were eye-witnesses to the incident. The learned Sessions Judge disbelieved these three eye-witnesses by adopting a rather curious process of reasoning. First he examined the prosecution story in regard to dragging of the dead body of the deceased Chet Ram. He held that the theory of dragging was not believable and gave four reasons for taking this view. Firstly, he thought that the dragging of the dead body from the court yard of Laxmi's house to Bhaira Nala was unnecessary. Secondly he could not appreciate why it was necessary for appellant No. 5 to give two pharsa blows on the neck of the deceased Chet Ram in front of the house of Buddhu carpenter. Thirdly, he felt that it was difficult, if not impossible, for two persons to drag the dead body upto a distance of four furlongs. And fourthly, he thought that if the dead body was dragged for such a long distance, there should be quite big post-mortem wounds on the dead body, but no such post-mortem wounds were found. He then proceeded to consider the evidence of the witnesses against the background of rejection of the story of dragging. So far as Ram Dayal is concerned, he dismissed the evidence of this witness on the ground that he was not an eye-witness, but at the same time relied on his evidence for the purpose of holding that there was enmity between the factions of Bindaban and Ram Sevak and the appellants belonged to the former faction while Ram Dayal, Ram Das and the deceased Chet Ram belonged to the latter and it was, therefore, not difficult to believe that Ram Dayal and Ram Das had falsely implicated the appellants. He observed that it was likely that when Ram Dayal lodged the report at Police Station Rath, he did not know who were the real assailants of the deceased Chet Ram, but implicated the appellants only because the latter belonged to a different faction than his. The evidence of Ghanshyam was discarded on the ground that he was a nephew of Ram Dayal and as such not a very reliable person. The evidence of Khem Raj was also rejected and the reasoning given was that he was a ploughman of Prithviraj who was the brother of Ram Sevak. The same criticism was also levelled against the evidence of Ram Das, and it was held that he was also an interested witness as he belonged to the faction of Ram Sevak. The learned Sessions Judge found it difficult to believe the

testimony of this witness when he said that he and the other witnesses entered the paur of Laxmi and from there saw that part of the incident which took place inside the house and they remained standing there even when the appellants dragged the dead body of the deceased Chet Ram out of the courtyard and carried it away by dragging it. So far as the evidence of Chandan, wife of Laxmi is concerned, the learned Sessions Judge conceded that she was a natural witness, but did not think it proper to place any reliance on her evidence, firstly, because she was not named as a witness in the charge-sheet nor was she examined as a witness in the Committing Magistrate's court, and secondly, because she mentioned in her evidence only the names of appellants Nos. 1, 3 and 6 and stated that she did not recognise the other assailants, and lastly, because it appeared from her evidence to be doubtful whether she saw the incident which took place in the courtyard. The learned Sessions Judge also pointed out that the First Information Report omitted to mention that appellants Nos. 3, 4 and 6 had attacked the deceased Chet Ram in the courtyard of Laxmi or anywhere else and this omission was a serious blow to the prosecution case. The learned Sessions Judge on this view held that the evidence on record did not establish the guilt of the appellants beyond doubt and he accordingly acquitted them.

4. The State preferred an appeal against the order of acquittal to the High Court. The High Court closely scrutinised the evidence and on the appreciation of the evidence came to the conclusion that the learned Sessions Judge had erred in acquitting the appellants. The High Court pointed out that the time and place of the incident were established beyond question and they were not challenged on behalf of the appellants. The High Court then proceeded to discuss the reasoning of the learned Sessions Judge in regard to the theory of dragging and demonstrated how in its opinion the reasoning was fallacious. The High Court observed that there was nothing inherently improbable in the conduct of the appellants in removing the dead body of the deceased Chet Ram from the court yard of Laxmi by dragging it. The High Court thought that the explanation given by the prosecution that appellant No. 5 must have given two pharsa blows on the neck of the deceased Chet Ram in front of the house of Buddhu carpenter in order to make sure that the victim died was quite plausible. The High Court also did not find it difficult to believe that two persons could have dragged the dead body upto a distance of four furlongs. So far as the argument based on absence of post-mortem injuries on the dead body was concerned, the High Court observed that according to the evidence of Ram Das and Khem Raj the appellants were dragging the dead body in such a manner that no part

of the dead body touched the ground except the head and there were two abrasions on the head which supported the case of dragging. The High Court accordingly held that the story of dragging could not be ruled out and the finding of the learned Sessions Judge on that point could not be sustained. The High Court then proceeded to consider the evidence of Ghanshyam and Ram Das and held that merely because they were witnesses belonging to the faction of Ram Sevak that was not sufficient reason for rejecting their testimony. Since the village was faction-ridden, it would be idle to expect independent persons to come forward as witnesses. The High Court accepted the evidence of Ghanshyam and Ram Das in so far as it related to the incident outside the house of Laxmi, but in so far as it related to the incident inside the house, the High Court preferred not to rely on the evidence of these two witnesses as it felt that it was rather improbable that they would take the risk of going inside the house when the appellants fully armed were assaulting the deceased Chet Ram. The High Court then considered the medical evidence and observed that the number of injuries found on the dead body of the deceased Chet Ram and the nature of such injuries clearly showed that they must have been caused by not less than five or six persons and they also corroborated the oral evidence of Ghanshyam and Ram Das that the appellants were armed with guns, spears, axe and pharsa. The High Court pointed out that injuries Nos. 1 and 2 in the post-mortem report tallied with the injuries alleged to have been inflicted by appellant No. 5 on the neck of the deceased Chet Ram in front of the house of Buddhu carpenter and they were injuries which could have been caused by pharsa, injuries Nos. 5, 6 and 7 were typical axe injuries and injuries Nos. 12 and 13 were clear spear injuries. There were four gun-shot wounds found in the back of the chest of the deceased Chet Ram and this circumstance supported the oral evidence of Ghanshyam and Ram Das that the deceased Chet Ram was chased by the appellants in the court-yard of Laxmi's house when the gun-shots were fired. The High Court pointed out: "It is also a significant fact that the mode of assault, the particular points of injuries and the various weapons wielded were all set out in the first information report which was lodged on 27-3-1967 whereas the dead body was recovered later, i. e., on 28-3-1967. If the witnesses had not seen the occurrence the injuries noted in the post-mortem report could not have tallied with those mentioned in the statements of the witnesses". The High Court also accepted the evidence of Chandan. She was, according to the High Court, a wholly independent witness and there was a ring of truth in her evidence. It is true that she did not mention the names of appellants Nos. 2, 4, and 5 as assailants of the deceased Chet Ram, but she explained this by saying that it was out

of fear that she did not mention their names and this explanation was found acceptable by the High Court since these appellants were either the sons or the nephews of Bindaban. The High Court relied on a very significant circumstance, namely, that her statement was recorded by the investigation officer Agni-hotri on the same day on which the incident took place and pointed out that it did not matter that she was not examined initially in the Court of the Committing Magistrate. The High Court agreed that the First Information Report did not mention that appellants Nos. 3, 4, 5 and 6 had also attacked the deceased Chet Ram in the courtyard of Laxmi's house or anywhere else, but did not consider this omission to be of any significance since the first Information Report was lodged by Ram Dayal who was not himself an eyewitness to the incident. The High Court attached great importance to the fact that the first Information Report was lodged promptly without deliberation or consultation and observed that it has a ring of truth about it. On a conspectus of these various circumstances the High Court took the view that it was sufficiently established by the evidence on record that the appellants had formed an unlawful assembly and in furtherance of the common object they attacked the deceased Chet Ram and intentionally caused his death. The High Court accordingly reversed the acquittal of the appellants and convicted and sentenced each of them for offences under Section 148 and Section 302 read with Section 149. The question is whether the High Court was justified in doing so?

5. Now, if we turn to the judgment of the learned Sessions Judge, we find that it suffers from several infirmities. We may first consider the discussion in regard to the theory of dragging. There are four reasons given by the learned Sessions Judge for rejecting the story of dragging. Each of these four reasons has been considered and disapproved by the High Court and, in our opinion, rightly. Let us look at the basic facts which are established beyond doubt. It can hardly be disputed that the assault on the deceased Chet Ram took place in the court-yard of Laxmi's house and in this assault, amongst various weapons, guns were used. There was a good deal of blood in the court-yard of Laxmi's house and nine pellets and three wads of cartridges were found there and there were also two pellets embedded in the door of Laxmi's house. Then again there was a pool of blood in front of the house of Buddhu carpenter and that means that the body of the deceased Chet Ram must have been taken to that place. The dead body was ultimately found submerged in the water in Bhaira Nala and it is, therefore, obvious that it must have been carried from near the house of Buddhu carpenter to Bhaira Nala. If that be so, how can the story of dragging be regarded as improbable. Does it not stand to reason that the assailants carried the dead body from the court-

yard of Laxmi's house to Bhaira Nala by dragging it? Apart from carrying the dead body in a vehicle—which it was nobody's case that the assailants did—dragging was the only mode by which they could have carried the dead body. Of course, it must be remembered that when the witnesses speak of dragging, it does not mean dragging in such manner that the whole of the dead body would be touching the ground. There is, therefore, no point in the criticism of the learned Sessions Judge that it was not necessary for the appellants to drag the dead body when we find that in fact they did carry it from the court-yard of Laxmi's house to Bhaira Nala. It is also difficult to understand the criticism of the learned Sessions Judge that it was not necessary for appellant No. 5 to give two pharsa blows on the neck of the deceased Chet Ram in front of the house of Buddhu carpenter when the oral evidence of the witnesses on this point is found amply corroborated by the existence of a pool of blood in front of the house of Buddhu carpenter and the medical evidence of injuries 1 and 2 in the post-mortem report. It cannot be said that the explanation given by the prosecution that appellant No. 5 gave two pharsa blows on the neck of the deceased Chet Ram in order to make sure that he was killed is farfetched or improbable. We also fail to appreciate the remark of the learned Sessions Judge that it would be difficult for two persons to drag the dead body upto a distance of four furlongs when the evidence on record clearly shows that in fact the dead body was carried by the assailants all this distance. The learned Sessions Judge relied on the absence of post-mortem wounds on the dead body in order to raise an inference that the dead body could not have been dragged such a long distance, but this observation is also, in our opinion, not justified. It is the evidence of Ghanshyam that "from beginning to end the dead body was dragged by holding it up only. Only his head was touching the ground". Appellants Nos. 1 and 2 were dragging the dead body in such a manner that no part of the dead body, except the head, touched the ground. If that be so, one can understand the absence of post-mortem injuries on the other parts of the dead body except the head. It may also be noted that, according to Agnihotri, Investigating Officer, who examined the dead body, he found that there were black dark marks on the back of the dead body and they were, in his opinion, due to dragging. Moreover, there is one very important circumstance which the learned Sessions Judge failed to take into account and it is that Agnihotri, Investigating Officer could trace the dead body to Bhaira Nala by following the stains of blood and marks of dragging along the path. This circumstance establishes beyond doubt that the dead body was carried by the appellants from the court-yard of Laxmi's house to Bhaira Nala by dragging it and the learned Sessions Judge

was plainly and egregiously wrong in disbelieving the story of dragging.

6. The learned Sessions Judge also fell into an error in observing that the deceased Chet Ram was a man of loose character and a bully and "the possibility of Karia having been murdered by some persons residents of this Bakhari cannot be ruled out". This was nothing but speculation on the part of the learned Sessions Judge for which there was not the slightest justification in the evidence on record. The learned Sessions Judge also adopted a rather superficial approach in rejecting the testimony of Ram Dayal, Ghanshyam, Ram Das and Khem Raj on the ground that Ram Dayal, Ghanshyam and Ram Das belonged to the faction of Ram Sevak and were, therefore, interested persons, and Khem Raj was a ploughman of Prithviraj who was a brother of Ram Sevak. The learned Sessions Judge overlooked the fact, which he himself took great care to emphasise in his judgment, that there were two factions in the village bitterly opposed to each other and their enmity had already taken a toll of twelve lives and, therefore, it would be idle to expect independent persons to come forward to give evidence and only partisan witnesses would be available, as they would even otherwise be natural and probable witnesses to the incident. It would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. This Court pointed out in *Raghubir Singh v. State of U. P.*, AIR 1971 SC 2156 = (1971 Cri LJ 1468) that "in this connection the general reluctance of an average villager to appear, as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind". The learned Sessions Judge was, therefore, plainly and indubitably in error in rejecting the evidence of Ram Dayal, Ghanshyam, Ram Das and Khem Raj without even caring to assess it on its own merits. It is indeed difficult to see how the evidence of Ram Dayal could be rejected. He lodged the first Information Report with the police at 5.30 p. m. on the same day and obviously, since he was not an eye-witness to the incident, he must have got the information from some one who witnessed the incident and there is no reason why he should be disbelieved when he stated that it was Ram Das, Ghanshyam, Ganga Din and Bally who gave the information to him on the basis of which he lodged the first Information Report. This part of the evidence of Ram Dayal would also show that Ram Das and Ghanshyam were eye-witnesses to the incident. It is quite natural that Ram Das and Ghanshyam were with the deceased Chet Ram as they all belonged to the same faction of Ram Sevak and there is no inherent improbability in their being present when the incident occurred. It is true that it is a little difficult to believe that when the ap-

pellants chased the deceased Chet Ram into the Court-yard of Laxmi, Ram Das and Ghanshyam followed them and, standing near the entrance, they saw that part of the incident which took place inside the court-yard. It is quite likely, as held by the High Court, that Ram Das and Ghanshyam would not have taken the risk of following the appellants inside the court-yard as they did not have any weapons, while the appellants were heavily armed. They must have remained outside and taken cover so as not to be seen by the appellants. But there is no doubt that they must have heard the gun shots fired by appellants 1 and 2. Equally, they must have seen the appellants dragging the dead body upto the house of Buddhu carpenter, appellant No. 5 giving two blows on the neck of the deceased Chet Ram and the appellants once again dragging the dead body towards Amgaon. If they had not seen the first part of the incident which took place outside the court-yard of Laxmi, heard the gunshots fired by appellants 1 and 2, seen the appellants dragging the dead body from the court-yard of Laxmi upto the house of Buddhu carpenter, appellant No. 5 giving two pharsa blows on the neck of the deceased Chet Ram and the appellants then once again dragging the dead body via Tila towards Amgaon, it is difficult to see how this information could have been received by Ram Dayal so as to enable him to lodge the first information report containing this information. The first information report mentions the names of the appellants and the weapons which each of them carried, narrates the first part of the incident which took place outside the court-yard of Laxmi and sets out the entire sequence of events after the firing of the gunshots inside the court-yard of Laxmi. How could Ram Dayal have obtained all this information unless Ram Das and Ghanshyam were eye-witnesses? Moreover, it may be noted that the first information report was lodged at 5.30 p. m. on 27th March, 1967 while the dead body was recovered on the next day and yet the particulars in regard to the firing of gun-shots and giving of two pharsa blows by appellant No. 5 on the neck of the deceased Chet Ram completely tally with the medical evidence as to the injuries detected as a result of the post-mortem examination. This circumstance lends the greatest assurance to the prosecution case that Ram Das and Ghanshyam were eye-witnesses to the incident.

7. The evidence of Chandan, wife of Laxmi was also rejected by the learned Sessions Judge on a rather flimsy ground. The learned Sessions Judge conceded that Chandan was a natural witness, but he found it difficult to accept her testimony for three reasons. One was that she was not named as a witness in the chargesheet or the calendar, the other was that she gave the names of only three appellants as assailants of the deceased Chet Ram and stated that she did

not recognise the others and thirdly, that she ran down after hearing the gun-shots and finding the door chained from outside, she ran upstairs again and it was only thereafter that she looked out into the court-yard and saw what was happening and it was, therefore, doubtful whether she saw the remaining part of the incident. None of these three reasons is well founded and the High Court rightly did not accept any one of them as valid. One basic fact which must be remembered while appreciating the evidence of this witness is that her statement was recorded on the same day immediately after the incident when Aguihotri, investigating officer came to the site and started investigation. It is true that she was not named as a witness in the chargesheet nor was she called as a witness in the Committing Magistrate's court but that cannot detract from the value of her testimony if otherwise it is found acceptable. It must be remembered that this was a faction ridden village and it is quite probable that this lady was afraid to come and give evidence as she would be incurring the enmity of the faction of Bindaban by doing so. That is perhaps the reason why she was not prepared to come and give evidence and the police accordingly did not mention her name as a witness in the chargesheet and the prosecution did not summon her to give evidence in the Committing Magistrate's court. Ultimately she did come forward to give evidence at the stage of the trial before the learned Sessions Judge. But by that time her husband's brother was murdered and Bindaban, his son and three others were accused of that offence. She was, therefore, obviously afraid of implicating appellants Nos. 2, 4 and 5, as they were sons or nephews of Bindaban and it was for this reason that she mentioned only the names of appellants 1, 3 and 6 as the assailants of the deceased Chet Ram, stating that she could not recognise the other assailants. Since this statement of hers was contrary to her police statement, she was allowed to be cross-examined by the prosecution and in answer to the prosecution, she admitted that due to fear she did not mention the names of all the appellants. This circumstance was completely overlooked by the learned Sessions Judge in rejecting her testimony. She was a natural witness and there is no reason why she should have been disbelieved by the learned Sessions Judge when she deposed that from the Chhajja in front of the atari of her house she saw five or six persons assaulting the deceased Chet Ram and they were armed with guns, spears, pharsa and axe. It must have taken her hardly a minute or two to rush down and on finding the door chained from outside, to run up again and there is little doubt that she must have seen the rest of the incident after the firing of the gun-shots. In fact it was not suggested to her in cross-examination that she could not have seen any part of the incident. The learned Sessions Judge was, therefore, clear-

ly in error in rejecting the testimony of this lady. The High Court rightly accepted her evidence and relied upon it for the purpose of holding the prosecution case established against the appellants.

8. We are, therefore, of the view that the High Court was justified in reversing the acquittal of the appellants and convicting and sentencing each of them for offences under Section 148 and Section 302 read with Section 149. We do not see any reason to interfere with the decision of the High Court. The appeal is accordingly dismissed.

Appeal dismissed.

AIR 1975 SUPREME COURT 1991

(From: KERALA)*

H. R. KHANNA, M. H. BEG AND
A. C. GUPTA JJ.

Sales Tax Officer, Special Circle, Ernakulam and another, Appellants v. The Tata Oil Mills Co. Ltd., Respondent.

Civil Appeals Nos. 1988-1989 of 1970,
D/- 29-7-1975.

(A) Constitution of India, Arts. 245, 246, Sch. 7, List 2, Ent. 54 — Kerala General Sales Tax Act (15 of 1963) — Competency of State Legislature to enact Section 22 (3). (Kerala General Sales Tax Act (15 of 1963), Section 22 (3)).

The State Legislature is not competent to enact law contained in Section 22 (3) of the Kerala General Sales Tax Act in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act. Judgment of Kerala High Court Affirmed. (Paras 6, 8)

It is not permissible for the State Legislature to enact a law under entry 54 for recovery by the State of an amount which cannot be recovered as sales tax or purchase tax in accordance with the law on the subject and which is wrongly realised by a dealer as sales tax or purchase tax. Such a law plainly will not be a law relating to tax on the sale or purchase of goods but will be one in respect of an amount wrongly realised by a dealer as sales tax or purchase tax. AIR 1964 SC 922, AIR 1971 SC 946, Followed. (Para 8)

The amount realised by a dealer in excess of what is due as tax cannot be held to be "tax," because such excess amount is not tax payable under the Act. If the State Legislature cannot make a law under entry 54 of List II of the Seventh Schedule to the Constitution directing the payment to the State of any amount collected as tax on transactions not liable to tax under the Act, it would likewise be incompetent to make a

* (W. P. No. 156 of 1967, D/ 29-10-1968-Ker);

law directing payment to the State of an amount realised by a dealer in excess of the tax payable under the Act. The amount realised in excess of the tax leviable under the Act would not stand for this purpose on a footing different from that of the amount realised as tax, even though the same could not be recovered as tax under the Act.

(Para 11)

Cases	Referred:	Chronological	Paras
AIR 1971 SC 946	=	(1970) 8 SCR 455	=
1971 Tax LR 414			10
AIR 1964 SC 922	=	(1964) 6 SCR 867	9

Dr. V. A. Seiyed Muhamad, Sr. Advocate (Mr. K. M. K. Nair, Advocate with him); (In C. A. No. 1988 of 1970) and K. M. K. Nair, Advocate (In C. A. No. 1989 of 1970) for Appellants; Mr. G. B. Pai, Sr. Advocate, (Mr. A. G. Meneses, Advocate, for M/s. J. B. Dadachanji and Co. with him), for Respondent.

Judgment of the Court was delivered by

H. R. KHANNA, J.:— This judgment would dispose of civil appeals Nos. 1988 and 1989 of 1970, filed on certificate against the judgment of the Kerala High Court, whereby that court held that it was beyond the competence of the State Legislature to enact law contained in sub-section (3) of Section 22 of the Kerala General Sales Tax Act, 1963 (Act 15 of 1963) (hereinafter referred to as the Act) in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act.

2. We may now set out the facts giving rise to one of the appeals. Both the learned counsel are agreed that the decision in that would also govern the other appeal.

3. Under Section 5 of the Act, tax is payable by a dealer on his taxable turnover. "Taxable turnover" is defined in Section 2 (xxv) of the Act as the turnover on which a dealer is liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed by the rules under the Act. It does not, however, include the turnover of purchase or sale in the course of inter-State trade or commerce or in the course of export or import of goods. The Kerala General Sales Tax Rules have been framed by the State Government in exercise of the power conferred by Section 57 of the Act. According to clause (i) of rule 9 of the said rules, in determining the taxable turnover the following amount shall be deducted from the total turnover of the dealer: "the excise duty, if any, paid by the dealer to the Government of Kerala or the Central Government in respect of the goods sold by him". It may be stated that clause (i) was omitted subsequently but we are concerned with the period when that clause was an integral part of the rule.

4. The respondent is an incorporated company engaged in the manufacture and sale of soaps, toilets and other goods. The

respondent's accounts disclosed that it had collected from the persons to whom it sold goods a sum of Rs. 30,591.71 as sales tax in excess of the tax which the respondent was liable to pay under the Act. The respondent, it would appear, paid Rs. 6,62,958 as excise duty and deducted the same from its total turnover for the purpose of determining the taxable turnover. When, however, the respondent company sold the goods it collected sales tax from the purchasers on the invoice price without deducting therefrom the excise duty paid in respect of the said goods. This resulted in the respondent company realising Rs. 30,591.71 in excess of the sales tax payable in respect of the goods sold by it. The Sales Tax Officer held that the respondent was liable to pay the aforesaid amount of Rs. 30,591.71 to the Government under Section 22 (3) of the Act. The respondent then filed writ petition in the Kerala High Court to challenge its liability to pay the aforesaid amount on the ground that the provisions of Section 22 in so far as they imposed a liability on a dealer to pay over to the Government any amount collected by him as sales tax, even though that amount was not payable as tax, was unconstitutional. The learned single Judge dismissed the petition filed by the respondent. On appeal, however, the Division Bench held, as already mentioned earlier, that the impugned provision was beyond the legislative competence of the State Legislature.

5. Sub-section (3) of Section 22 of the Act reads as under:

"(3) If any dealer or person collects tax on transactions not liable to tax under this Act or in excess of the tax leviable under this Act, such dealer or person shall, unless it is established to the satisfaction of the assessing authority that the tax so collected has been refunded to the person who had originally paid tax, pay over to the Government in addition to the tax payable, the amount so collected within such time and in such manner as may be prescribed."

The learned Judges of the High Court in holding the above provision, in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act to be beyond the legislative competence of the State Legislature, referred to entry 54 of the State List in the Seventh Schedule to the Constitution upon which reliance had been placed on behalf of the State. It was held that the State Legislature was incompetent to enact the impugned provisions contained in sub-section (3) of Section 22 of the Act under the above entry.

6. In appeal before us Dr. Seyid Muhammad on behalf of the appellants has assailed the judgment of the Division Bench of the High Court. As against that, Mr. Pai on behalf of the respondent has canvassed for the correctness of the said judgment. After hearing the learned counsel, we are of

the opinion that there is no merit in these two appeals.

7. A State Legislature is competent to make a law under entry 54 of List II in Seventh Schedule to the Constitution in respect of "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I". Entry 92A of List I relates to taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, and we are not concerned with this entry.

8. Entry 54 empowers State Legislatures to make law, except in certain cases with which we are not concerned, in respect of taxes on the sale or purchase of goods. As long as the law relates to taxes on the sale or purchase of goods, it would be within the competence of the State Legislature to enact such a law. It would not, however, be permissible for the State Legislature to enact a law under Entry 54 for recovery by the State of an amount which could not be recovered as Sales Tax or purchase tax in accordance with the law on the subject and which was wrongly realised by a dealer as Sales Tax or purchase tax. Such a law plainly would not be a law relating to tax on the sale or purchase of goods but would be one in respect of an amount wrongly realised by a dealer as Sales Tax or purchase tax. It looks perhaps odd that a dealer should recover in the course of business transactions certain sums of money as Sales Tax or purchase tax payable to the State and that he should subsequently decline to pay it to the State on the ground that the same amount is not exigible as Sales Tax or purchase tax. Whatever might be the propriety of such a course, the question with which we are concerned is whether the State Legislature is competent to enact a law under entry 54 for recovery by the State of an amount, which though not exigible under the State law as Sales Tax or purchase tax was wrongly realised as such by a dealer. The answer to such a question has to be in the negative. The matter indeed is not *res integra* and is concluded by two decisions of this Court.

9. A Constitution Bench of this Court examined in the case of *R. Abdul Quader and Co. v. Sales Tax Officer, Hyderabad* (1964) 6 SCR 867 = (AIR 1964 SC 922) the validity of Section 11 (2) of the Hyderabad Sales Tax Act, 1950 which reads as under:

"(2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

The appellant in that case collected Sales Tax from the purchasers of betel leaves in connection with the Sales made by it. The appellant, however, did not pay the amount collected to the Government. The Government directed the appellant to pay the amount to the Government. The appellant thereupon filed a writ petition in the High Court questioning the validity of Section 11 (2). The main contention of the appellant before the High Court was that Section 11 (2) which authorised the Government to recover a tax collected without the authority of law was beyond the competence of the State Legislature because a tax collected without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect under the authority of a law enacted under entry 54 of List II of the Seventh Schedule to the Constitution any such amount. The High Court upheld the validity of Section 11 (2). On appeal to this Court it was observed by the Constitution Bench as under:

"The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under entry 54 of List II to make a provision to the effect that money collected by way of tax even though it is not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law."

An attempt was made on behalf of the State in that case to sustain the validity of Section 11 (2) of the Hyderabad Act on the ground that the Legislature had enacted that law as part of the incidental and ancillary power to make provision for the levy and collection of sales or purchase tax. This contention was repelled and it was observed that the ambit of ancillary or incidental power did not go to the extent of permitting the legislature to provide that though the amount collected — may be wrongly — by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax.

10. The question again arose in this Court before a Bench consisting of six Judges in the case of *Ashoka Marketing Ltd. v. State of Bihar*, (1970) 3 SCR 455 = (AIR 1971 SC 946 = 1971 Tax LR 414). In that case in determining the appellant's turnover for assessment to Sales Tax for the year 1956-57 the Superintendent of Sales Tax included an amount representing Railway freight in the appellant's Sales of cement. The appellato

authority set aside the orders directing the inclusion of the Railway freight in the turnover. After the introduction of Section 20-A of the Bihar Sales Tax Act the Assistant Commissioner issued a notice under Section 20-A (3) of the Act requiring the appellant to show cause why an amount representing Sales Tax on the Railway freight which became refundable under the orders of assessment be not forfeited. The appellant's contention that Section 20-A was ultra vires the State Legislature was rejected by the Assistant Commissioner as well as by the High Court in a writ petition under Article 226 of the Constitution. On appeal filed by the assessee this Court held that sub-sections (3), (4) and (5) of Section 20-A were ultra vires the State legislature. As a corollary thereto, sub-sections (6) and (7) of that section were also held to be invalid. Sub-section (3) of Section 20-A of the Bihar Sales Tax Act read as under:

"(3) (a) Notwithstanding anything to the contrary contained in any law or contract or any judgment, decree or order of any Tribunal, Court or authority, if the prescribed authority has reason to believe that any dealer has or had, at any time, whether before or after the commencement of this Act, collected any such amount, in a case in which or to an extent to which the said dealer was or is not liable to pay such amount, it shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a time and place to be specified therein either to attend in person or through authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.

(b) On the day specified in the notice under clause (a) or as soon thereafter as may be, the prescribed authority may, after giving the dealer or his authorised representative a reasonable opportunity of being heard and examining such accounts and other evidence as may be produced by or on behalf of the dealer and making such further enquiry as it may deem necessary, order that the dealer shall deposit forthwith into the Government treasury, the amount found to have been so collected by the dealer and not refunded prior to the receipt of the notice aforesaid to the person from whom it had been collected."

In holding sub-section (3) and other impugned provisions of Section 20-A to be beyond the legislative competence of the State Legislature, this Court in the case of *Ashoka Marketing Ltd.* (supra) relied upon the decision of this Court in *Abdul Qader's case* (supra).

11. Dr. Muhammad has, however, tried to distinguish the above two cases on the ground that the present case relates to an amount realised in excess of the tax leviable under the Act and not to an amount which was not payable at all as tax under the Act. This fact, in our opinion, would not prevent the applicability of the principle laid

down in the cases of Abdul Qader and Ashoka Marketing Ltd. (supra). Any amount realised by a dealer in excess of the tax leviable under the Act stands, for the purpose of determining the legislative competence under entry 54, on the same footing as an amount not due as tax under the Act. Dr. Mahammad's argument involves inventing a category of a "deemed tax" which is not there in the Act. The provisions of the Act contain a definition of "tax". This necessarily means that everything outside it collected by the dealer would be an exaction not authorised by the Act. "Tax", according to Section 2 (xxiv) of the Act, means the tax payable under the Act. The amount which was realised by the respondent in excess of what was due as tax cannot be held to be "tax", because such excess amount was not tax payable under the Act. If the State Legislature cannot make a law under entry 54 of List II of the Seventh Schedule to the Constitution directing the payment to the State of any amount collected as tax on transactions not liable to tax under the Act, it would likewise be incompetent to make a law directing payment to the State of an amount realised by a dealer in excess of the tax payable under the Act. The amount realised in excess of the tax leviable under the Act would not stand for this purpose on a footing different from that of the amount realised as tax, even though the same could not be recovered as tax under the Act.

12. We would, therefore, dismiss the two appeals with costs. One hearing fee. Appeals dismissed.

AIR 1975 SUPREME COURT 1994

(From:— Calcutta)*

A. ALAGIRISWAMI, P. K. GOSWAMI AND N. L. UNTWALIA, JJ.

Jnan Ranjan Sen Gupta and others, Appellants v. Arun Kumar Bose, Respondent.

Civil Appeal No. 185 of 1973, D/- 24-7-1975.

(A) Calcutta Thika Tenancy Act (2 of 1949), Sec. 2 (5) — Ambit of — Erection of structures on land — Prior permission of landlord — Not necessary — Definition in beneficial legislation — Rule of construction. (Interpretation of Statutes).

S. 2 (5) does not require a thika tenant under the law to secure prior permission of the landlord for erection of structures on the land. The Act is for making better provision relating to the law of landlord and tenant in respect of thika tenancies in Calcutta. It is a piece of beneficial legislation conferring certain rights upon the tenants. In dealing with such a provision of law

* (Second Appeal No. 859 of 1969, D/- 25-4-1972 Cal).

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Court cannot read into the definition something which is not already there and the introduction of which will lead to imposing a restriction upon the rights of this class of tenants by judicial interpretation. This is not permissible in absence of express words to that effect or necessary manifest intent. Second Appeal No. 859 of 1969 D/- 25-4-1972 (Cal) Affirmed. (Para 9)

(B) Transfer of Property Act (1882), Section 108 (o) — Use of land not for purpose other than that of lease — Inhibition of Section 108 (o), not attracted.

Where the purpose of a lease of certain land was that the premises was not to be used for any purpose other than keeping of lorries as garage, the construction of structures and the use of the land by the tenant for the purpose of workshop for maintenance of the lorries could not be said to be for the purpose other than that of the lease so as to attract the inhibition of Section 108 (o), the dictionary meaning of garage being "a building for the storage or refitting motor vehicles". Ordinarily keeping of lorries as garage would connote the concept of construction of some structures for garaging the lorries. Second Appeal No. 859 of 1969, D/- 25-4-1972 (Cal) Affirmed. (Para 8)

Mr. Sachendra Chowdhary, Sr. Advocate, (M/s. S. K. Dholakia and R. C. Bhatia, Advocates with him), for Appellants; Mr. P. Chatterjee, Sr. Advocate, (Mr. Rathin Das, for Mrs. E. Udayaratnam, Advocate with him), for Respondent.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— In this appeal by special leave directed against the judgment of the Calcutta High Court the only question that arises for consideration is whether the respondent is a thika tenant under Section 2 (5) of the Calcutta Thika Tenancy Act, 1949.

2. On June 1, 1956, the predecessor-in-interest of the appellants (the latter, hereinafter to be described as the landlord) gave the land with which we are concerned in this appeal to the respondent (hereinafter to be described as the tenant) for occupation as a tenant on a monthly rent of Rs. 75/- for one year. One of the conditions of the tenancy was that "the premises shall not be used for any purpose other than keeping of the lorries as garage". Another condition of the tenancy was that "the lessee will on the expiration of one year peacefully surrender and yield up vacant possession to the lessor". On July 29, 1958, the landlord's advocate sent a notice of eviction to the tenant to vacate and deliver possession of the land on the expiry of August 1958. The tenant through his advocate by a letter of August 29, 1958, denied liability for eviction asserting that there was no violation of any terms and conditions of the tenancy and since there was refusal to accept the rent by the landlord the tenant had been depositing the rent every month from March 1958 under the provisions

of the Calcutta Thika Tenancy Act 1949 (briefly the Act) by which the tenancy was claimed to be governed. Thereafter a suit was filed by the landlord in the court of the 4th Munsif at Alipore on January 15, 1959.

3. It is not necessary to trace the history of the litigation covering this long period. It is sufficient to state that the High Court by its judgment on April 25, 1972, allowed the tenant's second appeal holding that he is a thika tenant within the meaning of Section 2 (5) of the Act. According to the High Court the tenant does not require any consent of the landlord to erect a structure on the land. The result was that the court of Munsif had no jurisdiction to entertain the suit, the matter being within the cognizance of the Controller appointed under the Act.

4. Mr. Sachin Chowdhary appearing on behalf of the appellants fairly and, if we may say so, rightly confined his argument to the principal question of law as set out above—

Is the tenant a thika tenant under the Act? If the answer is yes, the landlord is out of court. Before we proceed further we may briefly note that the tenant constructed certain structures on the land prior to the institution of the suit in 1959. Mr. Chowdhary, however, drew our attention to an observation in the judgment of the High Court to the effect that "admittedly the defendant (respondent herein) at his own cost constructed in 1962 structures upon the bare land which he took for the purpose of his business". Since the year of construction had not been particularly agitated in the courts below and there is evidence to show that the construction had commenced from 1957, we are not prepared to give undue importance to this observation about the year of construction mentioned in the judgment. This is particularly so in view of the fact that the tenant through his lawyer in reply to the notice of eviction asserted in August 1958 that—

"my client has constructed the structures and has done such other things as are needful for the purpose of the keeping lorries and other vehicles in the garages and making of necessary repairs of the same as well as upkeep and maintenance of the same for carrying on his business in transport service". Further, even so, although there is a reference to this reply of the advocate of August 29, 1958, in para 8 of the plaint, there is no denial of the construction of the structures as asserted in the said reply. Being faced with this factual position Mr. Chowdhary strenuously contended that under Section 2 (5) of the Act erection of structures by the tenant must be with the permission of the landlord. In other words, says Mr. Chowdhary, the erection should be lawfully done and if the tenant does not establish permission or consent of the landlord in the matter there

is no erection in the eye of law within the meaning of Section 2 (5).

5. We will, therefore read that section.

2(5): "thika tenant" means any person who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such person, but does not include a person....."

6. As the definition shows—

(1) a thika tenant must be a person who holds land under another person;

(2) it may be under a written lease or otherwise;

(3) there is a liability to pay rent to the landlord but for a special contract to the contrary; and

(4) he has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose.

The tenant here fulfils the requisite ingredients of the above definition clause.

7. There is no reference to landlord's permission or consent for erection of structure by the tenant in the definition clause. Mr. Chowdhary submits that it is implicit in the definition that in order to be a lawful erection of structure the tenant must take prior permission from the landlord. Counsel further submits that whatever is silent in the Act should be supplemented by reference to the Transfer of Property Act (briefly the T. P. Act). In this context Mr. Chowdhary draws our attention to Section 108 (c) of the T. P. Act which may be set out:

"the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto".

According to Mr. Chowdhary the purpose of the tenancy being that the premises shall not be used for any purpose other than keeping of lorries as garage, construction of structures for the purpose of running a workshop, which is the admitted factual position, would attract Section 108 (o) of the T. P. Act. He, therefore, submits that the case is squarely governed by the provisions of the Transfer of Property Act and the Court of Munsif had jurisdiction to entertain and decree the suit. We may, however, note in passing that one of the grounds on which a thika tenant may be ejected under unamended Section 3 (ii)

is that the tenant has used the land in a manner which renders it unfit for any of the purposes mentioned in clause (5) of Section 2 or that he has broken a condition consistent with this Act on breach of which he is under the terms of the contract liable to be ejected.

8. We are unable to agree that the particular condition of the tenancy referred to by Mr. Chowdhary militates against the construction of structures and the use of the land for the purpose of workshop for maintenance of the lorries by the tenant. Without being too hyper-technical, ordinarily keeping of lorries as garage would connote the concept of construction of some structures for garaging the lorries. The Chambers's Dictionary gives the meaning of garage as "the building where motor-vehicles are housed or tended". The Shorter Oxford English Dictionary gives the meaning of garage as "a building for the storage or refitting of motor vehicles". We are, therefore, unable to accept the submission that even on the terms of the tenancy, as pointed out, the tenant has used the land for a purpose other than that for which it was leased to attract the inhibition of Section 108 (o) of the T. P. Act.

9. We are also unable to accede to the contention that Section 2 (5) of the Act requires a thika tenant under the law to secure prior permission of the landlord for erection of structures on the land. As the preamble shows the Act is for making better provision relating to the law of landlord and tenant in respect of thika tenancies in Calcutta. It is a piece of beneficial legislation conferring certain rights upon the tenants. In dealing with such a provision of law we cannot read into the definition something which is not already there and the introduction of which will lead to imposing a restriction upon the rights of this class of tenants by judicial interpretation. This is not permissible in absence of express words to that effect or necessary manifest intentment. Besides, we do not find any vagueness or uncertainty in the definition clause. The submission is, therefore, of no avail.

10. We are not required to deal with the question whether the structures which stand on the land are permanent or not as this point had not been agitated in the courts below. But we may in passing notice that in view of Section 108 (p) of the T. P. Act since the lessee must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes, the State Legislature has by amending the Act by Act No. 29 of 1969 inserted Section 10A conferring a right upon a thika tenant to erect a pucca structure for a residential purpose with the previous permission of the Controller. We are, however, not required to consider such a question in this appeal.

11. Mr. Chowdhary also relied upon a contemporaneous letter written by the landlord to the tenant on June 1, 1953, which

was found by the courts below to contain interpolation by the tenant with regard to the according of permission to construct structures on the land. We however, do not think that this would have any bearing on our interpretation of Section 2 (5).

12. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 1996

(From: Calcutta)*

V. R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Devenport & Co. Pvt. Ltd., Appellant v. Commissioner of Income-tax, West Bengal-II, Respondent.

Civil Appeal No. 2034 of 1970, D/- 31-7-1975.

(A) Income-tax Act (1922), S. 24 (1), Explanation (2) — Loss in speculative business — "Speculative transaction" within S. 24 (1) Explanation 2—What is — AIR 1973 SC 2061, Overruled.

Explanation 2 to S. 24 (1) defines a speculative transaction as a transaction in which a contract for purchase and sale of any commodity is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity. The words "actual delivery" in Explanation 2 means real as opposed to notional delivery. For income-tax purposes, speculative transaction means what the definition of that expression in Explanation 2 says. Whether a transaction is speculative in the general sense or under the Contract Act is not relevant for the purpose of this Explanation. The definition of "delivery" in Section 2 (2) of the Sale of Goods Act which has been held to include both actual and constructive or symbolical delivery has no bearing on the definition of speculative transaction in the Explanation. A transaction which is otherwise speculative would not be a speculative transaction within the meaning of Explanation 2 if actual delivery of the commodity or the scrips has taken place; on the other hand, a transaction which is not otherwise speculative in nature may yet be

*(ITR No. 69 of 1968, D/- 8-7-1969 — Cal.)

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speculative according to Explanation 2 if there is no actual delivery of the commodity or the scrips. The Explanation does not invalidate speculative transactions which are otherwise legal but gives a special meaning to that expression for purposes of income tax only. (1966) 61 ITR 154 (Cal), Approved; AIR 1961 SC 1065; AIR 1955 SC 182, AIR 1962 SC 1585. Explained & Disting; AIR 1973 SC 2061 Overruled.

The assessee, a private limited company, carried on business in selling tea and tea garden tools and requisites. In the relevant year, ending on 30-6-1958, the assessee for the first time entered into certain transactions in jute. The assessee had contracted to purchase certain quantities of B-Twill and corn sacks and later on, to sell the aforesaid quantities. The assessee had no godown for keeping the goods and had not handled them. The goods were in the godown of the sellers and only the delivery orders addressed to the sellers changed hands. The transaction resulted in a loss to the assessee and the assessee claimed adjustment of that loss in the computation of its income for the assessment year 1959-60.

Held: that the transactions entered into by the assessee, involving mere transfer of delivery notes and not actual delivery of the goods, were speculative transactions within the meaning of Explanation 2 to S. 24 (1). ITR No. 69 of 1968 D/- 8-7-1969 (Cal), Affirmed. (Para 11)

Cases Referred: Chronological Paras

AIR 1973 SC 2061 = (1973) 90 ITR	
140 = 1973 Tax LR 1052	4
(1969) 73 ITR 713 = ILR (1969) 1 Cal	
195	4
(1966) 61 ITR 154 (Cal)	2
AIR 1962 SC 1585 = (1963) 1 SCR	
184	5
AIR 1961 SC 1065 = (1961) 3 SCR	
267	2
AIR 1955 SC 182 = (1955) 1 SCR	
1071	2
(1954) 2 All ER 694 = (1954) 1 WLR	
1286	9

Mr. D. N. Gupta. Advocate. for Appellant. Mr. G. C. Sharma Sr. Advocate (M/s. O. P. Dua and S. P. Nayar Advocates with him) for Respondent

Judgment of the Court was delivered by

GUPTA, J.:— This appeal by special leave turns on the true meaning and scope of explanation 2 to Section 24 (1) of the Income-Tax Act, 1922.

2. The appellant (hereinafter referred to as the assessee) is a private limited company carrying on business in tea garden tools and requisites and also acting as agents for selling tea; in fact the bulk of its income was from selling commission on tea. The assessment year in question is 1959-60; in the relevant previous year which ended on June 30, 1958, the assessee for the first time in its history entered into certain transactions in jute. On April 17, 1958 the assessee had contracted to purchase 1100 bales of B-Twill and 2500 bales of corn sacks; the contract for B-Twill was with two parties, M/s. Raghunath & Sons (P) Ltd. for 500 bales and M/s. Mahadeo Ramkumar for 600 bales. The corn sacks were all purchased from Tulsidar Jewaraj under three contracts for 800 bales, 1000 bales and 700 bales respectively. On June 18, 1958 the assessee entered into a contract with M/s. Lachhminarain Kanoria & Co. to sell the aforesaid quantities of B-Twill and corn sacks. The assessee had no godown for keeping the goods and had not handled them. The goods were in the godown of the mills and only the delivery orders addressed to the mills changed hands. The amount realised on sale to M/s. Lachhminarain Kanoria & Co. came to Rs. 10,49,865/-. The assessee had however purchased the corn sacks and B-Twill for Rupees 11,48,399/-. The transactions thus resulted in a loss of Rs. 98,534/- to the assessee and the assessee claimed adjustment of this loss in the computation of its income for the assessment year 1959-60. The Income-tax Officer held that the transactions involving mere transfer of delivery notes and not actual delivery of the goods were of a speculative character as contemplated in explanation 2 to Section 24 (1) and the loss could be set off only against speculation profits, and as there were no speculation profits in that year, he held that the loss would be carried forward and set off against

speculation profits in the future. The Appellate Assistant Commissioner on appeal by the assessee held that the transactions were not speculative and the loss should be treated as business loss relying on two decisions of this Court: *Bayyana Bhimayya v. Govt. of Andhra Pradesh*, (1961) 3 SCR 267 = (AIR 1961 SC 1065) and *Duni Chand v. Bhuwarka Brothers Ltd.* (1955) 1 SCR 1071 = (AIR 1955 SC 182). The Department took an appeal to the Tribunal and the Tribunal relied on the decision of the Calcutta High Court in *D. M. Wadhvana v. Commr. of Income-tax, West Bengal*, (1966) 61 ITR 154 (Cal), to hold that this case came within the scope of Section 24 (1) read with explanation 2 and restored the order of the Income-tax officer. On the application of the assessee the Tribunal referred to the High Court the following question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the transactions described above entered into by the assessee were speculative transactions within the meaning of explanation 2 to Section 24 (1)?"

The High Court answered the question in the affirmative and against the assessee. The correctness of that decision is challenged in this appeal.

3. Section 24 (1) so far as it is material for the purpose of this appeal is in these terms:

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year:

Provided that in computing the profits and gains chargeable under the head 'profits and gains of business, profession or vocation', any loss sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions:

(The second proviso is not relevant for the present purpose.)

Explanation 1: Where the speculative transactions carried on are of such a

nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business.

Explanation 2: A speculative transaction means a transaction in which a contract for purchase and sale of any commodity including stocks and shares is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.

(The rest of the section is also not relevant.)"

4. Before us both sides admitted that the question is covered by the decision of this Court in *Raghunath Prasad Poddar v. Commr. of Income-tax, Calcutta*, (1973) 90 ITR 140 = (AIR 1973 SC 2061 = 1973 Tax LR 1052) where it was held that such transactions were not speculative transactions within the meaning of explanation 2 to S. 24 (1). The learned counsel for the revenue however prayed for re-consideration of the decision on a fresh examination of the problem. In *Raghunath Prasad Poddar v. Commr. of Income-tax, Calcutta*, the assessee, a company dealing in jute and jute goods, purchased pucca delivery orders (in short P.D.Os.) in respect of gunny bags from various parties after paying the full price of the goods covered by the delivery orders and transferred those P.D.Os. to buyers after receiving the price fixed for the sale of those goods. The Tribunal following the decision in *D. M. Wadhvana v. Commr. of Income-tax* held that the sales in question were speculative and consequently the losses suffered by the assessee in these transactions could not be set off against the profits made by the assessee's non-speculative business. The High Court on reference following its earlier decisions in *D. M. Wadhvana's case* and *Nanlal M. Varma & Co. (P) Ltd. v. Commr. of Income-tax*, (1969) 73 ITR 713 (Cal) answered the questions referred to it, which are similar to the question formulated in this case, in favour of the revenue. This Court reversed the decision on appeal.

5. The view taken in *Raghunath Prasad's case* appears to be based on three earlier decisions of this Court, *Duni Chand Rataria v. Bhuwarka Brothers Ltd.*, *Bayanna Bhimay-*

ya and Sukhdevi Rathi v. The Government of Andhra Pradesh and State of Andhra Pradesh v. Kolla Sreeramamurthy, (1963) 1 SCR 184 = (AIR 1962 SC 1585). The reasoning in Raghunath Prasad's case proceeds like this:

6. To effect a valid transfer of any commodity, it is not necessary that the transfer in question should be followed up by actual delivery of the goods to the transferee. Even if the goods are delivered to the transferee's transferee, the first transfer also will be a valid transfer. What has to be seen in such cases is whether the ultimate purchaser of the P. D. Os. has taken actual delivery of the goods sold. It is erroneous to think that if any transfer of the P.D.Os. is not followed up by actual delivery of the goods to the transferee, that transaction is to be considered as speculative. The following observation in Duni Chand Rataria v. Bhuwalka Brothers Ltd. was relied on in support of the view taken:

"The sellers handed over these documents (like delivery orders) to the buyers against cash payment, and the buyers obtained these documents in token of delivery of possession of the goods. They in turn passed these documents from hand to hand until they rested with the ultimate buyer who took physical or manual delivery of possession of those goods. The constructive delivery of possession which was obtained by the intermediate parties was thus translated into a physical or manual delivery of possession in the ultimate analysis eliminating the unnecessary process of each of the intermediate parties taking and in his turn giving actual delivery of possession of the goods in the narrow sense of physical or manual delivery thereof."

7. In Duni Chand Rataria's case this Court was interpreting the words "actual delivery of possession" occurring in Section 2 (1) (b) (i) of West Bengal Jute Goods Future Ordinance, 1949. The question for determination in that case was whether certain contracts between the appellant and the respondents could be called contracts involving actual delivery of possession of the goods con-

cerned. Referring to the definition of "delivery" in Section 2 (2) of the Indian Sale of Goods Act, 1930 it was observed that this would include actual delivery as also symbolic or constructive delivery, and having regard to the mischief which was sought to be averted by the promulgation of the Ordinance — to prevent persons who dealt in differences only and never intended to take delivery under any circumstances it was held that the intentment of the Ordinance was that "actual delivery of possession" was actual delivery as contrasted with mere dealings in differences and such actual delivery included within its scope symbolic and constructive delivery of possession. With respect, these observations made in quite a different context do not appear to us to be of assistance in interpreting explanation 2 to Section 24 (1) of the Indian Income-Tax Act, 1922.

8. The other decision referred to in Raghunath Prasad's case, Bayanna Bhimayya and Sukhdevi Rathi v. The Government of Andhra Pradesh, was a case under the Madras General Sales Tax Act, 1939. The appellant in that case who dealt in gunnies entered into contracts with two mills agreeing to purchase gunnies at a certain rate for future delivery and also entered into agreements with third parties by which they charged something extra from the third parties and handed over to them the delivery orders described as Kutcha delivery orders. The mills however did not accept the third parties as contracting parties but only as agents of the appellants. The tax authorities treated the transaction between the appellants and the third parties as a fresh sale and sought to levy sales tax on this as well, to which the appellants objected saying that there was only one sale. It was held that a delivery order being a document of title to the goods covered by it, possession of the document not only gave one the right to recover the goods but also to transfer them to another by endorsement or delivery, and that there being two separate transactions of sale, one between the mills and the original purchasers, and the other between the original purchasers and the third parties, tax was payable at both the points. In reach-

ing this conclusion the court observed:

"At the moment of delivery by the mills to the third parties, there were, in effect, two deliveries, one by the mills to the appellants represented, in so far as the mills were concerned, by the appellants' agents, the third parties, and the other, by the appellants to the third parties as buyers from the appellants. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law."

Here also the only question was whether on the facts of the case there were two separate transactions of sale so that tax was payable at both the points under the Madras General Sales Tax Act, 1939. The observation made in this context does not also seem to us relevant to the question under consideration in the appeal before us.

9. Another authority on which the decision in Raghunath Prasad's case relies is *State of Andhra Pradesh v. Kolla Sreeramamurthy*, which is also a case under the Madras General Sales Tax Act, 1939. The respondent in that case, a dealer in gunny bags, purchased gunnies from the mills on terms of written contracts which were on printed forms. These contracts were entered into by brokers acting for the respondent who sent him 'Bought-Notes' setting out the terms upon which the purchases had been effected from the mills. The mills having received a part of the purchase money in terms of the contract issued delivery orders directing the delivery of goods as per the contract. Instead of taking delivery himself the respondent endorsed the delivery orders and these passed through several hands before the ultimate holder of the delivery orders presented them to the mills and obtained delivery of the gunnies on payment. The question that arose for decision was whether the transactions entered into by the respondent were mere sales of delivery orders or sales of goods so as to bring them to charge under Sec. 3 of the said Act. At the date of the contract for purchase by the respondent, the goods which were the subject matter of the purchase were not appropriated to the contract so that

there was no completed sale since no property passed, but only an agreement for sale. In considering the effect of the position that the property in the goods passed to the ultimate endorsee of the delivery orders, Mr. Justice Ayyangar speaking for the Court relied on an English decision, *Butterworthy v. Kingsway*, (1954) 2 All ER 694 to hold that though the respondent and his transferees had not acquired any title to the goods, the title acquired by the ultimate endorsee of the delivery orders went to feed their previously defective titles and enured to their benefit. His Lordship further observed that this was the principle that formed the basis of the decision in *Bayanna Bhimayya's* case. Here again, the question that was considered has hardly any connection with sec. 24 of the Indian Income-Tax Act, 1922, and the observations made in this case cannot be a guide to the solution of the problem arising in the case before us.

10. Section 6 of the Indian Income-Tax Act, 1922 enumerates the heads of income chargeable to income-tax. Sec. 24(1) of the Act provides that where an assessee sustains a loss under any of these heads in any year, he shall be entitled to have the loss set off against his income, profits or gains under any other head in that year. This general provision is qualified by the first proviso which permits the set off of a loss in speculative business against the assessee's profits and gains, if any, in a similar business only. Explanation 1 says that where the speculative transactions are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business. Explanation 2 defines a speculative transaction as a transaction in which a contract for purchase and sale of any commodity is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity. The words 'actual delivery' in explanation 2 mean real as opposed to notional delivery. For income-tax purposes speculative transaction means what the definition of that expression in explanation 2 says. Whether a transaction is speculative in the general sense or under the Contract Act is not

[relevant for the purpose of this explanation. The definition of "delivery" in Section 2 (2) of the Sale of Goods Act which has been held to include both actual and constructive or symbolical delivery has no bearing on the definition of speculative transaction in the explanation. A transaction which is otherwise speculative would not be a speculative transaction within the meaning of explanation 2 if actual delivery of the commodity or the scrips has taken place; on the other hand, a transaction which is not otherwise speculative in nature may yet be speculative according to explanation 2 if there is no actual delivery of the commodity or the scrips. The explanation does not invalidate speculative transactions which are otherwise legal but gives a special meaning to that expression for purposes of income-tax only. In *D. M. Wadhwana v. Commr. of Income-tax*, on which the Tribunal's decision in this case is based, the Calcutta High Court observed:

"The explanation to Section 24 (1), however, does not prevent persons from entering into contracts in which the buyers and sellers may not actually hand over the goods physically. The explanation is only designed at segregating for income-tax purposes loss sustained in transactions of a certain kind. It may be that such transactions are not speculative in the light of Section 30 of the Contract Act. . . . In enacting the explanation 2 of Section 24 (1) of the Income-Tax Act, the legislature did not intend to affect any transaction of sale wherein the goods were not physically delivered by the seller to the buyer but only laid down that if there was no actual or physical delivery, the loss, if any, would be a loss in a speculative transaction which could be allowed to be set off only against a profit in a transaction of the same nature The object of the explanation is not to invalidate the transactions which are not completed by actual delivery of the goods but only to brand them as speculative transactions so as to put them in a special category for income-tax purposes."

11. In our opinion this is a correct statement of the law. This as-
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pect of the matter was not considered in *Raghunath Prasad Poddar v. Commissioner of Income-tax, Calcutta*. We think the law on the point was correctly stated in *D. M. Wadhwana v. Commissioner of Income-tax*, and in our opinion the question referred to the High Court in the present case has been correctly answered. The appeal is accordingly dismissed but in the circumstances of the case without any order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2001

(From: Punjab & Haryana)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA, JJ.

State of Punjab, Appellant v. Mukhtiar Singh and another, Respondents.

Criminal Appeal No. 350 of 1974, D/- 30-7-1975.

(A) Constitution of India, Article 136 — Penal Code (1860), S. 302 — Murder case — Appeal against acquittal — Interference by Supreme Court — Practice.

When sitting in appeal over a judgment of acquittal recorded by the High Court, in a murder case (arising from a quarrel between rival parties plying taxis), it will not be safe for the Supreme Court to act upon the testimony of a close relation (brother) of the deceased without corroboration from independent sources against the accused. Cogent corroboration held available in this case so far as the complicity of one of the two accused in the commission of murder was concerned. He was accordingly convicted under Section 302, Penal Code and sentenced to imprisonment for life. But in the case of the other accused, in the absence of confirmation of the prosecution story, if not completely discounted by the independent evidence on record, the Supreme Court did not, as a matter of caution, interfere with his acquittal recorded by the High Court. (Paras 22, 23, 24)

*(Criminal Appeal No. 22 of 1973, D/- 6-11-1973 — Punj & Har.)

HS/HS/C789/75/VBB

Cases Referred: Chronological Paras
 AIR 1974 SC 1168 = (1974) 4 SCC
 552 = 1974 Cri LJ 822 20

Mr. O. P. Sharma Advocate, for Appellant; Mr. Hardayal Hardy, Sr. Advocate, (Mr. M. S. Dhillon, Advocate with him), for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.— Jarnail Singh, Mukhtiar Singh and one Gurmmail Singh were tried by the Sessions Judge, Ludhiana for the murder of Ajmer Lal. Gurmmail Singh died during the pendency of the trial. Mukhtiar Singh and Jarnail Singh were convicted under Section 302 read with Section 34, Penal Code and each of them was sentenced to imprisonment for life and fine of Rupees 1000/-. They were further convicted under S. 27 of the Arms Act and sentenced to four years rigorous imprisonment, each. The sentences were directed to run concurrently.

2. On appeal, the High Court of Punjab and Haryana acquitted them by its judgment, dated 6-11-1973. Aggrieved by that acquittal, the State of Punjab has now come in appeal to this Court after obtaining special leave under Article 136 of the Constitution.

3. The accused-respondents are real brothers. Ajmer Lal deceased and Ramji Dass P.W. are also brothers. They were plying their private cars as taxis in Ludhiana and the surrounding areas. There was professional rivalry between them. On January 2, 1972 at 6 p.m. both the parties had parked their taxis near the Rikhi Theatre in Ludhiana. Two potential passengers approached the accused and inquired about the hiring charges for Phagwara. The accused quoted Rs. 25/- per passenger. Ajmer Lal deceased offered to charge Rs. 20/- per passenger. The accused then reduced their quotation to Rs. 15/-. The deceased and his brother Ramji Dass declared that they would give the passengers a free ride to Phagwara. A quarrel ensued between the competitors, in the course of which abuses were exchanged. Inderjit Singh (P.W.10) another taxi operator, interceded and disengaged them. The prospective passengers however went

away without hiring any taxi. About 15 minutes after this quarrel, the accused drove off in their taxis, while the deceased and his brother stayed on till 8 or 8.15 p.m. when Traffic Constable Kirpal Singh (P.W. 7) came there. Kirpal Singh was in plain clothes. He was on friendly terms with the deceased and his brother. His wife and that of Ramji Dass both hailed from village Kular. Kirpal Singh told Ramji Dass that he was proceeding to Kular and if the latter had any message to deliver at Kular, the former would do so. Ramji Dass replied that he had to send some clothes of his brother-in-law. He requested Kirpal Singh to collect those clothes from the former's house. Kirpal Singh agreed. Thereafter Ajmer Lal deceased, Ramji Dass, Kirpal Singh and Rup Lal proceeded in the deceased's car No.-JKN-2727 driven by one Satish Kumar, to the houses of Ramji Dass and Ajmer Lal. Those houses are situated in a narrow street in Janta Nagar at a distance of three miles from the taxistand. After covering 2 1/2 miles, when they reached the junction of the Gill Road and the street leading to the house of Ramji Dass, the driver reminded them that the car was running short of fuel. Thereupon, Ajmer Lal, Ramji Dass, Rup Lal and Kirpal Singh alighted and proceeded to the house of Ramji Dass on foot while Satish Kumar took the car for re-fueling to the filling station on the Gill Road.

4. After the departure of the deceased and his companions from the taxi stand, Mukhtiar Singh and Jarnail Singh accused came there in truck No. PUL-475 driven by Gurmmail Singh. Jarnail Singh got down from the truck. He was carrying a rifle. He was looking for Ajmer Lal and Ramji Dass who were not present there. Jarnail Singh then fired a shot in the air and proclaimed that they would see to Ajmer Lal and Ramji Dass. The accused then drove off in the truck and reached the entrance of the street leading to the houses of Ramji Dass and Ajmer Lal. They saw the deceased proceeding in the street. They stopped the truck there and challenged the deceased. Jarnail Singh and Mukhtiar Singh both were armed with rifles. On hearing the challenge the deceased

ed turned round. At this moment, he was hit in the abdomen by a bullet fired by Jarnail Singh. His companions, who were a little ahead of the deceased ran and took cover by the side of a wall. When Ajmer Lal was in the process of falling to the ground, he was struck in the arm by a second bullet fired by Mukhtiar Singh. On the hue and cry raised by the witnesses, the accused hurriedly got into the truck and sped away. While Jarnail Singh was boarding the truck, his turban fell down and was left behind at the spot.

5. After the departure of the assailants, Ramji Dass, Kirpal Singh and Rup Lal removed the injured in the car to the Civil Hospital, three miles away. In the Hospital, Ajmer Lal was pronounced dead by the Medical Officer. Leaving the corpse under the care of P. Ws. Kirpal Singh and Rup Lal, Ramji Dass went to the Police Station, Industrial Area, Ludhiana in the car and lodged the F.I.R. (Ex. PG) at 9.40 p.m. Assistant Sub-Inspector Pritam Chand (P.W. 14) recorded the F.I.R. and then went to the Hospital and prepared the inquest report. After despatching the dead body for post-mortem examination, he visited the scene of occurrence. At 12-30 a.m. the investigation was taken over by S.H.O. Joginder Singh (P.W. 20). One cartridge case (Ex. C-1) of a rifle, one turban (Ex. P-3) and one fellow of a shoe were found at the scene of crime. The Investigating Officer took these articles into possession and sealed them into parcels at day-break

6. The autopsy was conducted on January 3, 1972 at 4 p.m. by Dr. Puran Singh. The Doctor found three gunshot injuries on the dead-body. Injury No. 1 was a gunshot wound of entrance 1 cm. x 1 cm. on the left side of abdomen 1 cm. outer, and at the level of umbilicus. The margins were found inverted and slightly blackish. Injury No. 2 was also a gunshot wound of entrance, 1 cm. x 1 cm. on the inner aspect of right upper arm just below the axilla. The margins were found to be inverted and slightly blackish. Injury No. 3 was a gunshot wound of exit 3 cm. x 2 cm. on the back of upper part of right shoulder.

7. The Doctor opined that Injuries 1 and 2 — which were individually sufficient to cause death in the ordinary course of nature — could be the result of two separate shots fired either from the same rifle or from two different rifles of the same calibre from a distance with about 6 ft.

8. The accused Mukhtiar Singh and Jarnail Singh were arrested from the house of their uncle, Kartar Singh (P.W. 13) on January 3, 1972 at about 7 p.m. by S. H. O. Joginder Singh. Kartar Singh produced the rifle (Ex. P-1) and the revolver Ex. P-4 along with cartridges. The Sub-Inspector took them into possession and sealed them into parcels. These firearms were the licensed weapons of Mukhtiar Singh. In due course the sealed parcels containing the rifle and the cartridge case, C-1, were sent to the Forensic Science Laboratory at Chandigarh. The Ballistic Expert Shri J. K. Sinha (P.W. 5) examined them. In his opinion, the empty, C-1, (found at the scene of crime) had been fired through the rifle (Ex. P-1).

9. In his examination under S. 342, Jarnail Singh gave this version of the incident:

"I operate my own truck. Ajmeri Lal deceased's brother Piare Lal stole away the car of Gurcharan Singh. I spotted that car with Piare Lal and I informed Gurcharan Singh. Piare Lal was arrested and challan-ed. Due to this Ramji Dass felt offended and his wife's brother Roop Lal also felt offended. Constable Kirpal Singh is friend of Ramji Dass and he arranged his marriage in village Kular. On 2-1-1972 I was having minor repairs of my truck carried out at the Kuka's Workshop at Miller Ganj. There minor repairs were carried out to the truck No. PUL 475 by Bhan Singh also. He went to the Transport Company (Associate Traders and Engineers Company) and on returning from there he told him that an additional load was not ready for despatch. He then told me that I should drop him at his house in Janta Nagar and then take the truck PUL 475 to Kartar Bhawan after so doing for parking. I brought Bhan Singh in that truck to Janta Nagar. When the truck entered the mouth of the lane leading to the house of Bhan Singh, Ajmeri

Lal with gandasa in his hand was seen coming from the opposite side and he on seeing the truck stood in front of it in Kucha (Lane). I stopped the truck and got down from the same. In the meantime Ajmeri Lal advanced towards me with his gandasa and attempted to assault me by wielding that gandasa. On this I stepped back with the result that my turban went off my head by coming in contact with the body of the truck and the gandasa blow caused a slight injury on the right side of my forehead. The other portion of the blade of the gandasa of course had hit the body of the truck. Ajmeri Lal again wielded a gandasa and aimed a blow at me. Thereupon I ran towards the back side. He came in front of me from a side and gave a blow with it and that blow hit me on my right hand. Thereafter he wielded 4/5 gandasa blows which hit on different parts of my body when I was trying to save myself by moving hither and thither. In the meantime Bhan Singh came down from the truck with a rifle of Mukhtiar Singh which was in the truck for my rescue. He raised a Lalkara. Thereupon Ajmeri Lal left me and diverted his attention towards Bhan Singh. He also advanced towards him and gave gandasa blow which landed on the butt of the rifle held by Bhan Singh. Bhan Singh then fired a shot at Ajmeri Lal which hit on his right shoulder. Ajmeri Lal again wielded a gandasa blow towards Bhan Singh. Bhan Singh then fired another shot from the rifle hitting him in the abdomen. Thereupon, Ajmeri Lal dropped on the ground. The gandasa had also fallen on the ground as Ajmeri Lal had lost the grip of the same. Thereafter I and Bhan Singh came in that very truck to Kartar Bhawan leaving Ajmeri Lal and his gandasa at the spot. I handed over the rifle to my mother and then went to the Police Station, Industrial Area, Ludhiana. Finding some men and women present opposite to that police station I changed mind and went to Patiala where I got myself medically examined by Dr. Tandon, who also dressed my wounds. I am innocent."

10. Mukhtiar Singh denied the prosecution case, and pleaded alibi. He, however admitted that the rifle

(P-1) was his licensed weapon which used to be kept in his truck PUL 475, for protection of the goods.

11. The learned Sessions Judge rejected the defence version, as false. He accepted the prosecution story and convicted both the accused as aforesaid.

12. The High Court rejected the defence version. It partly accepted the prosecution case, namely, with regard to the quarrel between the accused and the deceased at about 6 P.M. and the return of the accused a couple of hours later to the taxi-stand in search of the deceased and the firing of a rifle-shot in the air by the accused on this occasion. It further found that the rifle, Ex. P-1, had been used in the commission of the murder. The High Court, however, rejected the testimony of the three eye-witnesses, namely, Ramji Dass Kirpal Singh and Roop Lal because in its opinion, none of them "can be said to have witnessed the occurrence". The High Court concluded that the circumstances established by the prosecution "do give rise to a strong suspicion against the accused persons, but... suspicions howsoever strong cannot take the place of proof..." In the result, it accorded the benefit of doubt to both the accused and acquitted them.

13. We have heard the learned Counsel on both sides and carefully examined the evidence on record. The following circumstances have been indubitably established by the prosecution:

(i) At about 6 P.M. on the day of occurrence, there was a serious quarrel between the accused on one side and the deceased and his brother Ramji Dass, on the other, at the taxi-stand. In the course of this quarrel the accused abused and threatened the deceased. The timely intercession of Inderjit Singh (P.W.10), who pacified the parties, saved the situation.

(ii) About 15 or 20 minutes after the quarrel, both the accused went away in their taxi car from the taxi-stand, while the deceased and his brother left that place at about 7 or 8 p.m.

(iii) Shortly after the departure of the deceased and his brother, the

accused returned to the taxi-stand at about 8 P.M. in truck No. PUL 475—which was driven by Gurmail Singh—in search of the deceased. Jarnail Singh got down from the truck. He was carrying a rifle. He fired a shot in the air and proclaimed that they would see to Ajmer Lal and Ramji Dass. Thereafter, the accused drove away in the same truck, towards Jagraon Over-Bridge.

(iv) The occurrence took place about 45 minutes after the preceding incident near the entrance to the street leading to the house of the deceased, which is at a distance of about 3 miles from the taxi-stand.

(v) The crime cartridge, C-1, found at the scene of occurrence was proved to have been fired through the rifle. Ex-P-1 which is a licensed firearm belonging to Mukhtiar Singh accused.

(vi) The turban found at the scene of crime admittedly belongs to Jarnail Singh, accused.

14. Both the courts below are substantially agreed with regard to the proof of these circumstances. The chief witness in respect of the first three circumstances was Inderjit Singh (PW 10). The trial court found his evidence fully trustworthy. The High Court held that his testimony had a ring of truth. The High Court has not specifically adverted to the sixth circumstance, although it has rejected the version of Jarnail Singh, inter alia, with regard to the circumstances in which his turban was left behind at the spot.

15. Mr. Hardy, learned counsel for the accused-respondents does not maintain that the concurrent finding of the courts below as to the proof of these circumstances is unreasonable. His contention is that these circumstances, by themselves, go no further than creating a suspicion—may be a strong suspicion as the High Court has said—about the complicity of the accused in the crime.

16. In our opinion, these circumstances are of a determinative character. They lead general assurance to the prosecution story and render it probable. At any rate, they go a long way to mark out Jarnail Singh as the person who in all pro-

bability fired the fatal shots at the deceased with the rifle. Ex. P-1. Instead of explaining this catenation of circumstances, Jarnail Singh set up a false counter-version. This factor had also to be taken into account.

17. The evidence of the eye-witnesses had to be appreciated against the background of the above circumstances.

18. In reaching the conclusion that Ramji Dass, P.W.6, Kirpal Singh, P.W.7 and Roop Lal, P.W.9 had not seen the occurrence, the High Court gave these reasons:

(a) The names of the eye-witnesses do not find mention in the gist of the First Information Report that was entered in the General Diary of the Police Station in purported compliance with the provisions of S. 154 of the Code of Criminal Procedure.

(b) The version of Kirpal Singh, P.W.7 that he left Kotwali at about 8.00 P.M. and thereafter at 8.15 P.M. proceeded from the Taxi-stand in the company of the deceased and Ramji Dass etc. to the latter's house for collecting clothes, is not acceptable because (i) he was present in the Kotwali at the time of roll call which was held by Dayal Singh (D. W. 10) at 8-30 P.M. From the Kotwali the place of occurrence is more than 3 1/4 miles via the taxi-stand. The occurrence took place at about 8.45 p.m. (ii) neither in the F.I.R., nor in the statement of Inderjit Singh P.W.10, there is any mention of the visit of Kirpal Singh to the Taxi-Stand. (iii) Kirpal Singh took part in the general parade on the morning of 3rd January. "His leave commenced on the 3rd at 6.15 P.M. That being so, there was no apparent urgency for getting the clothes on the evening of the 2nd January."

(c) "According to Inderjit Singh P. W. Ramji Dass and Ajmer Lal left the taxi stand around 7 p.m. and did not return thereafter. So the testimony of these witnesses (Ramji Dass and Kirpal Singh) that they left the taxi-stand a little after 8-30 p.m. is obviously not acceptable."

(d) "...Kirpal Singh could not be at the taxi stand by 8-30 p.m. Therefore, his inclusion in this version falsifies the entire version justifying

the theory that the witnesses above-named saw the incident."

(e) Ramji Dass was the brother of the deceased and as such was a highly interested witness. The relations of Ramji Dass and the deceased with the accused were strained.

(f) Inderjit Singh P.W.10, is silent about the presence of Roop Lal at the taxi stand and his departure from there in the company of Ramji Dass and the deceased in a car driven by Satish Kumar.

(g) No reason was shown why petrol was not had from any of "the petrol pumps which were on the way". "One fails to see why they (P. Ws) would choose to alight there" (only 160 yds. from the house of Ramji Dass) and not ask Satish Kumar to drop them at their house".

19. Mr. O. P. Sharma, learned Counsel for the appellant-State has assailed the reasoning of the High Court. He has adopted the reasoning of the trial court to rehabilitate the credibility of the eye-witnesses. He has laid great stress on the fact that the F.I.R. in this case was lodged by Ramji Dass, P.W.6, with utmost promptitude, and that its copy had reached the Magistrate by 11.30 P.M. Ramji Dass had no time, proceeds the argument to concoct a false story and to induct false witnesses. In any case, maintains the Counsel, the presence of Ramji Dass at the scene of occurrence could not be doubted, and his evidence alone corroborated by the F.I.R. and the other tell-tale circumstances which the courts below have concurrently held to have been established, was sufficient to bring home the charges to the accused.

20. As against the above Mr. Hardy tried to support the reasoning and the conclusions arrived at by the High Court. His main argument is that this is a case in which two views of the evidence are reasonably possible, one of which, taken by the High Court supports the acquittal. Learned Counsel has reminded us that in such a situation this Court would not, as a rule of prudence, disturb the order of acquittal. In this connection, he has cited *State of Punjab v. Hari Singh*. (1974) 4 SCC 552 = (AIR 1974 SC 1168 = 1974 Cri LJ 822). Counsel

further maintains that the presence of Kirpal Singh and Roop Lal, at the scene of occurrence was highly improbable. Apart from reiterating the reasoning of the High Court, Counsel points out that the inquest report or any other record does not show the presence of these witnesses in the Hospital when the A. S. I. reached there to make the inquest. As a last resort, learned Counsel submits that even if the presence of Ramji Dass at the venue of crime was considered to be probable, it would be hazardous to accept his evidence without looking for independent corroboration. According to him, sufficient corroboration firmly fixing the identity of Mukhtiar Singh with the crime is not forthcoming in this case.

21. A glance at the reasons catalogued above given by the High Court would reveal their inherent fallacy. While two views about the presence of Kirpal Singh at the scene of occurrence around 8.45 P. M. are possible, the same cannot be said regarding Ramji Dass, P. W. 6. If Kirpal Singh's evidence were to be rejected on the score that his presence at the scene of incident was doubtful, this would not as the learned Judges of the High Court have erroneously held, lead to the conclusion that Ramji Dass and Roop Lal were not with the deceased at the time of the fatal assault on him. Ramji Dass is the brother of the deceased. He was a party to the quarrel which took place earlier in the day around 6 p. m. at the taxi stand. It may be recalled that the accused had on that occasion held out a threat to deal with Ajmer Lal deceased and Ramji Dass. From the testimony of Inderjit Singh P. W. 10, it appears that the two brothers Ajmer Lal and Ramji Dass had gone away from the taxi stand about 50 minutes after the quarrel. In fact he has stated that both the accused went away from the taxi stand about 20 minutes after the quarrel and about half an hour thereafter, the deceased and his brother Ramji Dass also left the place. The High Court has construed this version of Inderjit Singh to mean that the deceased and his brother Ramji Dass went away at 7 P. m. while Ramji

Dass himself puts the time of his departure around 8 P. M. The High Court has treated this difference with regard to the time of departure in the statements of these two witnesses as a material discrepancy. We do not agree. Inderjit Singh has said that it was around 8 P. M. that both the accused returned to the taxi stand in a truck and at that time Ramji Dass and the deceased were not present at the taxi stand. It is not disputed that after their departure from the taxi stand, the deceased and his brother did not return there. The fact remains that the deceased and Ramji Dass both left for their house together from the taxi stand about one hour before the occurrence. In view of the threat held out by the accused at the taxi stand during the quarrel, the deceased was not likely to go alone particularly after night-fall to his house. The same would be the state of Ramji Dass's mind. Roop Lal is the brother-in-law of Ramji Dass. It is in evidence that he drives one of the taxis belonging to these two brothers. Admittedly the deceased was not in any vehicle at the time when he received the fatal shots. The place of occurrence is not in dispute. He was at the material time about 160 yards from the building in the separate apartments of which the two brothers were residing. The presence of Ramji Dass in the company of the deceased at the material time was thus highly probable. It was he who had lodged the First Information Report in the Police Station at Industrial Area, Ludhiana at 9.40 P.M. Within less than two hours of the registration of the case, a copy of this First Information had reached the Magistrate. The names of the three eye-witnesses, the accused and all other material particulars of the case find mention in the First Information Report. The version given by Ramji Dass at the trial was consistent in material particulars with what he had said in the First Information Report.

22. We cannot lose sight of the fact that Ramji Dass and Roop Lal being close relations were highly interested in the prosecution. There was no love lost between Ramji Dass and the deceased on one hand and both the accused on the other. In a

case of this kind, therefore particularly when sitting in appeal over a judgment of acquittal recorded by the High Court, it will not be safe to act upon his testimony without corroboration from independent sources against each of the two accused. The circumstances enumerated above furnish cogent corroboration so far as the complicity of Jarnail Singh in the commission of murder is concerned.

23. From the record it emerges that only one rifle Exh. P-1 was used in the commission of the crime. Dr. Puran Singh has opined that two bullet-wounds found on the dead body of Ajmer Lal could be the result of two separate bullets fired from the same rifle. The fact that the dimensions of the two wounds of entry are identical also points towards that conclusion. Further, only one fire-arm has been recovered by the Investigating Officer in this case. It is the rifle Exh. P-1 which is a licensed weapon belonging to Mukhtiar Singh accused. The crime cartridge C-1, according to the opinion of the ballistic expert Shri J. K. Sinha, had been fired through this rifle Exh. P-1. Thus both the fatal shots were fired from this rifle either by Mukhtiar Singh or. by Jarnail Singh. It is not disputed that the firing at the taxi-stand about one hour preceding the occurrence was done by Jarnail Singh. On that occasion Jarnail Singh alone had alighted from the truck and fired a shot. Inderjit Singh who has deposed to that fact does not say that there were two rifles or two fire-arms with the accused at that time. The accused had come in search of the deceased and his brother Ramji Dass and they had gone away in the truck obviously to pursue the deceased and his brother. According to Inderjit Singh they went over the Jagraon-Overbridge. This way leads to the locality known as Janta Nagar where the house of the deceased is situate. Again, besides the empty cartridge Ex. C-1 the turban of Jarnail Singh was found at the scene of crime. Jarnail Singh has given a false version with regard to the occurrence and the circumstances in which his turban fell down and was left at the spot. The totality of the circumstances coupled with the ocular account

given by Ramji Dass firmly leads to the conclusion that the fatal shots were fired from this rifle by Jarnail Singh. So far as Jarnail Singh is concerned the charge against him has been proved to the hilt.

24. The question remains whether Mukhtiar Singh is also vicariously liable by the operation of S. 34 for the act of Jarnail Singh. The prosecution case as put by Ramji Dass at the trial was that both Mukhtiar Singh and Jarnail Singh were armed with rifles from which they actually fired one bullet each and both those bullets found their mark. Since firing attributed to Mukhtiar Singh with another rifle has not been confirmed, if not completely discounted by the independent evidence on record, we would not, as a matter of caution, interfere with his acquittal recorded by the High Court.

25. In the light of what has been said above, we would partly allow this appeal, set aside the acquittal of Jarnail Singh and convict him under S. 302, Penal Code and sentence him to imprisonment for life for the murder of Ajmer Lal. We dismiss the appeal against Mukhtiar Singh.

Appeal partly allowed.

AIR 1975 SUPREME COURT 2008

(From: Rajasthan)*

A. N. RAY, C. J., M. H. BEG AND
Y. V. CHANDRACHUD, JJ.

Panna Lal and others etc., etc.,
Appellants v. State of Rajasthan and
others, Respondents.

Civil Appeals Nos. 1213-1220,
1353, 1354, 1385-1387, 1387-1388, 1564,
1566-1567, 1579-1581, 1608, 1622, 1623-
1624, 1626, 1630, 1647, 1764, 1862,
1432, 1433 and 1871 of 1974. D/- 1-8-
1975.

(A) Rajasthan Excise Act (2 of
1950), Sections 30, 24, 28 — Country
liquor licenses granted under systems
of Guarantee and Exclusive Privilege
— Licensee whether liable to pay the
stipulated lump sum mentioned in the
license — Enforcing payment of
guaranteed sum whether amounts to

*(W. P. Nos. 1497-1503 and 1505 of
1971, D/- 9-5-1974 Raj.)

HS/HS/C865/75/LGC

recovery of excise duty. (Rajasthan
Excise Rules (1956), R. 67A — Issue
price).

The license fee stipulated to be paid by the liquor contractors is the price or consideration or rental which the Government charges from the licensees for parting with its privilege in stipulated lump sum payment and is a normal incident of a trading or business transaction. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the State confers the right to vend liquor by farming out either by auction or by private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government. AIR 1975 SC 360; AIR 1975 SC 1121 and ILR (1969) 2 Ker 71, Followed. (Para 20)

The licenses granted under both the Guarantee system and the Exclusive privilege system to the liquor contractors are contracts between the parties. The licensees fully exploited to their advantage the contracts to the exclusion of others. The lump sum amount voluntarily agreed to by the licensees to pay to the State are not levies of excise duty but are in the nature of lease money or rental or lump sum amount for the exclusive privilege of retail sales granted by the States to the licensees.

(Paras 21, 26)

There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licenses, for these reasons. First the licenses were granted to the licensees, the liquor contractors, after offer and acceptance or by accepting their tenders or auction bid. The licensees stipulated to pay lump sum amounts as the price for the exclusive privilege of vending country liquor. The licensees agreed to pay what they considered to be equivalent to the value of the right. Second, the stipulated payment has no relation to the production or manufacture of country liquor except that it enables

the licensee to sell it. The country liquor is produced by the distilleries. Under Section 28 of the Act and under the relevant duty notifications the excise levy is on the manufacture and not on the sale or retail of liquor. The taxable event is not the sale of liquor to the contractors but the manufacture of liquor. The liability for excise is on the distillery and the liquor contractors are not concerned with it. Before 1965 there was no excise duty. The licensees were required to pay the guaranteed amount. After the imposition of excise duty the position is not altered because the privilege of selling is granted by auction or by offer and acceptance before the goods came into existence. Excise contracts are settled in the preceding year. Third, the stipulated amounts payable by the licensees have relation only to what the licensees foresaw they could recoup by the sale of country liquor from the liquor shops licensed to them. There are several varieties of country liquor and rates of excise levy on these varieties are different. The licensees are not bound to take any particular quantity or any particular quality of any variety. Without reference to any quantity or quality, it is impossible to predicate the alleged levy of excise duty.

(Para 27)

The contractual obligation of the liquor contractors to pay the stipulated amounts is not dependent on the quantum of liquor sold by them which is relevant only for the purpose of remission to be earned by them under the license. No excise duty is charged or chargeable on undrawn liquor under the license. The lump sum amount payable for the exclusive privilege is not to be confused with the issue price. In essence what is sought to be recovered from the liquor contractors is the short-fall occasioned on account of failure on the part of liquor contractor to fulfil the terms of license.

(Paras 30, 31)

Before imposition of excise duty in 1965, the issue price did not have even a notional component of excise duty under Issue Price Rules. Therefore, no excise duty could be attributed to the contractual amounts pay-

able by the licensees. The references to excise duty in licenses under the guarantee system or exclusive privilege system prevalent subsequent to the year 1965 are only for the purposes of adjustment or concession as a unit of measure. It is not an excise duty currently imposed or levied in the year of the license that is being collected with regard to undrawn liquor because the adjustment of issue price is with reference to the issue price prevailing in the preceding year. (Para 28)

The lump sum amount stipulated under the agreement is not to be equated with issue price. The issue price is payable only when the contractors take delivery of a particular quantity of specified value of country liquor. The issue price relates only to liquor drawn by the contractors and does not pertain to undrawn liquor. No excise duty is or can be collected on undrawn liquor. So far as the liquor contractors are concerned, they pay the price of the liquor even though that price may include the component of excise duty in respect of which they have no direct liability. (Para 29)

The agreements give the liquor contractors an exclusive privilege to sell country liquor in a specified area for the period fixed for a stipulated sum of money for enjoying the privilege. If the contractors do not sell any liquor they are yet bound to pay the stipulated sum. If they sell liquor they are given the benefit of remission in the price of the exclusive privilege. The measure for this remission is the excise duty leviable to the extent that the liquor contractors can neutralise the entire amount of exclusive privilege in the excise duty payable by them. If the contractors fail to lift adequate quantity of liquor and thereby fail in neutralising the entire price of exclusive privilege the contractors are not called upon to pay excise duty. (Para 34)

Cases Referred: Chronological Paras

AIR 1975 SC 360 = (1975) 1 SCC 29

20
AIR 1975 SC 1121 = 1975 Tax LR

1569
20
AIR 1972 SC 1816 = (1972) 3 SCR 784

AIR 1971 SC 517 = (1971) 1 SCR 844 33
 ILR (1969) 2 Ker 71 = 1969 Ker LJ 22
 289
 AIR 1967 SC 1512 = (1967) 1 SCR 24
 548
 AIR 1954 SC 220 = 1954 SCR 873 25
 AIR 1939 FC 1 = 1939 FCR 18 23

Mr. A. K. Sen, Sr. Advocate (Mr. B. D. Sharma, Advocate with him) for Appellants in C. A. Nos. 1213-1220 and 1862 of 1974. Mr. B. D. Sharma Advocate, for Appellants in C. A. Nos. 1353, 1354 and 1647 of 1974. M/s. Badri Das Sharma and S. R. Srivastava, Advocates, for Appellants in C. A. Numbers 1623, 1432, 1433 and 1871 of 1974. Mr. D. V. Patel, Sr. Advocate, (Mr. S. S. Khanduja, Advocate, with him), for Appellants in C. A. No. 1385. Mr. S. S. Khanduja, Advocate, for Appellants in C.As. Nos. 1386-1388, 1530, 1564, 1566, 1567, 1579-1580, 1581, 1608, 1622, 1624, 1626, 1630 and 1764 of 1974. Dr. L. M. Singhvi, Advocate-General for Rajasthan (Mr. S. M. Jain, Advocate with him), for Respondents in all the Appeals.

Judgment of the Court was delivered by

RAY, C. J.:— These appeals by certificate turn on the question as to whether the excise license granted to the appellants rendered them liable to pay the stipulated lump sum mentioned in the license.

2. These appeals relate to country liquor licenses (a) for the years 1962-63 and 1963-64; (b) for the years 1967-68 and (c) for the years 1968-69, 1969-70 and 1970-71.

3. For the years 1962-63 and 1963-64 licenses for sale of country liquor were given to contractors under a guaranteed system. There was a total guaranteed amount. Where the contractors failed to fulfil the guaranteed amount and there was a short-fall, demand notices were issued for the total short-fall.

4. For the years 1967-1968, 1968-69 and 1969-70 the liquor contractors obtained licenses for sale of country liquor at a stipulated amount of license fee under the exclusive privilege system. Where the contractors failed to pay the guaranteed amount there was a demand for a short-fall.

5. The appellants who were the liquor contractors challenged the demand for short-fall of the guaranteed amount. The liquor contractors contended that what was being demanded as short-fall amounted to levy of excise duty. The State, on the other hand, contended that what was being realized from the liquor contractors was the guaranteed amount in the licence for the exclusive privilege of selling country liquor.

6. It may be stated here that there was no levy of excise duty prior to 6 March, 1964. After the imposition of excise duty, the licenses during the year 1967-68 and thereafter were issued for a guaranteed sum under the exclusive privilege system. The State contended that what was being demanded as short-fall was the stipulated guaranteed amount which was excise revenue.

7. The licenses granted upto the year 1967-68 contained the following principal conditions:—

(1) The licensee guarantees to the Governor of Rajasthan State that he, in the year concluding on.....March shall receive from the Government and sell such quantity of wine of which issue price shall not be less than Rs..... (hereinafter known as the "guaranteed price" which are prevailing on.....March.....).

(2) The liquor shall be supplied to the licensee at the prevailing issue price, but the difference between such issue price and the issue price calculated at the prevailing rate on 31 March..... shall not be included in the guarantee amount.

(3) The licensee will have to pay the shortfall, if any, between the price of the liquor obtained by him upto the end of any month at the issue price of 31 March..... and the amount of guarantee multiplied by the months, which have passed and divided by eleven at the godown by the tenth of the next month.

(4) In case of non-payment, the license will be cancelled and when cancelled this way, the abovementioned difference shall be recovered from security, cash deposits and remnant, if any, shall be recovered from the licensee and the surety jointly and severally.

8. From 1968-69 the licenses contained, inter alia the following principal conditions:—

(1) The licensee will have to deposit Rs..... as license fee under Section 24 of the Rajasthan Excise Act, 1950 for his exclusive privilege as fixed by the Excise Commissioner. From it the amount of excise duty will be adjusted towards the payment of the amount for the exclusive privilege but this adjustment will be limited to the payment of the amount for the exclusive privilege. The licensee will have to deposit the aforesaid amount in 12 equal instalments and will have to deposit the monthly instalments by the 10th of the next month in Government Treasury. The fees deposited by the licensee-holder in that month in the form of the component of the issue price will be treated as excise duty under the instalment of the license-fee.

(2) If the license-holder does not deposit the instalments for any two months as laid down in the aforesaid condition within the prescribed period then the officer issuing the license will have the right to realise the amount of that instalment from the cash security of the licensee-holder or from his surety. In addition to this, he will also have the right to cancel the license of the licensee.

9. The appellants repeated the contention which had been advanced before the High Court that when the State Government wanted to enforce the guaranteed sum it amounted to recovery of excise duty by license. The appellants contended that the issue prices in the license are exclusive of prices of container but inclusive of excise duty levied under the Government notification and therefore, enforcement of the guaranteed amount meant realisation of excise duty.

10. The appellants contended that unfulfilled guarantee amount which is sought to be recovered from the appellants is not balance of lump sum payment as price of exclusive privilege because the Government license sanctioning guarantee system stated that "the licensee shall guarantee in respect of the year.....in-

come to the Government on account of the issue price of country liquor issued for sale at his shop during the year....." It was, therefore, said by the appellants that a promise to give income to the Government by purchasing a minimum quantity of liquor from the Government warehouse was not equivalent to the payment of sum of money in consideration of grant of such privilege within the meaning of Section 30 of the Rajasthan Excise Act.

11. The appellants contended that the amounts of money sought to be recovered from the licensee under the exclusive privilege system introduced from the year 1968 as well as under the guarantee system prevalent prior to the year 1968 are nothing but demands for excise duty on unlifted liquor. The reasons advanced by the appellants are that under the exclusive privilege system of licensing introduced in 1968 the amount was agreed to be paid and deposited specifically towards excise duty given as a component of the issue price for the supply of country liquor and was agreed to be adjusted in the amount of the exclusive privilege.

12. The appellants also submitted that the word 'issue price' was a composite name for 'cost price of liquor and 'excise' duty leviable thereon' and therefore, an agreement by the licensees under the guarantee system to pay 'issue price' was tantamount to an agreement to pay 'cost price' and 'excise duty' as distinct items though described as issue price.

13. The appellants contended that licenses under both systems of Guarantee and Exclusive Privilege contain a term about the payment and adjustment of excise duty and under both systems 'excise duty' is a distinct item agreed to be paid as such in terms of the licenses.

14. The licenses were granted under the Rajasthan Excise Act, 1950 (referred to as the Act).

15. Section 24 of the Act confers power on the Excise Commissioner to grant any person a license for the exclusive privilege—

(1) of manufacturing or supply by wholesale, or of both, or

(2) of selling by wholesale, or by retail, or

(3) of manufacturing or of supplying by wholesale, or of both, and of selling by retail,

any country liquor or intoxicating drug within any local area of those parts of the State of Rajasthan to which the Act extends.

16. Section 28 of the Act provides that an excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified area, on any excisable article imported or exported, or transported or manufactured, cultivated or collected under any license granted under the Act, or manufactured in any distillery, pot-still or brewery established or licensed under the Act. The Explanation to Section 28 provides that duty may be imposed under this section at different rates according to the places to which any excisable article or intoxicating drug is to be removed for consumption or according to the varying strength and quality of such article.

17. Section 29 of the Act provides that subject to such rules regulating the time, place and manner of payment, as the State Government may prescribe such duty may be levied in such one or more ways as the State Government may by notification in the Official Gazette direct.

18. Section 30 of the Act provides that instead of or in addition to any duty leviable under Chapter V (which contains Sections 28, 29 and 30), the Excise Commissioner may accept payment of a sum in consideration of the grant of the license for exclusive privilege under S. 24.

19. The Rajasthan Excise Rules, 1956 provide in Rules 67I, 67J, 67K and 67L the different forms of procedure for grant of exclusive privilege. Rule 67I provides that license for exclusive privilege of selling by retail of country liquor within any local area under Section 24 of the Act may be granted on condition of payment of such lump sum instead of, or in addition to excise duty, as may be determined by the Excise Commissioner and subject to such other terms and

conditions as may be laid down by him. Rule 67J provides that a license under Rule 67I may be granted by way of allotment by negotiation in accordance with the procedure laid down in sub-rules (2) to (4) of Rule 67J. Rule 67K provides that subject to such general or special directions as may be issued by the Excise Commissioner from time to time, the District Excise Officer may put the license under Rule 67I to auction for any area. In such an auction the Presiding Officer shall call upon for lump sum payment for exclusive privilege payable instead of or in addition to excise duty as may be directed by the Excise Commissioner. Rule 67L provides that the Excise Commissioner may at his discretion grant license under Rule 67I for any area by negotiation with any third party. There is a proviso that highest bidder or highest tenderer if any shall be given a chance to make a higher offer unless he has been debarred from holding license or has rejected the offer under Rule 67 (2).

20. The license fee stipulated to be paid by the appellants is the price or consideration or rental which the Government charges from the licensees for parting with its privilege in stipulated lump sum payment and is a normal incident of a trading or business transaction. This Court in the recent decision in *Nashirwar v. State of Madhya Pradesh* reported in (1975) 1 SCC 29 = (AIR 1975 SC 360) and the unreported decision D/- 21-1-1975 in Civil Appeal No. 365 of 1969 = (Reported in AIR 1975 SC 1121), *Hari Shankar v. Deputy Excise and Taxation Commr.* held that the State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. The nature of the trade is such that the State confers the right to vend liquor by farming out either by auction or by private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.

21. The licenses in the present case are contracts between the

parties. The licensees voluntarily accepted the contracts. They fully exploited to their advantage the contracts to the exclusion of others. The High Court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High Court were that the licensees accepted the licence by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms.

22. The legal position is also correctly stated in *Madhavan v. Asst. Excise Commr., Palghat*, ILR (1969) 2 Ker 71, where it is said that the rental charged by the State for licenses is the consideration for the privilege of vending liquor. The licensees in the present appeals voluntarily contracted to pay the guaranteed sum of the stipulated lump sum for the exclusive privilege to vend liquor.

23. In the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 case, reported in 1939 FCR 18 = (AIR 1939 FC 1), it has been said that in several Acts by which excise duties are imposed it is provided that the duty is to be paid by the manufacturer or producer on the issue of the excisable articles from the place of manufacture or production and there is no provision for the imposition of an excise duty on retail sales. Many Acts provide for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for privilege or as consideration for the temporary grant of a monopoly, but these are clearly, not excise duties or anything like them. (See 1939 FCR 18 at pp. 53 and 54) = (AIR 1939 FC 1 at p. 12).

24. This Court in *M/s. Guruswamy & Co. v. State of Mysore*, (1967) 1 SCR 548 = (AIR 1967 SC 1512) considered the question whether the payment of shop rent for the exclusive privilege of sale of liquor in a specified shop is an excise duty. In *Guruswami's case* (supra) the petitioners paid shop rent or the 'kist' for

a group of toddy shops amounting to Rs. 3,61,116 a month. This 'kist' amount was determined at the auction sale of exclusive privilege of vending toddy in the shops. The notification for auction mentioned rates of duty, price, etcetera on the several kinds of excisable articles. The notification also mentioned that health cess at a certain rate shall also be payable on the shop rent and tree tax on toddy and other duties of excise levied. The petitioners challenged the authority of the State to levy and collect health cess. The main ground was that the health cess was in reality a tax and not a mere cess. This Court said that the true character or nature of levy in *Guruswami's case* (supra) was that it was a payment for the exclusive privilege of selling toddy. The payment had no close relation to the production or manufacture of toddy. The only relation the levy had to production or manufacture was that it enabled the licensee to sell it. The excise duty is paid on toddy in the form of tree tax. He who keeps toddy pays tree tax. The privilege of selling toddy was auctioned well before the goods came into existence. In view of these characteristics the health cess was found not to be excise duty. The taxable event in regard to the health cess was not the manufacture or production of goods but the acceptance of the license to sell the goods.

25. A Bench decision of this Court in *State of Orissa v. Harinarayan Jaiswal*, (1972) 3 SCR 784 = (AIR 1972 SC 1816) considered the grant of exclusive privilege of manufacture and sale of country liquor by licensees. This Court held that the power given to the Government to sell the exclusive privilege in such manner as it thinks fit is a very wide power. In *Cooverjee B. Bharucha v. Excise Commr. and the Chief Commr., Ajmer*, 1954 SCR 873 = (AIR 1954 SC 220) this Court held that an important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of State revenues. The power of the Government to sell the exclusive privilege is by public auction or by negotiation. The fact that the price

fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale is a mode of raising revenue.

26. The decisions of this Court establish that the lump sum amount voluntarily agreed to by the appellants to pay to the State are not levies of excise duty but are in the nature of lease money or rental or lump sum amount for the exclusive privilege of retail sales granted by the States to the appellants.

27. There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licenses, for these reasons. First, the licenses were granted to the appellants after offer and acceptance or by accepting their tenders or auction bid. The appellants stipulated to pay lump sum amounts as the price for the exclusive privilege of vending country liquor. The appellants agreed to pay what they considered to be equivalent to the value of the right. Second, the stipulated payment has no relation to the production or manufacture of country liquor except that it enables the licensee to sell it. The country liquor is produced by the distilleries. Under Section 28 of the Act and under the relevant duty notifications the excise levy is on the manufacture and not on the sale or retail of liquor. Under the duty notifications no excise duty is levied or collected from the liquor contractors who are liable only to pay the price of liquor. The taxable event is not the sale of liquor to the contractors but the manufacture of liquor. What the liquor contractors pay in consideration of the licence is a payment for the exclusive privilege for selling country liquor. The liability for excise is on the distillery and the liquor contractors are not concerned with it. Before 1965 there was no excise duty. The appellants were required to pay the guaranteed amount. After the imposition of excise duty the position is not altered because the privilege of selling is granted by auction or by offer and acceptance before the goods came into existence. Excise contracts are settled in the preceding year. Third, the stipulated amounts pay-

able by the appellants have relation only to what the appellants foresaw they could recoup by the sale of country liquor from the liquor shops licensed to them. There are several varieties of country liquor and rates of excise levy on these varieties are different. The appellants are not bound to take any particular quantity or any particular quality of any variety. Without reference to any quantity or quality, it is impossible to predicate the alleged levy of excise duty.

28. Before imposition of excise duty in 1965, the issue price did not have even a notional component of excise duty under Issue Price Rules. Therefore, no excise duty could be attributed to the contractual amounts payable by the appellants. The references to excise duty in licenses under the guarantee system or exclusive privilege system prevalent subsequent to the year 1965 are only for the purposes of adjustment or concession as a unit of measure. It is not an excise duty currently imposed or levied in the year of the license that is being collected with regard to undrawn liquor because the adjustment of issue price is with reference to the issue price prevailing in the preceding year. Rule 67-A of the Rajasthan Excise Rules, 1956 defines value as the price current on the 1st January preceding the financial year to which the guarantee relates. Under Rule 67-A licenses for retail shops of country liquor under the guarantee system may be granted to persons guaranteeing to draw from a Government warehouse and sell in a financial year or part thereof, country liquor of a specified value, called the 'amount of guarantee'. The explanation to Rule 67-A is that 'value' for the purpose of that rule shall be the total issue price at a Government warehouse calculated at the rate of such price current on the first day of January preceding the financial year to which the guarantee relates. The licenses under the guarantee system are granted either by inviting tenders or by auction or by negotiation. The amount of guarantee under Rule 67-A shall be (a) where a license is granted by inviting tenders the

amount of the tender accepted for the grant of the license; (b) where a license is granted by auction the amount of the bid accepted for the grant of the license; and (c) where a license is granted by auction or negotiation, the amount of guarantee shall be the amount determined by the Excise Commissioner and accepted by the licensee.

29. The lump sum amount stipulated under the agreement is not to be equated with issue price. The issue price is payable only when the contractors take delivery of a particular quantity of specified value of country liquor. The issue price relates only to liquor drawn by the contractors and does not pertain to undrawn liquor. No excise duty is or can be collected on undrawn liquor. The issue price is the price at which country liquor is sold to the liquor contractors. So far as the liquor contractors are concerned, they pay the price of the liquor even though the price may include the component of excise duty in respect of which they have no direct liability. Illustrations may be found in case of a person buying a match-box or a motor car or a refrigerator. When the purchaser pays the price of a match-box, or a motor car or a refrigerator the price includes excise duty levied and collected on the manufacture of these goods. The price of goods necessarily includes different components but the price a buyer pays is different from duties and taxes paid or payable by the manufacturers. The incidence of all the components of cost and taxes is inevitably passed on to the consumer. What the consumer pays is the price of the goods and not the antecedent components as such.

30. The licenses after stipulating an agreed sum of money which is payable by the licensees under the licenses provides a scheme of remission. The liquor contractor is given a remission in the matter of his obligation to pay the stipulated amount to the extent of the excise duty component of the issue price paid by him. The excise duty component of the issue price is, therefore, only a measure of the quantum or extent of the concession or the remission to be

given to the liquor contractor. The concession is not what is paid by the contractor to the State but it is a remission or a reduction in the stipulated amount for exclusive privilege allowed by the State to the contractor. The lump sum amount payable for the exclusive privilege is not to be confused with the issue price. In essence what is sought to be recovered from the liquor contractors is the shortfall occasioned on account of failure on the part of liquor contractor to fulfil the terms of license.

31. The contractual obligation of the appellants to pay the stipulated amounts is not dependent on the quantum of liquor sold by them which is relevant only for the purpose of remission to be earned by them under the license. No excise duty is charged or chargeable on undrawn liquor under the license. To suggest that the license obliges the contractors to pay excise duty on undrawn liquor is totally misreading the conditions of the license. The excise duty is collected only in relation to the quantity and quality of the country liquor which is drawn. No excise duty can be predicated in respect of undrawn liquor.

32. Adjustment by way of reduction in the contractual liability of the appellants to the extent of a specific and quantified portion of the issue price is purely a measure of concession or remission and is a method of calculation. The question of adjustment arises only when liquor is drawn, otherwise the formula of remission does not come into the picture at all.

33. The appellants relied on the decision of this Court in *Bimal Chandra v. State of Madhya Pradesh*, (1971) 1 SCR 844 = (AIR 1971 SC 517) in support of the contention that the attempt on the part of the State to enforce the full guaranteed amount or stipulated sum is collecting excise duty. In *Bimal Chandra Banerjee's case* (supra) a levy of excise duty on undrawn liquor was imposed in terms by the State Government by a notification amending the Rules and by an alteration in the conditions of the license. It was provided that certain minimum quantity

of liquor would have to be withdrawn by each contractor who was to be liable to make good every month the deficit monthly average of the total minimum duty on or before the 10th of each month following the months to which the deficit duty relates. The decision there was that in imposing the excise duty on undrawn liquor by the impugned notification, the State Government was exercising powers which it did not possess. In the present case, the State Government has not imposed any excise duty on the licensee. On the contrary, the license only takes into account the excise duty component of the issue price for the purposes of giving a concession or remission to the contractors. In Bimal Chandra Banerjee's case (supra), the impugned notification was assailed on the ground that it exceeded the legislative competence of the State. No such question arises here. The scheme of remission in the present case is that if the liquor contractor purchased liquor of the value, the excise duty whereof equalled the price of exclusive privilege, the liquor contractor is to be given credit therefor.

34. The agreements give the liquor contractors an exclusive privilege to sell country liquor in a specified area for the period fixed for a stipulated sum of money for enjoying the privilege. If the contractors do not sell any liquor they are yet bound to pay the stipulated sum. If they sell liquor they are given the benefit of remission in the price of the exclusive privilege. The measure for this remission is the excise duty leviable to the extent that the liquor contractors can neutralise the entire amount of exclusive privilege in the excise duty payable by them. If the contractors fail to lift adequate quantity of liquor and thereby fail in neutralising the entire price of exclusive privilege the contractors are not called upon to pay excise duty.

35. For these reasons the contentions of the appellants fail. The appeals are dismissed save what follows hereinafter in Civil Appeal Number 1433 of 1974 and Civil Appeal No. 1871 of 1974. Parties to pay and bear their own costs as they did in the High Court.

36. In Civil Appeal No. 1433 of 1974 there is a short supply of liquor in respect of the year 1963-64. In Civil Appeal No. 1871 of 1974 there is a short supply of liquor in respect of the year 1967-68. In these appeals for these two years, the order will be the same as order dated 29-8-1974 in Civil Appeal Nos. 1170, 1171 and 1176 of 1974 with the modification that if there has been any interim stay in these matters, the interim stay will stand vacated.

Order accordingly.

AIR 1975 SUPREME COURT 2016

(From: (1969) 82 Mad LW 259)

Y. V. CHANDRACHUD, R. S.
SARKARIA AND A. C.
GUPTA JJ.

The Madurai District Central Co-operative Bank Ltd., Appellant v. The Third Income Tax Officer, Madurai, Respondent.

Civil Appeal No. 1795 of 1970,
D/- 28-7-1975.

(A) Constitution of India, Article 246 (1), Sch. 7 List 1 Entry 82 — Parliament is competent to introduce charging provision in Finance Act — Finance Acts are not necessarily temporary Acts — (i) Finance Act (1963), Section 2 — (ii) Interpretation of Statutes).

The Income-tax Act, 1961 and the annual Finance Acts are enacted by the Parliament in exercise of the power conferred by Article 246 (1) read with Entry 82 of List I. Though it will be unconventional for the Parliament to amend a taxing statute by incorporating the amending provision in an Act of a different pith and substance, such a course will not be unconstitutional. (Para 12)

True, that the Income-tax Act is a permanent Act while the Finance Acts are passed every year and their primary purpose is to prescribe the rates at which the income-tax will be charged under the Income-tax Act. But that does not mean that a new and distinct charge cannot be introduced under the Finance Act. What

is not 'income' under the Income-tax Act can be made 'income' by a Finance Act. An exemption granted by the Income-tax Act can be withdrawn by the Finance Act or the efficacy of that exemption may be reduced by the imposition of a new charge. Subject to constitutional limitations, additional tax-revenue may be collected either by enhancing the rate or by the levy of a fresh charge. The Parliament, through the medium of a Finance Act, may as much do the one as the other. The Finance Acts though annual Acts are not necessarily temporary Acts for they may and often do contain provisions of a general character which are of a permanent operation. Thus, the Parliament is competent to introduce a charging provision in a Finance Act. (1955) 27 ITR 389 (Cal), AIR 1959 SC 771 and AIR 1966 SC 619, Followed; (1969) 82 Mad LW 259, Affirmed.

(Paras 13, 15)

(B) Constitution of India, Article 246 (1) — Competency of Parliament to take away exemption under Section 81 (i) (a) of Income-tax Act by making provision in Finance Act—
(i) Income-tax Act (1961) (as it stood prior to its amendment by Act 20 of 1967) Section 81 (i) (a)—(ii) Finance Act (1963), Section 2).

Even if Section 81 (1) (a) of Income-tax Act were to grant an express exemption from surcharges on business-income, the Parliament could take away that exemption or curtail the benefit available under it by making an appropriate provision in the Finance Act. If while legislating on a matter within its competence the Parliament can grant an exemption, it is surely competent to it to withdraw that exemption in exercise of the self-same power.

(Para 20)

The Finance Act, 1963, like its annual counterparts, contains provisions not only prescribing rates of taxation but making extensive and important modifications in the Income-tax Act itself. Such innovations fall within the legitimate scope of Finance Acts. AIR 1959 SC 771, Followed; (1969) 82 Mad LW 259, Affirmed.

(Para 21)

(C) Finance Act (1963), Sections 2, 3, Sch. I Part I Para A (Surcharge

on Income-tax) Cl. (c) — Scope — Surcharge is relatable to Art. 271 of Constitution — Additional surcharge — Calculation of — Residual income — Ascertainment — Mode — Additional surcharge is a distinct charge — Applicability of Section 156 of Income-tax Act—1972 Tax LR 57 (All), Overruled — ((i) Constitution of India, Art. 271 — (ii) Income-tax Act (1961), (as it stood prior to its amendment by Act 20 of 1967) Ss. 81 (i) (a), 156).

By Art. 271, notwithstanding anything in Arts. 269 and 270, Parliament may increase any of the duties or taxes referred to in those Articles by a surcharge for purposes of the Union. Surcharges leviable under Section 2 (1) of the Finance Act, 1963 are relatable to Art. 271 of the Constitution. (Para 23)

Both the purpose and concept of the additional surcharge are different from those of income-tax. The additional surcharge is leviable exclusively for purposes of the Union so that the entire proceeds of such surcharge may, under Art. 271 of the Constitution, form part of the Consolidated Fund of India. Taxes and duties mentioned in Art. 269 (1), though levied and collected by the Government, have to be assigned to the States under Art. 269 (2). Then again, the additional surcharge levied for purposes of the Union is to be calculated not on total income like the income-tax but it is to be calculated on the residual income. (Para 24)

The residual income is not the same as the business income of a co-operative bank, which is exempt under Section 81 (i) (a) from income-tax. For ascertaining the residual income, the total income is reduced by the amount of capital gains and further by the amount of tax (other than additional surcharge) which would have been charged on such reduced total income on the assumption that the whole of it was liable to be brought to tax. (Para 24)

Section 3 of the Finance Act, by its terms, has precedence over anything contained in Chapter VII or VIII-A or in Section 110 of the Income-tax Act or Section 2 (5) of the Finance Act itself. Additional surcharge is treated in this way as falling in a separate category. Thus,

additional surcharge is a distinct charge, not dependent for its liability on the assessee's liability to pay income-tax or super-tax. The income-tax computed at a certain rate is by Section 2 (1) (a) (ii) to be further increased by an additional surcharge for purposes of the Union.

(Paras 25, 26)

Therefore, the assessee (a Co-operative bank) is liable to pay additional surcharge on its non-business income. This is so, not because additional surcharge is payable by law on non-business income but because it is payable on residual income and residual income, by definition, includes non-business income as reduced.

(Para 27)

If an assessee is liable to pay additional surcharge but no income-tax or super-tax, the notice of demand under S. 156 of the Income-tax Act will mention the particular amount payable as tax due. The Income-tax Act exempts the assessee's business income from income-tax and super-tax. The Finance Act brings to tax its residual income.

(Paras 28, 29)

Thus, the additional surcharge though levied by the Finance Act, 1963 independently of the Income-tax Act, is but a mode of levying tax on a portion of the assessee's income computed in accordance with the definition in Section 2 (8) thereof. Therefore, the notice of demand under Section 156 of the Income-tax Act can lawfully call for the payment of amount due from an assessee by way of additional surcharge. (1969) 82 Mad LW 259 Affirmed; 1972 Tax LR 57 (All), Overruled. (Para 30)

Cases Referred: Chronological Paras

AIR 1973 SC 2172 = 88 ITR 169 =	
1973 Tax LR 1139	28
1972 Tax LR 57 = 83 ITR 895 (All)	30
AIR 1972 SC 491 = 83 ITR 346 =	
1972 Tax LR 242	18
AIR 1966 SC 619 = (1966) 2 SCR	22
	14
AIR 1966 SC 1370 = (1966) 2 SCR	
688	13
(1961) 42 ITR 49 (SC)	28
AIR 1959 SC 771 = 36 ITR	65
	13, 21
AIR 1957 SC 918 = 32 ITR 688	28
(1955) 27 ITR 389 (Cal)	13

Mr. S. T. Desai, Sr. Advocate, (Mr. T. A. Ramachandran, Advocate with him), for Appellant; Mr. N. D. Karkhanis, Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Respondent.

Judgment of the Court was delivered by

Y. V. CHANDRACHUD, J.:— The appellant filed a writ petition in the High Court of Madras under Article 226 of the Constitution to challenge an assessment order dated August 22, 1963 made by the respondent, levying additional surcharge on its residual income. The High Court dismissed the writ petition by its judgment dated October 15, 1968 but it has granted to the appellant a certificate to file an appeal to this Court under Article 133 (1) (a) and (c) of the Constitution.

2. The appellant is a co-operative society engaged in the business of banking. Its total income for the assessment year 1963-64 was computed by the respondent at Rupees 10,00,098. Out of this, Rs. 9,48,335 was its business income while Rupees 51,763 was its income from other sources. Since, under Section 81 (i) (a) of the Income-tax Act, 1961 a co-operative society engaged in the business of banking is not liable to pay income-tax on its business income, the tax amounting to Rs. 23,845.47 was charged on Rs. 51,763 only though for the purposes of rate the income was taken at Rs. 9,48,335 in view of Section 110 of the Act. Applying the Finance Act, XIII of 1963, the respondent computed the residual income of the appellant at Rs. 5,39,386 and levied on it an additional surcharge of Rs. 52,828.60. Thus the total tax levied on the appellant came to Rs. 23,845.47 plus Rs. 52,828.60 i. e., Rs. 76,674.07.

3. The main grievance of the appellant before the High Court was that where its taxable income was only Rs. 51,763, a tax of Rs. 76,674.07 was imposed on it. The relevant provisions of the Finance Act were accordingly said to be invalid as they could not subject to additional surcharge an income which was exempt from tax under the provisions of the Income-tax Act. The additional surcharge, it was contended, was intended as an

additional levy on the income-tax and had no independent existence apart from it. These contentions were rejected by the High Court and hence this appeal.

4. Section 81 of the Income-tax Act, 1961 was deleted by the Finance Act, XX of 1967, with effect from April 1, 1968 but its provisions were incorporated by the same Finance Act in Section 80P. Section 81 (i) (a) read thus:

"81. Income of co-operative societies.— Income-tax shall not be payable by a co-operative society—

(i) in respect of the profits and gains of business carried on by it, if it is—

(a) a society engaged in carrying on the business of banking or providing credit facilities to its members;"

It is indisputable that by reason of this provision, the banking income of the appellant amounting to Rupees 9.48,335 is exempt from income-tax. It is equally clear that by reason of Section 99 (1) (v) of the Act of 1961, the appellant is not liable to pay super-tax on its business income. That section provides that where the assessee is a co-operative society, super-tax shall not be payable by it on any income in respect whereof no income-tax is payable by it by virtue of the provisions of Section 81.

5. The dispute really centres round the provisions of Finance Act, XIII of 1963. The provisions of that Act which are relevant for our purpose are Sections 2 (1) (a), 2 (8), 3, Paragraph A (ii) of Part I of the First Schedule, and clause (c) of that portion of Part I, called "Surcharges on Income Tax".

6. Section 2 (1) (a) of the Finance Act, 1963 provides that:

"2. Income-tax and super-tax.— (1) Subject to the provisions of sub-sections (2), (3), (4) and (5), for the assessment year commencing on the 1st day of April, 1963,—

(a) income-tax shall be charged at the rates specified in Part I of the First Schedule and,—

(i) in the cases to which paragraphs A, B, C and E of that Part apply, shall be increased by a surcharge for purposes of the Union and, except in the cases to which the said

paragraph E applies, a special surcharge, calculated in either case in the manner provided therein; and

(ii) in the cases to which paragraphs A and C of the aforesaid Part apply, shall further be increased by an additional surcharge for purposes of the Union (hereinafter referred to as additional surcharge) calculated in the manner provided in the said Schedule;"

7. Section 2(8) provides that:

"For the purposes of paragraphs A and C of Part I of the First Schedule, the expression "residual income" means the amount of the total income as reduced by—

(a) the amount of the capital gains, if any, included therein; and

(b) the amount of tax (exclusive of additional surcharge) which would have been chargeable on such reduced total income if it had been the total income no part of which had been exempt from tax and on no portion of which deduction of tax had been admissible under any provisions of the Income-tax Act or this Act".

8. Section 3 provides that:

"Notwithstanding anything contained in the provisions of Chapter VII or Chapter VIII-A or Section 110 of the Income-tax Act or sub-section (5) of Section 2 of this Act, in calculating any relief, rebate or deduction in respect of income-tax payable on the total income of an assessee which includes any income on which no income-tax is payable or in respect of which a deduction of income-tax is admissible under any of the aforesaid provisions, no account shall be taken of the additional surcharge."

9. The First Schedule of the Finance Act, 1963 consists of three parts out of which we are only concerned with Part I. Part I which is called "Income-tax and surcharges on income-tax" consists of Paragraphs A, B, C, D and E out of which we are concerned with Paragraph A only. Clause (ii) of Paragraph A prescribes rates of income-tax for incomes accruing inter alia, to "association of persons". Since a co-operative society is an association of persons, Paragraph A of Part I would apply to the case of the appellant for the purposes of Section 2 (1) (a) (ii) of

the Finance Act of 1963, though not for the purpose of bringing its exempted business income to income-tax.

10. That portion of Part I, Paragraph A, called "Surcharges on Income Tax" provides: "The amount of income-tax computed at the rates hereinbefore specified shall be increased by the aggregate of the surcharges calculated as under". Clause (a) provides for a surcharge for the purposes of the Union at the rates mentioned in sub-clauses (i), (ii) and (iii). Clause (b) provides for the levy of a special surcharge. Clause (c) with which we are concerned provides for the levy of "an additional surcharge for the purposes of the Union calculated on the amount of the residual income" at the rates mentioned therein.

11. The grievance of the appellant, which appears to have been pressed before the High Court with some earnestness, that the tax levied upon it exceeds its taxable income can afford no true guide to the construction of the relevant provisions of the Income-tax Act or the Finance Act. Harshness of a taxing statute, apart from a possible challenge to it under Article 13 of the Constitution, cannot be an invalidating circumstance. But the grievance on this score is basically misconceived. It assumes, what has to be examined, that no part of the income exempted from income-tax and super-tax under the Income-tax Act can be brought to tax by a Finance Act. The total income of the appellant was computed at Rupees 10,00,098. By reason of sections 81 (i) (a) and 99 (1) (v) of the Income-tax Act, 1961 the appellant enjoys an exemption from income-tax and super-tax in respect of its business income which amounts to Rs. 9,48,335. The balance, viz. Rs. 51,763 which was the appellant's income from other sources was alone taxable under the Act of 1961 and a tax of Rs. 23,845.47 was imposed on that income. The Finance Act of 1963 subjects 'residual income' to certain charges and such income was computed, admittedly correctly, at Rs. 5,39,386. An additional surcharge of Rs. 52,828.60 was levied on the residual income. Thus on the as-

sumption that the Finance Act, validly and on a true interpretation, imposes the additional surcharge on residual income, the tax imposed on the appellant is Rs. 23,845.47 plus Rs. 52,828.60. The total tax of Rupees 76,674.07 thus imposed is far less than the appellant's total taxable income arrived at by the addition of its non-business income and the residual income. That leads to the inquiry first as regards the scope of a Finance Act and then as regards the interpretation of the Finance Act of 1963.

12. Learned counsel for the appellant, during the course of his arguments, gave up the challenge to the power of the Parliament to impose a new charge by a Finance Act. This concession was properly made. By Article 246 (1) of the Constitution, Parliament has the exclusive power to make laws with respect to any of the matters in List I of the Seventh Schedule. Entry 82 in List I relates to "taxes on income other than agricultural income". The Income-tax Act, 1961 and the annual Finance Acts are enacted by the Parliament in exercise of the power conferred by Article 246 (1) read with Entry 82 of List I. Once the Parliament has the legislative competence to enact a law with respect to a certain subject-matter, the limits of that competence cannot be judged further by the form or manner in which that power is exercised. Accordingly, though it would be unconventional for the Parliament to amend a taxing statute by incorporating the amending provision in an Act of a different pith and substance, such a course would not be unconstitutional.

13. Much more so can the Parliament introduce a charging provision in a Finance Act. True, as said in *Kesoram Industries and Cotton Mills Ltd. v. Commr. of Wealth Tax*, (Central) Calcutta, (1966) 2 SCR 688 at p. 704 = (AIR 1966 SC 1370 at p. 1376) that the Income-tax Act is a permanent Act while the Finance Acts are passed every year and their primary purpose is to prescribe the rates at which the income-tax will be charged under the Income-tax Act. But that does not mean that a new

and distinct charge cannot be introduced under the Finance Act. Exigencies of the Financial year determine the scope and nature of its provisions. If the Parliament has the legislative competence to introduce a new charge of tax, it may exercise that power either by incorporating that charge in the Income-tax Act or by introducing it in the Finance Act or for the matter of that in any other statute. The alternative in this regard is generally determined by the consideration whether the new charge is intended to be more or less of a permanent nature or whether its introduction is dictated by the financial exigencies of the particular year. Therefore, what is not 'income' under the Income-tax Act can be made 'income' by a Finance Act, an exemption granted by the Income-tax Act can be withdrawn by the Finance Act or the efficacy of that exemption may be reduced by the imposition of a new charge. Subject to constitutional limitations, additional tax-revenue may be collected either by enhancing the rate or by the levy of a fresh charge. The Parliament, through the medium of a Finance Act, may as much do the one as the other. In *McGregor and Balfour Ltd., Calcutta v. C. I. T., West Bengal*, (1955) 27 ITR 389 (Cal) which was affirmed by this Court in 36 ITR 65 = (AIR 1959 SC 771) Chakravarti C. J. delivering the judgment of a Division Bench observed that the Finance Acts though annual Acts are not necessarily temporary Acts for they may and often do contain provisions of a general character which are of a permanent operation.

14. In *Hari Krishna Bhargava Union of India*, (1966) 2 SCR 22 = (AIR 1966 SC 619) an assessee challenged the scheme of Annuity Deposits on the ground that the Parliament had no competence to incorporate in the Income-tax Act a provision which was substantially one relating to borrowings by the Central Government from a class of taxpayers. That scheme was introduced by Finance Act 5 of 1964 which incorporated Chapter XXII-A containing Sections 280-A to Section 280-X in the Income-tax Act, 1961. The challenge was repelled by this Court on the

ground that if the Parliament had the legislative competence to pass an Act for collecting Annuity Deposits from taxpayers, nothing contained in the Constitution disentitled it "as a matter of legislative arrangement to incorporate the provisions relating to borrowing from taxpayers in the Income-tax Act or any other statute."

15. This discussion became necessary in spite of the appellant's concession on the Parliament's legislative competence because for a proper understanding of the provisions of the Finance Act 1963, it is essential to appreciate that a Finance Act may not only prescribe rates but also introduce a new charge.

16. We will now proceed to consider the provisions of the Finance Act, 1963 under which the respondent has levied additional surcharge on the appellant's residual income. The question for consideration is whether clause (c) of the portion "Surcharges on Income Tax" occurring in Paragraph A of Part I introduces a new charge in the shape of additional surcharge so that the said charge can be levied even on a part of the appellant's income which is exempt from income-tax and super-tax under Sections 81 (i) (a) and 99 (1) (v) of the Act of 1961.

17. The history of Indian Income-tax, according to appellant's counsel, shows that surcharges by way of increase in the amount of income-tax are nothing but income-tax and therefore the expression "income-tax" occurring in Sections 4 and 81 of the Act of 1961 and in Section 2 and the First Schedule of the Finance Act, 1963 includes surcharges. To put it differently, the argument is that the exemption granted by Section 81 (i) (a) extends to surcharges also as a result whereof a co-operative society engaged in the business of banking is neither liable to pay income-tax nor any of the surcharges on its business income.

18. In *C. I. T. Kerala v. K. Srinivasan*, 83 ITR 346 = (AIR 1972 SC 491) on which the appellant relies, this Court has traced the history of the concept of 'surcharge' in the tax laws of our country. After considering the report of the Committee on

Indian Constitutional Reforms, the provisions of the Government of India Act, 1935, the provisions of Articles 269, 270 and 271 of the Constitution and the various Finance Acts, this Court held, differing from the High Court, that the word "income-tax" in Section 2 (2) of the Finance Act, 1964 includes surcharges and the additional surcharge.

19. This case does not touch the point before us. In that case, the assessee's income for the accounting year ending March 30, 1964 consisted mainly of his salary. Section 2 (2) (a) of the Finance Act, 1964 did not by itself refer to any surcharge but it provided that in making the assessment for the assessment year commencing on April 1, 1964 the "income-tax" payable by the assessee on his salary-income shall be an amount bearing to the total amount of "income-tax" payable according to the rates applicable under the operation of the Finance Act, 1963 on his total income, the same proportion as the salary-income bears to the total income. The question which arose for consideration was whether the words "income-tax payable according to the rates applicable under the operation of the Finance Act, 1963" included surcharges which were leviable under the Act of 1963. The question was answered by this Court in the affirmative. As the judgment shows, "the essential point for determination" was "whether surcharge is an additional mode or rate for charging income-tax" (p. 351). The Court held that it was. The question before us is whether, even if the surcharge is but an additional mode or rate for charging income-tax, the Finance Act of 1963 authorises by its terms the levy of additional surcharge on income which is exempt from income-tax under the Income-tax Act, 1961. In *K. Srinivasan's* case the Court declined to express any opinion on the distinction made by the High Court that surcharges are levied under the Finance Act while income-tax was levied under the Income-tax Act (page 351). In the instant case it is not disputed by the revenue that a surcharge partakes of the essential characteristics of income-tax and is an increase in income-tax. What we

have to determine is whether the Act of 1963 provides for the levy of additional surcharge.

20. Granting that the word "income-tax" includes surcharges, it may be arguable that the exemption from the payment of income-tax under Section 81 (i) (a) of the 1961 Act would extend to surcharges. But the matter does not rest with what section 81 (i) (a) says. Even if that section were to grant an express exemption from surcharges on business-income, the Parliament could take away that exemption or curtail the benefit available under it by making an appropriate provision in the Finance Act. If while legislating on a matter within its competence the Parliament can grant an exemption, it is surely competent to it to withdraw that exemption in exercise of the self-same power.

21. The Finance Act, 1963, like its annual counterparts, contains provisions not only prescribing rates of taxation but making extensive and important modifications in the Income-tax Act itself. By Sections 4 to 20 of the Act of 1963, various provisions of the Income-tax Act have been amended. By these amendments, some of which are given retrospective effect, old provisions are deleted, new ones are added and indeed new concepts of taxation altogether are introduced. Such innovations fall within the legitimate scope of Finance Acts. Section 11 (14) of the Indian Finance Act, 1946, made the amount of excess profits tax repaid under Section 28 of the U. K. Finance Act, 1941, "income" for the purpose of the Indian Income-tax Act and further provided that that "income" shall be "treated" for purposes of assessment to income-tax and super-tax as the income of the previous year. It was held by this Court in *McGregor and Balfour Ltd. v. C. I. T. West Bengal*, 36 ITR 65 = (AIR 1959 SC 771) that Section 11 (14) charged the amount with a liability to tax by its own force. It was further held that the particular provision, framed as it was, applied to subsequent assessment years just as it applied to the assessment year 1946-47.

22. Having seen the nature and scope of Finance Acts, the specific question which we have to consider is whether, as contended by the appellant, Section 2 read with Paragraph A, Part I of the First Schedule of the Finance Act, 1963 merely lays down a method of computation in cases where income-tax is in fact payable or whether, as contended by the revenue, the Finance Act provides for the levy of a new and independent charge. According to the appellant, these provisions of the Finance Act do not, directly or indirectly bring about any amendment to S. 81 (i) (a) of the Income-tax Act but merely prescribe that in cases where the income-tax is payable, "The amount of income-tax..... shall be increased by the aggregate of the surcharges." The heading "Surcharges on Income Tax" under which provision is made in the Finance Act for the calculation of a surcharge, a special surcharge and an additional surcharge is also said to bear out the contention that the levy of additional surcharge on the residual income cannot be dissociated from the main charge of income-tax.

23. We are unable to accept this contention. Article 269 (1) of the Constitution provides that the duties and taxes mentioned therein shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2). Article 270 (1) provides that Taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in clause (2). By Article 271, notwithstanding anything in Articles 269 and 270, Parliament may increase any of the duties or taxes referred to in those Articles by a surcharge for purposes of the Union. Surcharges leviable under Section 2 (1) of the Finance Act, 1963 are relatable to Article 271 of the Constitution.

24. Section 2 (1) (a) (ii) of that Act provides, in so far as relevant, that for the assessment year commencing on April 1, 1963 income-tax shall be charged at the rates specified in Part I of First Schedule and

in cases to which paragraph A of Part I applies, the income-tax shall further be increased by an additional surcharge for purposes of the Union calculated in the manner provided in the First Schedule. Clause (c) of Paragraph A prescribes the manner in which the additional surcharge is to be calculated. It provides that additional surcharge for purposes of the Union shall be calculated "on the amount of the residual income" at the rates mentioned in that clause. Thus, both the purpose and concept of the additional surcharge are different from those of income-tax. The additional surcharge is leviable exclusively for purposes of the Union so that the entire proceeds of such surcharge may, under Article 271 of the Constitution, form part of the Consolidated Fund of India. Taxes and duties mentioned in Article 269 (1), though levied and collected by the Government, have to be assigned to the States in the manner provided in clause (2) of that Article. Then again, the additional surcharge levied for purposes of the Union is to be calculated not on total income like the income-tax but it is to be calculated on the residual income. Section 2 (8) of the Act of 1963 defines residual income as total income reduced by (a) capital gains, if any, included in that total income and (b) the amount of tax (exclusive of additional surcharge) which would have been chargeable on such reduced total income if it had been the total income no part of which had been exempt from tax and on no portion of which deduction of tax had been admissible. In order that the exemption granted to co-operative banks by Section 81 (i) (a) may not lose its meaning and content, Section 2 (8) of the Finance Act introduces the concept of residual income on which alone the additional surcharge is payable. The residual income is not the same as the business income of a co-operative bank, which is exempt under Section 81 (i) (a) from income-tax. For ascertaining the residual income, the total income is reduced by the amount of capital gains and further by the amount of tax (other than additional surcharge) which would

have been charged on such reduced total income on the assumption that the whole of it was liable to be brought to tax.

25. Thus, in the instant case the additional surcharge is not levied on the appellant's business income of Rs. 9,48,335 which is exempt from income-tax and super-tax. It is levied on the residual income of Rupees 5,39,386 which is arrived at after deducting Gross taxes (exclusive of additional surcharge) amounting to Rs. 4,60,712 from the assessee's gross income of Rs. 10,00,098. By Section 3 of the Finance Act of 1963 no account can be taken of the additional surcharge in calculating any relief, rebate or deduction in respect of income-tax payable on the total income of an assessee which includes any income on which no income-tax is payable or in respect of which a deduction of income-tax is admissible. Section 3, by its terms, has precedence over anything contained in Chapter VII or Chapter VIII-A or in Section 110 of the Income-tax Act or Section 2 (5) of the Finance Act itself. Additional surcharge is treated in this way as falling in a separate category.

26. Thus, additional surcharge is a distinct charge, not dependent for its leviability on the assessee's liability to pay income-tax or super-tax. Such a qualification cannot be read into Section 2 (1) (a) (ii) of the Act of 1963 as argued by the appellant. That section uses the language that "income-tax.....shall further be increased by an additional surcharge", not for making the assessability to surcharge dependent upon assessability to income-tax but for the simple reason that if an assessee's total income includes income on which no tax is payable, tax has all the same to be computed for purposes of rate. S. 110 of the Income-tax Act, 1961 provides that where there is included in the total income of an assessee any income on which no income-tax is payable, the assessee shall be entitled to deduction, from the amount of income-tax with which he is chargeable on his total income, of an amount equal to the income-tax calculated at the average rate of income-tax on the amount on which no income-tax is payable. The income-tax comput-

ed at a certain rate is by Section 2 (1) (a) (ii) to be further increased by an additional surcharge for purposes of the Union. This becomes clearer still from the language of Paragraph A. under the heading "Surcharges on Income Tax". It says: "The amount of income-tax computed at the rate hereinbefore specified shall be increased by the aggregate of the surcharges". If the intention was to limit the liability to pay additional surcharge to income which can be brought to income-tax, appropriate language could have been used to convey that simple sense.

27. The weakness of the appellant's contention becomes manifest when it is realised that were the contention right, the appellant would not be liable to pay additional surcharge even on that portion of its non-business income which is contained in the residual income. By the definition in Section 2 (8) of the Act of 1963, residual income means the total income as reduced and therefore, the non-business income which is chargeable to income-tax must form a component of the residual income. Concededly, the appellant is liable to pay additional surcharge on its non-business income. This is so, not because additional surcharge is payable by law on non-business income but because it is payable on residual income and residual income, by definition, includes non-business income as reduced. In fact, it consists of the amount of total income as reduced by the amounts mentioned in clauses (a) and (b) of Section 2 (8).

28. Relying on *United Commercial Bank Ltd. v. Commr. of Income-tax, West Bengal*, 32 ITR 688 = (AIR 1957 SC 918); *East India Housing and Land Development Trust Ltd. v. Commr. of Income-tax West Bengal*, (1961) 42 ITR 49 (SC) and *Ramathan Chettiar v. Commr. of Income-tax, Madras*, 88 ITR 169 at p. 191 = (AIR 1973 SC 2172 at pp. 2181, 2182) the appellant's counsel urged that income-tax is a single levy, that it is one tax and not so many taxes separately levied on several heads of income. This partly is the same argument in a different disguise that an assessee who is not liable to pay income-tax cannot be made liable to

pay additional surcharge under the Finance Act, 1963. We have rejected that contention. Partly, the argument is designed to establish correlation with Section 156 of the Income-tax Act, 1961 by which, when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Income-tax Officer has to serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable. This provision presents no difficulty for, if an assessee is liable to pay additional surcharge but no income-tax or super-tax, the notice of demand will mention the particular amount payable as tax due. The appellant being liable to pay tax on its non-business income and additional surcharge on its residual income, the demand notice will call for payment of the total amount due from the appellant by way of tax.

29. The interpretation put by us on the Finance Act, 1963 does no violence to Section 4 of the Income-tax Act, 1961 under which income-tax at the rates prescribed by the Finance Act is to be charged "in accordance with, and subject to the provisions of," the Income-tax Act. The Income-tax Act exempts the assessee's business income from income-tax and super-tax. The Finance Act brings to tax its residual income.

30. The decision of the Allahabad High Court in Allahabad District Co-operative Bank Ltd. v. Union of India, (1972) 83 ITR 895 = (1972 Tax LR 57 (All)) is directly in favour of the appellant and naturally, learned counsel for the appellant relies on it very strongly. But that case, in our opinion is incorrectly decided. The learned Judges were in error in holding that Section 2 of the Finance Act, 1963 "does not provide for the levy of a tax other than income-tax" and that therefore, additional surcharge is not payable to the extent of the income which is exempt under Section 81 of the Income-tax Act. One of the difficulties which the learned judges felt in accepting the revenue's contention was that if "the additional surcharge mentioned in the Finance Act of 1963

does not partake of the nature of income-tax it will not be possible to demand and realise it under the provisions of the Income-tax Act, and the notice of demand and recovery proceedings would be vitiated on that account." The very assumption of this observation is fallacious because additional surcharge indubitably partakes of the nature and essential characteristics of income-tax. It is a tax on residual income and by reason of the definition contained in Section 2 (8) of the Act of 1963, "residual income" would include non-business income which under the Income-tax Act is chargeable to income-tax. Thus, the additional surcharge, though levied by the Finance Act, 1963 independently of the Income-tax Act, is but a mode of levying tax on a portion of the assessee's income computed in accordance with the definition in Section 2 (8) of the Act of 1963. Therefore, the notice of demand under Section 156 of the income-tax Act can lawfully call for the payment of amount due from an assessee by way of additional surcharge.

31. For these reasons, we confirm the judgment of the High Court but in the circumstances there will be no order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2025

(From: Labour Court Poona)*

A. ALAGIRISWAMI, P. K. GO-SWAMI AND N. L. UNTWALIA JJ.

Ruston & Hornsby (I) Ltd. Appellant v. T. B. Kadam, Respondent.

Civil Appeal No. 1142 of 1969, D/- 24-7-1975.

(A) Industrial Disputes Act (1947), Sch. 2, Item 3 — Dismissal of workman as a result of domestic inquiry — Charge of suspected dishonesty in connection with company's property — On basis of facts held that charge was one of attempt to steal company's property — Workman being watchman, charge was serious one and, if held proved, he deserved dismissal. (Para 4)

*(Reference (IDA) No 9 of 1967, D/- 8-11-1968 — Poona).

HS/HS/C741/75/GMJ

(B) Industrial Disputes Act (1947), Sections 10 and 2A — Reference of dispute under S. 10 read with Section 2A — Facts giving rise to dispute falling under Section 2A arising before section came into force — Validity of reference. AIR 1970 Mys 171, Overruled.

The only relevant factor for consideration in making a reference under Section 10 is whether an industrial dispute exists or is apprehended. Where on the day the reference under Section 10 read with Section 2A was made an industrial dispute as defined under Section 2A did exist, the fact that the facts giving rise to the dispute, falling under Section 2A arose before that section came into force would not make the reference invalid. There is no question of giving retrospective effect to Section 2A. Section 2A is a definition section and when it uses the words "where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman" it does not deal with the question as to when that was done. It refers to a situation or a state of affairs. ILR (1948) 2 Cal 209, AIR 1966 SC 907, (1969) 2 Lab LJ 186 (Delhi) and 1968 Lab IC 1259 (Punj & Har) Foll. AIR 1970 Mys 171 Overruled.

(Para 6)

(C) Industrial Disputes Act (1947), Section 15 and Sch. 2, Item 3 — Dismissal of workman as a result of domestic inquiry — Reference of dispute to Labour Court — Powers of such Court — Scope.

When a workman is dismissed as a result of a domestic enquiry the only power which the Labour Court has is to consider whether the enquiry was proper and if it was so no further question arises. If the enquiry was not proper the employer and the employee have to be given an opportunity to examine their witnesses. It was not the duty of the Enquiry Officer in this case to seek permission of the police constable's superiors when the constable was produced as a witness by the workman on his behalf. It was the workman's duty to have him properly summoned. He did not even apply to the Enquiry Officer requesting him to seek the permission of the police constable's

superiors. It was, therefore, wrong on the part of the Labour Court to have held that the enquiry against the workman was not a proper enquiry. In this view, there was no room for the summoning and examination of the police constable by the Labour Court. There was no failure on the part of the Enquiry Officer to give a reasonable opportunity to the workman, the enquiry was fair and the Labour Court had, therefore, no right to examine the witness on behalf of the workman and on that evidence to upset the finding arrived at the domestic enquiry. AIR 1972 SC 1031, AIR 1973 SC 1227 and AIR 1965 SC 155 Foll. (Paras 7 & 8)

Cases Referred: Chronological Paras

AIR 1975 SC 1660 = 31 Fac LR 24 6
AIR 1973 SC 1227 = (1973) 3 SCR 587 7

AIR 1972 SC 1031 = (1972) 3 SCR 29 7

AIR 1970 Mys 171 = (1970) 2 Lab LJ 738 6

(1969) 2 Lab LJ 186 = 19 Fac LR 1 (Delhi) 6

1968 Lab IC 1259 (Punj & Har) 6

AIR 1966 SC 907 = (1966) 1 Lab LJ 430 6

AIR 1965 SC 155 = (1964) 7 SCR 555 7

ILR (1948) 2 Cal 209 6

Mr. G. B. Pai, Sr. Advocate (M/s. O. C. Mathur, D. C. Shroff and D. N. Mishra, Advocates with him), for Appellant; Mr. S. C. Manchanda, Sr. Advocate. (Mr. A. G. Ratnaparkhi, Advocate with him), for Respondents.

Judgment of the Court was delivered by:

ALAGIRISWAMI, J.:— This is an appeal by special leave against the award of the Labour Court Poona, directing the reinstatement of the respondent in the service of the appellant company.

2. The respondent was a watchman in the factory of the appellant at Chinchwad, Poona. A domestic enquiry was held against him in respect of an incident on the night of 15-16 December 1963 and following the enquiry he was dismissed from service on the 7th January 1964. His appeal was dismissed after a personal hearing by the appellate authority. Section 2A of the Industrial Disputes Act came into

force on 1st December 1965 and on 23rd June 1967 a reference was made by the Government of Maharashtra regarding the dismissal of the respondent to the Labour Court, Poona, and the Labour Court held that the domestic enquiry held against the respondent was defective, that the charges against the respondent had not been made out and directed him to be reinstated.

3. There were four charges framed against the respondent in the domestic enquiry. They were:

(1) Suspected dishonesty in connection with the company's property.

(2) Gross negligence in performance of his duties.

(3) Disobedience of instructions given by the superiors.

(4) Commission of an act subversive of discipline.

For the purposes of this appeal it is not necessary to consider other charges than charge No. 1. The charge-sheet is rather a bit confused but the statement of facts regarding charge No. 1 is clear and there cannot be any doubt or confusion about it. The facts stated in the charge-sheet are as follows:

"It is reported that while you were on duty in the 2nd shift on Sunday the 15th December, 1963 at about 10.30 P. M. you left the guard room and went into the factory. While returning from the factory you are reported to have brought out with you a new Fluorescent Tube and to have kept it in the guard room. Immediately after this you are also reported to have directed one of the two watchmen on duty at that time to take a round with the tel-a-tel clock. It is further reported that at about 11.20 P. M. you removed the Fluorescent Tube from the guardroom and were carrying it away out of the factory. At this stage you were challenged by the watchman, Shri M. B. Shinde and consequently you brought back the tube and left it in the guard room. The Company had, however, not received any report in the matter from you.

You were, therefore, called up when you reported for duty on 16th afternoon and were questioned in the matter. When you were asked to sub-

mit your written report about the incident and about your failure to report immediately to your superiors you stated that you will submit your report after consulting your pleader.

The above mentioned facts and particularly your unwillingness to submit written report when called upon to do so give rise to doubts about your integrity and faithfulness both in regard to the security and property belonging to the Company for which you are responsible while on duty as a person in charge of the security of the Company."

4. The Labour Court took the view that the charge of suspected dishonesty in connection with the company's property did not constitute any misconduct either under Standing Order 24 or otherwise and therefore no action could be taken against the respondent on the basis of that charge, and also that the charge-sheet was vague. We can see no vagueness in the charge-sheet and on the basis of the facts set out above there could be no doubt that the charge is one of an attempt to steal the company's property. The respondent being a watchman the charge is a serious one and if it was held proved he deserves nothing short of dismissal.

5. The Labour Court was concerned only with the question whether the domestic enquiry held against the respondent was a proper enquiry. It held that the enquiry was not a proper one on the ground that the respondent had produced a police constable as his witness at the time of enquiry and this witness expressed his inability to give evidence without the permission of his superiors, that it was clearly the duty of the Inquiry Officer to obtain the necessary permission and to help the respondent in the matter of his defence, that the reluctance on the part of the Inquiry Officer to pursue the matter further is indicative of the fact that he was not inclined to afford proper opportunity to the respondent to defend himself, that there was no necessity for the respondent to apply again to the Inquiry Officer for obtaining the necessary permission, that the passive approach adopted by the Inquiry Officer in the mat-

ter had undoubtedly resulted in an opportunity to defend himself being denied and the inquiry will therefore be defective in this respect. It summoned and examined the police constable and taking his evidence also into account held as follows:

"Then there is evidence on the record of the inquiry to show that the relations of the second party with the Security Jamadar Shri David were strained. As a matter of fact the evidence shows that the reports from the watchmen started coming in at his instance. The proceedings against the second party started on the report of Shri David. The said report and the reports made by the other watchman and the second party are not forthcoming though referred to in the record of the inquiry. Then there is the glaring fact that very ambiguous allegations and charges which do not even constitute any misconduct are made against the second party and in spite of the fact that the evidence in the inquiry is too conflicting and vague the concerned authorities have without affording proper opportunity to defend found the second party guilty of the charges levelled against him. On a careful reading of the findings of the Inquiry Officer, the Works Manager and the Appellate Authority in the light of the recitals in the charge-sheet it becomes absolutely clear that they have found him guilty without applying their mind to the facts and circumstances of the case. All these factors raise a strong presumption that the removal of the second party was predetermined by the first party and that his dismissal is by way of victimization. For all the aforesaid reasons therefore the dismissal of the second party must be held to be illegal and improper. There is nothing adverse in the past against him and he is therefore entitled to the relief of reinstatement with back wages"

6. The first argument on behalf of the appellant is that the incident took place in December 1963 and the order of dismissal was made on the 7th of January 1964 and as Section 2A of the Industrial Disputes Act came into force on 1-12-1965 the reference of this dispute under Section 10 of the Industrial Disputes

Act read with Section 2A is bad. It is argued that this will amount to giving retrospective effect to the provisions of Section 2A. We are not able to accept this contention. Section 2A is in effect a definition section. It provides in effect that what would not be an industrial dispute as defined in Section 2 (k) as interpreted by this Court would be deemed to be an industrial dispute in certain circumstances. As was pointed out by this Court in *Chemicals & Fibres of India Ltd. v. D. G. Bhoir* (C. A. Nos. 1633-1644 of 1973, decided on 2-5-1975) = (reported in AIR 1975 SC 1660) the definition could as well have been made part of clause (k) of Section 2 instead of being put in as a separate section. There is therefore no question of giving retrospective effect to that section in making the reference which resulted in the award under consideration. When the section uses the words "where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman" it does not deal with the question as to when that was done. It refers to a situation or a state of affairs. In other words where there is a discharge, dismissal, retrenchment or termination of service otherwise the dispute relating to such discharge, dismissal, retrenchment or termination becomes an industrial dispute. It is no objection to this to say that this interpretation would lead to a situation where the disputes would be reopened after the lapse of many years and referred for adjudication under Section 10. The question of creation of new rights by Section 2A is also not very relevant. Even before the introduction of Section 2A a dispute relating to an individual workman could become an industrial dispute by its being sponsored by a labour union or a group of workmen. Any reference under Section 10 would be made only sometime after the dispute itself has arisen. The only relevant factor for consideration in making a reference under Section 10 is whether an industrial dispute exists or is apprehended. There cannot be any doubt that on the day the reference was made in the present case an indus-

trial dispute as defined under Section 2A did exist. Normally the dispute regarding an individual workman is not an industrial dispute unless it is sponsored by the union to which he belongs or a group of workmen. The change made by section 2A is that in certain cases such a dispute need not be so sponsored and it will still be deemed an industrial dispute. Supposing in this very case a labour union or a group of workmen had sponsored the case of the respondent before the reference was made, such a reference would have been valid. All that Section 2A has done is that by legislative action such a dispute is deemed to be an industrial dispute even where it is not sponsored by a labour union or a group of workmen. What a labour union or a group of workmen can do the law is competent to do. The only question for consideration in considering the validity of a reference is whether there was or apprehended an industrial dispute when the reference was made. If there was an industrial dispute or an industrial dispute was apprehended, even though the facts giving rise to that dispute might have arisen before the reference was made the reference would still be valid. It is to be borne in mind that every reference would be made only sometime after the dispute has arisen. In *Birla Brothers, Ltd. v. Modak* (ILR (1948) 2 Cal 209) it was pointed out that though the Industrial Disputes Act came into force in 1947, reference of an industrial dispute based on the facts which arose before that Act came into force is a valid reference. The same reasoning would apply to a reference of a dispute falling under Section 2A even though the facts giving rise to that dispute arose before that section came into force. The decision in *Birla Brothers' case* (supra) was approved by this Court in its decision in *Jahiruddin v. Model Mills, Nagpur* (1966-1 Lab LJ 430) = (AIR 1966 SC 907). These two decisions clearly establish that the test for the validity of a reference under Section 10 is whether there was in existence a dispute on the day the reference was made and there was no question of giving retrospective effect to the Act. We find that that is

the view taken by the Delhi High Court in *National Productivity Council v. S. N. Kaul* (1969-2 Lab LJ 186 (Delhi)), by the Punjab & Haryana High Court in *Shree Gopal Paper Mills Ltd. v. The State of Haryana* (1968 Lab IC 1259 Punj & Har). The view of the High Court of Mysore in *P. Janardhana Shetty v. Union of India*, (1970-2 Lab LJ 738) = (AIR 1970 Mys 171) to the contrary is not correct.

7. Coming now to the other points in the case: the decisions of this Court establish clearly that when a workman is dismissed as a result of a domestic enquiry the only power which the Labour Court has is to consider whether the enquiry was proper and if it was so no further question arises. If the enquiry was not proper the employer and the employee had to be given an opportunity to examine their witnesses. It is not the duty of the Enquiry Officer in this case to seek permission of the police constable's superiors. It was the respondent's duty to have him properly summoned. He did not even apply to the Enquiry Officer requesting him to seek the permission of the police constable's superiors. It is therefore wrong on the part of the Labour Court to have held that the enquiry against the respondent was not a proper enquiry. Once this conclusion is reached there was no room for the summoning and examination of the police constable by the Labour Court. The question regarding the jurisdiction exercised by an Industrial Tribunal in respect of a domestic enquiry held by the management against a worker has been elaborately considered by this Court in its decision in *D. C. M. v. Ludh Budh Singh*, (1972 (3) SCR 29) = (AIR 1972 SC 1031) and the principles that emerge out of the earlier decisions of this Court have been set out in that decision. The decision of this Court in *Workmen v. Firestone Tyre & Rubber Co.* (1973 (3) SCR 587) = (AIR 1973 SC 1227) also sets out the principles that emerge from the earlier decisions. In *Tata Oil Mills Co. Ltd. v. Its Workmen*, (1964 (7) SCR 555) = (AIR 1965 SC 155) it was argued that where the employee is unable to lead his evidence before

the domestic Tribunal for no fault of his own, an opportunity should be given to him to prove his case in proceedings before the Industrial Tribunal. This Court held that this contention was not well founded. It was pointed out that the Enquiry Officer gave the employee ample opportunity to lead his evidence and the enquiry had been fair. It was also pointed out that merely because the witnesses did not appear to give evidence in support of the employee's case it could not be held that he should be allowed to lead such evidence before the Industrial Tribunal and if such a plea was to be upheld no domestic enquiry would be effective and in every case the matter would have to be tried afresh by the Industrial Tribunal. It was pointed out that findings properly recorded at the enquiries fairly conducted were binding on the parties, unless it was known that the said findings were perverse, or were not based on any evidence. We are not able to agree with the Labour Court in this case that the findings of the domestic enquiry are either perverse or not based on any evidence.

8. We therefore come to the conclusion that there was no failure on the part of the Enquiry Officer to give a reasonable opportunity to the respondent workman, that the enquiry was fair and the Labour Court had, therefore, no right to examine the witness on behalf of the workman and based on that evidence to upset the finding arrived at the domestic enquiry. We also hold that the punishment imposed in the circumstances is one in which the Labour Court cannot interfere. The result is that the appeal will have to be allowed and the award of the Labour Court set aside.

9. It, however, appears that the respondent had attained the age of 60 on 11-6-73 and even if he had been in service he would have retired on that date. Under an interim order made by this Court on 29-4-1969 the respondent has been paid Rs. 200/- per month as part of the remuneration payable to him till the hearing and final disposal of the appeal and such payment has been made upto-date. Even if the respondent

had succeeded in this appeal he would not have been entitled to any payment after 11-6-73. In view of this appeal being allowed and the award of the Labour Court being set aside the respondent will have to repay the money he had received in pursuance of the order of this Court. The appellant has agreed that it would not take any steps to recover from the respondent the payments already made to him. There will be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2030

(From: ILR (1974) Andh Pra 686)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

State of Andhra Pradesh and another, Appellants v. Potta Sanyasi Rao and others, Respondents.

Civil Appeal No. 1408 of 1974,
D/- 26-8-1975.

(A) Essential Commodities Act (1955), Sections 3 (2), 5 and 2 (a) (xi) — A. P. Tyres and Tubes Dealer's Licensing Order (1973) is not invalid. ILR (1974) Andh Pra 686 Reversed. A. P. Tyres and Tubes Dealers' Licensing Order (1973)).

The Licensing Order is not invalid on the ground that the tyres and tubes were declared to be essential commodities by the Central Government after the order of delegation under Section 5. ILR (1974) Andh Pra 686 Reversed. (Para 9)

Delegation under Section 5 is a general delegation and will inure in favour of exercise of power by the State Government with respect to commodities declared essential by the Central Government from time to time under Section 2 (a) (xi) even subsequent to the order of delegation. (Para 9)

All that is required is that the commodity, on the date of the order of the State Government, answers the description of the clauses in Section 2 (a) of the Act. The fact that a commodity is declared essential after the order of delegation does not affect the exercise of power by the

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State Government under Section 3 of the Act. (Para 9)

Mr. P. Ram Reddy, Sr. Advocate, (Mr. P. P. Rao, Advocate with him), for Appellants; Mr. Gobind Das, Sr. Advocate, (Mr. Girish Chandra, Advocate with him), for Respondents.

Judgment of the Court was delivered by:

GOSWAMI, J.— This appeal by special leave is directed against the judgment of the Andhra Pradesh High Court whereby the Andhra Pradesh Tyres and Tubes Dealers' Licensing Order 1973 (briefly the Licensing Order) was struck down as illegal and ultra vires.

2. A few facts which are material may first be noted.

3. By Notification S. O. 1844 dated June 18, 1966, the Central Government in exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (briefly the Act) directed "that the powers conferred on it by sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in clauses (d), (e), (f), (g), (h), (i), (ii) and (j) of sub-section (2) thereof shall in relation to all commodities other than foodstuffs and fertilisers (whether inorganic, organic or mixed), be exercisable also by a State Government, or in relation to a Union territory, by the administrator thereof, subject to the following conditions....."

x x x x x

4. Section 2 (a) of the Act defines "essential commodity" which means ten specified commodities and the residuary clause (xi) thereof refers to—

"any other class of commodity which the Central Government may, by notified order, declare to be an essential commodity for the purposes of this Act, being a commodity with respect to which Parliament has power to make laws by virtue of entry 33 in List III in the Seventh Schedule to the Constitution".

5. Tyres and tubes are not included in the specified commodities in Section 2 (a). However, the Central Government by three notified orders, namely, S. O. No. 2511

dated August 17, 1966, S. O. No. 2878 of August 22, 1968 and S. O. No. 85 dated January 3, 1969, declared cycle tyres and tubes, car and tractor tyres and tubes and tubes and tyres of buses, vans, trucks, etc. as essential commodities under Section 2 (a) (xi).

6. The impugned Licensing Order was passed by the Government of Andhra Pradesh on June 18, 1973 in exercise of the powers conferred by sub-section (2) of Section 3 of the Act read with S. O. No. 1844 dated June 18, 1966 and with the prior concurrence of the Central Government. The respondents, who were dealers in tyres and tubes of buses, trucks, jeeps, cars and other auto-vehicles, challenged the validity of the Licensing Order on the ground that the State Government had no power to issue the same with regard to tyres and tubes which were declared by the Central Government to be essential commodities subsequent to the delegation of powers to the State Government under Section 5 which had been made earlier on June 18, 1966. Their contention was accepted by the High Court and the Licensing Order was struck down. Hence this appeal by special leave at the instance of the State Government.

7. The short question that arises for consideration is whether the order of delegation of power by the Central Government under section 5 enabling the State Government to make orders or issue notifications under S. 3 would empower the State Government to promulgate orders with regard to commodities which were declared to be essential commodities by the Central Government subsequent to the order of delegation.

8. Section 5 of the Act reads as follows:—

"The Central Government may, by notified order, direct that the powers to make orders or issue notifications under S. 3 shall, in relation to such matters and subject to conditions, if any, as may be specified in the direction, be exercisable also by—

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or authority subordinate to a State Government.

as may be specified in the direction."

9. There is nothing in Section 5 to limit the power of delegation in favour of the State Government only to the commodities specified in Section 2 (a) or to those commodities declared essential under Section 2 (a) (xi) upto the date of delegation. Delegation under Section 5 is a general delegation and will inure in favour of exercise of power by the State Government with respect to commodities declared essential by the Central Government from time to time under Section 2 (a) (xi) even subsequent to the order of delegation. It is not necessary that every time the Central Government declares an essential commodity it has also to pass an order of delegation under Section 5 with regard to that commodity. Reading Section 5 and Section 3 together there is no warrant for the view that the power of delegation is confined to essential commodities specified under the Act and such others as may be declared by the Central Government upto the order of delegation. Delegation of power to the State Government to act under Section 3 is not restricted to any specified essential commodity as such. It will be sufficient in law if on the date the State Government, duly empowered under Section 5, makes a notification under Section 3 with regard to an essential commodity within the meaning of Section 2 (a) including the residuary clause (xi) thereof. All that is required is that the commodity, on the date of the order of the State Government, answers the description of the clauses in Section 2 (a) of the Act. The fact that a commodity is declared essential after the order of delegation does not affect the exercise of power by the State Government under Section 3 of the Act. The High Court is, therefore, not right in narrowly construing the order of delegation under Section 5 of the Act. The Licensing Order is, therefore, not invalid on the ground that the tyres and tubes were declared to be essential commodities by the Central Government after the

order of delegation under Section 5 of the Act.

10. In the result the appeal is allowed and the judgment of the High Court is set aside. There will be, however, no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2032

(From:— Award of Industrial Tribunal, Maharashtra Bombay)*

A. ALAGIRISWAMI AND N. L. UNTWALIA, JJ.

The Dhanrajgirji Hospital, Appellant v. The Workmen, Respondents.

Civil Appeal No. 1837 (NL) of 1969. D/- 19-8-1975.

(A) Industrial Disputes Act (1947), Section 2 (j) and 10 — 'Industry' — Hospitals — Dhanrajgirji Hospital, Sholapur is not an 'industry' — Hence the reference of the dispute raised by its employees is incompetent.

Dhanrajgirji Hospital, Sholapur was not carrying on any economic activity in the nature of trade or business. It was not rendering any material services by bringing in any element of trade or business in its activity. The main activity of the Hospital began by imparting training in general nursing and midwifery. There were quite a good number of trainees and the beds in the hospital were meant for their practical training. Even in the deed of trust the settlor while creating a charitable trust said that the hospital was to be maintained for the public of Sholapur and the trustees may do any and all other acts which might be beneficial for maintaining and running the said hospital to the best advantage of the public of Sholapur. Thus the Dhanrajgirji Hospital, Sholapur was not engaged in any industry within the meaning of the Industrial Disputes Act. The reference to the Industrial Tribunal for adjudication of a dispute raised by its employees was, therefore, incompetent. AIR 1970 SC 1407, Foll. (Paras 6, 7, 8)

*Reference (IT:) No. 64 of 1968, D/- 18-2-1969).

Cases Referred: Chronological Paras

AIR 1970 SC 1407 = (1971) 1 SCR 177 3, 4, 8

AIR 1968 SC 554 = (1968) 1 SCR 742 2, 4

AIR 1960 SC 610 = (1960) 2 SCR 866 4

M/s. K. Rajendra Chaudhuri, K. R. Chaudhuri and De Costa, Advocates, for Appellant.

Judgment of the Court was delivered by:

UNTWALIA, J.:— An industrial dispute was raised by the Medical College and Sholapur Hospital Staff Union on behalf of the employees of the Dhanrajgirji Hospital — the appellant in this appeal by special leave. It was referred for adjudication by the Government of Maharashtra to the Industrial Tribunal, Bombay. A preliminary objection was taken on behalf of the appellant as respects the maintainability of the reference on the ground that the dispute raised did not pertain to any industry and hence was not an industrial dispute which could be made the subject matter of the reference. The Tribunal by its impugned order dated the 18th February, 1969 decided the preliminary issue against the appellant and directed the reference to be heard on merits. The appellant Hospital assails that order in this appeal.

2. The Tribunal did not consider the materials placed before it fully in support of its finding that the appellant is engaged in an industry within the meaning of the Industrial Disputes Act, 1947. Even so, the finding recorded by it is that the activities of the appellant are not mainly educational but the Hospital was established in 1930 for the benefit of the public of Sholapur and its main function is to look after the patients availing of the facilities afforded by the Hospital. This finding is chiefly based upon the terms of the Trust Deed by which the creator of the Trust had established the Hospital. The finding recorded by the Tribunal is in these words:

"It is thus clear that the primary object of creating the Trust is to provide medical relief to the public of Sholapur and that the educational

activities undertaken by it later are ancillary. The hospital, no doubt, imparts some training and education during the course of its usual activities of giving medical relief to the public of Sholapur but these additional activities cannot turn it into a purely educational institution not doing any industrial activity."

Distinguishing the decision of this Court in Secretary, Madras Gymkhana Club Employees' Union v. Management of the Gymkhana Club, (1968) 1 SCR 742 = (AIR 1968 SC 554) it has held that the activities carried on by the Hospital amount to an industry and attract the provisions of the Industrial Disputes Act.

3. Although the hearing of this appeal proceeded ex parte as the workmen were not represented, we examined the matter with care with the assistance of the learned counsel for the appellant. In our judgment even on the findings of primary facts recorded by the Tribunal the ratio of the decision of this Court in Management of Safdar Jung Hospital, New Delhi v. Kuldip Singh Sethi, (1971) 1 SCR 177 = (AIR 1970 SC 1407) squarely applies to this case. Following the said decision the appeal has got to be allowed. We shall, however, point out some more materials from the records of this case to further fortify our conclusions.

4. In the Safdar Jung Hospital case (supra) the decision of this Court in the case of State of Bombay v. Hospital Mazdoor Sabha, (1960) 2 SCR 866 = (AIR 1960 SC 610) was dissented from and held to be not laying down the law correctly. The Madras Gymkhana Club case (supra) was also considered and approved; but some observations quoted at page 184 from that decision were somewhat qualified. The two parts of the definition of the word "industry" given in clause (j) of Section 2 of the Industrial Disputes Act were read as a whole to denote a collective enterprise in which employers and employees are associated and it was further said at page 184 (of SCR) = (at p. 1411 of AIR):

"It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and em-

ployees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocation as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen. The definition no doubt seeks to define 'industry' with reference to employers' occupation but includes the employees, for without the two there can be no industry. An industry is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfil their own occupations." After consideration of some more decisions the law enunciated at page 188 (of SCR) = (at p. 1413 of AIR) is in these terms:

"It, therefore, follows that before an industrial dispute can be raised between employers and their employees or between employers and employees or between employees and employees in relation to the employment or non-employment or the terms of employment or with the conditions of labour of any person, there must be first established a relationship of employers and employees associating together the former following a trade, business, manufacture, undertaking or calling of employers in the production of material goods and material services and the latter following any calling service, employment, handicraft, or industrial occupation or avocation of workmen in aid of the employers' enterprise. It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense." By closely examining the Hospital Mazdoor Sabha case, Hidayatullah, C. J. delivering the judgment on behalf of the Bench of 6 Judges hastened to add at page 189 (of SCR) = (at p. 1414 of AIR):

"We may say at once that if a hospital, nursing home or dispensary is run as a business in a commercial way there may be found elements of an industry there. Then the hospital is more than a place where persons

can get treated for their ailment. It becomes a business."

5. In the light of the principles enunciated the cases of the three hospitals which were under consideration were separately examined. Apropos the case of Safdarjung Hospital it was said that it did not embark on an economic activity which could be said to be analogous to trade or business. There was no evidence that it was more than a place where persons could get treated. Similarly, in the case of Tuberculosis Hospital it was found that it was wholly charitable and a research institute. The dominant purpose of the Hospital was research and training and the Hospital was run for aiding the said activity. In case of Kurji Holy family Hospital also it was noticed that it carried on work of training, research and treatment. Its income was mostly from donations. None of the three Hospitals was held to be carrying on an industry.

6. As we have said above even on the findings recorded by the Tribunal the appellant was not carrying on any economic activity in the nature of trade or business. It was not rendering any material services by bringing in any element of trade or business in its activity. We may refer to some more materials in the records to justify this conclusion.

7. In paragraph 7 of the written statement of the appellant filed before the Tribunal the workmens' statement that the Hospital was self-supporting was strongly contradicted and it was asserted that the Hospital had to incur loan for day to day affairs to the tune of Rs. 300,000/- and odd. The State Government of Maharashtra had sanctioned Rupees 25,000/- to meet the deficit in the finances. According to the affidavit of Dr. M. V. Mulay who was cross-examined also by the workmen the main activity of the Hospital began by imparting training in general nursing and midwifery. There were quite a good number of trainees and the beds in the hospital were meant for their practical training. In cross-examination Dr. Mulay stated that the Central Government gave a grant of Rs. 83.50 per trainee but that was

not enough to meet his expenses. He further said that "the hospital is not distinct or separate from the training of nurses. The patients are charged according to their financial condition and there is no regular charges fixed for a patient." Even in the deed of trust the settlor while creating a charitable trust said that the hospital was to be maintained for the public of Sholapur and the trustees may do any and all other acts which might be beneficial for maintaining and running the said hospital to the best advantage of the public of Sholapur.

8. Taking into consideration the entire facts and circumstances of this case we have no doubt in our mind that on application of the principles of law enunciated by this Court in the case of *Safdar Jung Hospital* (supra) it must be held that the appellant is not engaged in any industry within the meaning of the Industrial Disputes Act. The Tribunal committed an error of law in holding to the contrary. The reference, therefore, was incompetent.

9. For the reasons stated above, we allow this appeal, set aside the order of the Tribunal and direct it to file the reference as being incompetent. No costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2035

(From:— Award of Industrial Tribunal Maharashtra)*

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

Sangam Press Ltd., Appellant v. The Workmen, Respondents.

Civil Appeal No. 470 of 1975, D/- 2-5-1975.

(A) Industrial Dispute — Wages, dispute as to — Minimum wage and fair wage, distinction — Capacity to pay not relevant to former but is material for latter issue. (1. Minimum Wages Act — 2. Industrial Disputes Act, Section 10).

*(Reference (IT) No. 218 of 1972 D/- 1-11-1974—Ind. Tri. Maharashtra)

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It is well settled that while the question of capacity to pay is irrelevant in the case of minimum wage, the matter of a fair wage stands on a different footing. In case of a fair wage, besides the principle of industry-cum-region, the company's capacity to bear the financial burden must receive due consideration. The past performances of the company and the future prospects with a totality of the picture must be present in the mind of adjudicator in deciding a dispute of this nature. (Para 3)

(B) Accounts — Profit and Loss Account — Capital Expenditure and carried forward loss of previous years not to be added back.

It is a basic principle of accountancy that capital expenditure does not go into the profit and loss account. The amount of the capital expenditure cannot, therefore, be added back to the profit and loss appearing in the Profit and Loss Account for the purpose of arriving at the correct trading result. So also, it is an error to add back the carried forward loss of the previous years to the Profit and Loss Account on the footing that it is not genuine to the profit or loss appearing at the foot of the Profit and Loss Account, in order to determine the true profit or loss of the particular accounting year. (Para 4)

(C) Industrial Dispute — Wage dispute — Mere hopeful observations in director's report cannot be basis for awarding increased wages.

Observations in director's report evidencing optimism for future — Such observations are sometimes made in annual reports of Companies to inspire hope and confidence in shareholders and they cannot be a substitute for actual audited figures — Industrial tribunal cannot award rise in wages merely on basis of such observations. (Para 5)

(D) Constitution of India, Art. 136 — Appeal against award of Industrial Tribunal — New point raised by respondent in support of award — Admissibility.

Ordinarily, a party to a reference should be entitled to justify the award of the Tribunal on other grounds (than those given in the award) so long as he does

not travel outside the material on record.

[In this case, the respondent was not allowed to justify the award on new ground as it was not based on the material on record — Ed.] (Para 6)

Mr. G. B. Pai, Sr. Advocate (M/s. D. N. Mishra, O. C. Mathur and Miss Bhuvanesh Kumari, Advocates with him), for Appellant; M/s. L. M. Nerlekar and V. N. Ganpule, Advocates, for Respondents

Judgment of the Court was delivered by.

GOSWAMI, J.:— This appeal by special leave is directed against the award of the Industrial Tribunal, Maharashtra. Several items including the claim of 30 per cent wage rise were referred to the Tribunal for adjudication. The tribunal granted all the reliefs except with regard to two demands which were not pressed. The Tribunal granted 25 per cent increase in wages. Hence this appeal.

2. Even according to the Tribunal the total additional financial burden of the company (Appellant herein) in accordance with the award will come to Rs. 1,16,687.18. The Company owns a press employing 150 workers. The State Government prescribed minimum wages with a special allowance under the Minimum Wages Act for press employees. It is not disputed before us that the company's wage scale is not lower than the prescribed minimum wages. The company pleaded before the Tribunal its inability to bear any more financial burden. The company produced the accounts and showed that it was incurring losses in several years (1968-69, 1970-71 and 1971-72).

3. We are dealing with a case of a company whose employees are in receipt of some kind of a fair wage, not bare minimum wage at subsistence level. It is well settled that while the question of capacity to pay is irrelevant in the case of minimum wage, the matter of a fair wage stands on a different footing. In case of a fair wage, besides the principle of industry-cum-region, the company's capacity to bear the financial burden must receive due consideration. The past

performances of the company and the future prospects with a totality of the picture must be present in the mind of the adjudicator in deciding a dispute of this nature.

4. The tribunal was conscious of its duty to ascertain the financial capacity of the company but in doing so adopted an absolutely wrong approach resulting in erroneous conclusion. The Tribunal seems to have computed the profits of the appellant for each year on the assumption that the capital expenditure incurred in a particular year must have come out of the profits of that year and, therefore, to arrive at the correct trading result, the amount of the capital expenditure must be added back. This assumption, with great respect, betrays ignorance of the true function of the Profit and Loss Account and fails to take note of the basic principle of accountancy that capital expenditure does not go into the profit and loss account. There can, therefore, be no question of adding back the amount of the capital expenditure to the profit and loss appearing in the Profit and Loss Account for the purpose of arriving at the correct trading result. Equally patent is another error committed by the Tribunal, namely of adding back the carried forward loss of the previous years on the footing that it is not genuine to the profit or loss appearing at the foot of the Profit and Loss Account in order to determine the true profit or loss of the particular accounting year. This exercise on the part of the Tribunal is based on the assumption that the carried forward loss of the previous years is taken into account in arriving at the profit or loss appearing in the Profit and Loss Account of the particular accounting year, and therefore, if such carried forward loss is not genuine, it must be excluded in computing the Profit or Loss of a particular accounting year and to that extent, the real profit or loss would stand enhanced. But this assumption is clearly wrong. The Profit and Loss Account of a particular accounting year never includes the carried forward loss of the previous years. It merely reflects the trading result of the year in question. If any par-

particular item debited in the Profit and Loss Account is wrong, it may be added back but the carried forward loss of the previous year not being an item of debit in the Profit and Loss Account, it is impossible to see how it can be added back to arrive at the true profit or loss. The Tribunal was therefore clearly in error in taking the view that the gross profit of the appellant for nine years from 1962-63 to 1971-72 was Rupees 16,55,361.75 or that the average annual gross profit was Rs. 1,83,929.23 and basing its award on these erroneous figures.

5. We also note that the Tribunal drew an inference against the Company from the Director's report of 1971-72 evidencing a slight optimism for future in view of reduction of expenditure. The inference however, is not in accord with the reality of the situation reflected in the accounts of the company. Sometimes observations of the like nature in the annual reports are made to strike a note of hope to dispel doubts and misgivings in the minds of the shareholders and these cannot be a substitute for actual audited figures.

6. The learned counsel appearing on behalf of the workmen, however, tried to support the ultimate conclusions in the award on the basis of other material on record. He relied on an award made by the Industrial Tribunal in Reference (II) No. 37 of 1969 and published in Maharashtra Government Gazette, Part I-L dated February 8, 1972 at page 1411. This award relates to about 12 presses in the Poona Region and the contention urged on behalf of the workmen was that some of these presses were comparable concerns and if the wage scales awarded in respect of these presses were taken into account on industry-cum-region principle, the increase of 25 per cent in the consolidated wages given by the Tribunal in the present case clearly appeared to be justified. The learned counsel also attempted to refer to certain other material on record to show that what was in fact awarded by the Tribunal was fair and just and there was no reason to interfere with it. Whether the Poona presses in the aforesaid award are com-

parable concerns may require investigation into facts. We, therefore, declined to permit the learned counsel to sustain the award on other grounds in this appeal. But while so doing we would like to make it clear that ordinarily a party to a reference should be entitled to justify the award of the Tribunal on other grounds, so long as he does not travel outside the material on record.

7. We are clearly of opinion that there was no proper adjudication of the dispute referred to the Tribunal. The award is, therefore, set aside and the reference is restored to the file of the Tribunal for a proper and early disposal in accordance with law and in the light of the observations made herein above. The appeal is accordingly allowed with no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2037

(From:— 1972 Tax LR 2525)

(Andh Pra)

H. R. KHANNA, M. H. BEG AND
Y. V. CHANDRACHUD. JJ.

The Government of Andhra Pradesh and another, Appellants v. Hindustan Machine Tools Ltd., Respondent.

Civil Appeal No. 1189 of 1972,
D/- 1-5-1975.

(A) Constitution of India, Art. 265 — Gram Panchayat, power of, to levy taxes and fees — Fact that the party sought to be charged is not aware of the existence of the Gram Panchayat does not affect the liability of such party to pay taxes and fees which the Gram Panchayat is entitled, under the law, to levy. (Para 2)

(B) Andhra Pradesh Gram Panchayats Act (2 of 1964), Section 2 (15) (as amended by A. P. Gram Panchayats (Amendment) Act, 16 of 1974) — Validity — Legislature and judiciary powers of — "House" definition of, for purpose of levy of house tax — Amendment of definition so as to include buildings not originally included in definition — Building not having main entrance on common way in-

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cluded in definition by amendment though originally not covered by definition—"Factory originally not covered by definition, included" in definition under amendment — Amendment expressly made retrospective so as to validate, notwithstanding any judgment, decree or order to the contrary, tax already levied on any building, as if the definition as amended was in force at the time the tax was levied — Held: there was no encroachment on the judicial power by the legislature — Validity of amendment not open to challenge. (Constitution of India Art. 245) — AIR 1941 FC 16, Rel. on; AIR 1973 SC 405 Foll., AIR 1970 SC 1292; AIR 1971 SC 57 and AIR 1971 SC 231, Dist. (Paras 8, 9)

[For a discussion of the principle involved in the above view, see AIR Commentary on the Constitution of India, 2nd Edn. Art. 245 Note 6, Pts. 12 et. seq. — Ed.]

(C) Interpretation of Statutes — Retrospective effect — Taxing statute — Amendment of — Amendment expressly made retrospective so as to cover taxes already levied, and providing that notwithstanding any judicial decision to the contrary the levy of such taxes would be valid as if the law as amended was in force at the time of the levy of the tax — Such provision does not amount to encroachment on the powers of the judiciary by the Legislature and is valid — A. I. R. 1941 FC 16 (24), Foll.— (See for illustration Pt. (b) — Ed.) (Para 10)

[For a discussion of the above principle see AIR Commentary on the Constitution of India, 2nd Edn. Article 245, Note 6, Pts. 12 et. seq.]

(D) Constitution of India, Article 245 — Power to legislate with retrospective effect — Plenary power of legislature — Within the scope of its legislative competence and subject to other constitutional limitations. the power of the Legislature to enact laws is plenary — Retrospective legislation is within the power of the Legislature — AIR 1941 FC 16 Foll. (See A. I. R. Commentary on the Constitution of India, 2nd Ed. Art. 245, N. 12). (Para 8)

(E) Constitution of India, Article 245 — Legislative power — Scope

of — Retrospective validation of laws — Power of — The power to validate a law retrospectively is within the scope of the legislative competence of the legislature and subject to other constitutional limitations, such power is ancillary to the power to legislate on the particular subject. (Parat 8)

[See A. I. R. Commentary on the Constitution of India, 2nd Ed., Article 245 Note 6].

(F) Constitution of India, Schedule 7, List 2, Entry 49 — "Taxes on lands and "buildings" — Taxes levied on buildings constructed by Respondent — House tax levied by Gram Panchayat under Andhra Pradesh Gram Panchayats Act, 1964 as amended by Amending Act of 1974 to include factory within the definition of "house" under Section 2 (15) of the Act, for the purpose of taxation — Rule 6 of the Rules relating to house tax under the Act providing that machinery and furniture are to be excluded from consideration for the purpose of assessment of house tax — The tax is only on "buildings" within the meaning of Entry 49 and does not transgress the scope of Entry 49 — Andhra Pradesh Gram Panchayats Act, 1964, Section 69 (1) (a), "house tax" — Gram Panchayat can impose tax on factory. (Paras 13, 14)

(G) Constitution of India, Schedule 7, List II, Entry 49 and Schedule 7, List III, Entries 36 and 47 — State Legislature can impose taxes and not merely fees on lands and buildings belonging to a factory. (Paras 14, 15)

[The argument was that "factories" came under List III, Item 36 as Item 36 was a more specific item than "lands and buildings" under List II Item 49, but List III item 36 read with item 47 of List III enabled the Legislature only to levy fees and not taxes in respect of factories — Contention overruled; the reason given being that the levy imposed by the State Legislature was not on a factory in a comprehensive sense as including machinery and furniture but only on the "buildings" occupied by the factory and hence. the term "factory" cannot be regarded as "specific" so as to exclude applicability of List II, Item 49—Ed.]

(H) Constitution of India, Article 133 (1) (a) — New plea — Appeal against judgment of High Court on writ petition — Point not raised before High Court — Point involving investigation into question of fact — Point cannot be raised in the appeal before the Supreme Court.

(Para 16)

[See A. I. R. Commentary on Constitution of India, 2nd Ed, Art. 133, Note 23—Ed.]

(I) Andhra Pradesh Gram Panchayats Act (1964), Sections 69, 92, 109, 111, 121, 122 and 131 — Power to impose fees for granting permission to construct building — No such power given to Gram Panchayat.

(Para 17)

No provision making it necessary to obtain permission of Gram Panchayat for constructing building — Semble: levy of permission fee for building factory may be legal, but no provision for requiring permission of Gram Panchayat for construction of other buildings. — Rule-making power cannot confer such power in absence of power granted by the Act.

(Para 18)

(J) Constitution of India, Article 265 — "Fee" and "Tax" distinction between — Unless the authority claiming to impose a "fee" renders a service in consideration of the levy exacted, the levy cannot be demanded — AIR 1954 SC 282, AIR 1975 SC 846, Foll.

(Para 19)

[See A. I. R. Commentary on the Constitution of India, 2nd Edn. Article 265, Note 4 (B).]

Held that "fee" cannot be demanded by Village Panchayat under Andhra Pradesh Village Panchayat Act, 1964 for permission to construct building (not only because there was no provision in the Act for the imposition of such a "fee" (See Pt. (i)) but also because there was no quid pro quo (consideration) for such fee.

(Para 19)

(K) Constitution of India, Article 265 — "Fee" levy of — Validity — Service necessary.

"Fee" can only be levied by any authority only for some service rendered by it to the person from whom the levy is exacted — Fee levied by local authority like Gram Panchayat

— Validity — Fee can be justified only if there is some special service rendered to the person from whom fee is collected — Sum total of the activities of a public body like Gram Panchayat cannot be taken into account for this purpose — Expenses incurred by Gram Panchayat or Municipality in discharging its obligatory functions are usually met by imposition of a variety of taxes.

(Para 20)

(L) Constitution of India, Article 265 — "Fee" — Validity — Some service must be rendered in lieu of the fee — Fee imposed by local authority for permission to raise building — Laying of roads for providing access to new buildings and drainage and the supply of street lights etc. are statutory functions of public authorities and are not services rendered individually to the applicant for licence so as to validate the levy of such fees on him.

(Para 21)

(M) Constitution of India, Article 265 — "Tax" and "fee" distinction — Fee for permission to construct building is not a tax on buildings as such fee may be imposed even if a building does not eventually come into existence — Permission fee becomes payable at the time when the permission to construct a building is applied for.

(Para 22)

Cases Referred: Chronological Paras
AIR 1975 SC 846 = 1971 Tax LR 1455 19

AIR 1973 SC 405 = 1973 Tax LR 1951 10

AIR 1970 SC 1292 = (1971) 1 SCR 288 11

AIR 1971 SC 57 = (1970) 3 SCR 745 11

AIR 1971 SC 231 = 1971 SCD 91 12

AIR 1954 SC 282 = 1954 SCR 1005 19

AIR 1941 FC 16 = 1940 FCR 110 8

Mr. P. Ram Reddy, Sr. Advocate. (Mr. P. P. Rao, Advocate with him), for Appellants; Mr. B. Sen, Sr. Advocate, (Mr. Naunit Lal, Advocate, with him), for Respondent; Mr. K. Srinivasamurthy, Sr. Advocate. (Mr. Naunit Lal & Mrs. Lalita Kohli, Advocates, with him) for Interveners.

The Judgment of the Court was delivered by

CHANDRACHUD, J.:— This is a tax dispute concerning the power of

the second appellant, Kuthbullapur Gram Panchayat, to levy house-tax and Permission Fee on the respondent. The Hindustan Machine Tools Ltd., which is a Government of India Undertaking. The first appellant is the Government of Andhra Pradesh.

2. The Kuthbullapur Gram Panchayat was established in 1959. In 1964 the Andhra Pradesh State Legislature passed the Andhra Pradesh Gram Panchayats Act, 2 of 1964, which with the exception of Chapter VII of the Act, came into force on January 18, 1964. The Act applies to the Kuthbullapur Gram Panchayat within whose geographical limits the respondent has established a factory for the manufacture of special apparatus machines, presses etc. The construction of the factory began in 1964 and was completed in December 1965. The factory was constructed without the permission of the Gram Panchayat. Considering the skeleton staff which mans the Panchayat and its skeleton activities, the respondent's plea that it did not obtain the Panchayat's permission because it was not aware of its existence is not implausible. But such awareness has no relevance on the respondent's liability to pay taxes and fees. In any event, on coming to know of the construction of the factory and the other buildings the Panchayat asked the respondent to obtain the requisite permission. The respondent asked for ex-post facto permission in January, 1967.

3. In its meeting of May 8, 1967 the Panchayat passed a resolution for collecting Permission Fee from the respondent at $\frac{1}{2}$ per cent on the capital value of the factory buildings and at 1 per cent on the capital value of other buildings. By a letter dated August 20, 1968 the Panchayat called upon the respondent to pay house-tax for the years 1966-67, 1967-68 and 1968-69 amounting to Rupees 1,83,750 at the rate of Rs. 61,250 per annum. On March 3, 1969 the Panchayat demanded from the respondent a sum of Rs. 1,65,000 by way of Permission Fee, Rs. 80,000 being for factory buildings and Rs. 85,000 in respect of the other buildings.

4. On November 25, 1969 the respondent filed a writ petition in

the High Court of Andhra Pradesh challenging the levy of house-tax and the Permission Fee. By its judgment dated August 6, 1971 the High Court allowed the writ petition. It held that the buildings constructed by the respondent did not fall within the definition of a 'house' as contained in the Act and therefore no house-tax could be levied on the buildings. Regarding the Permission Fee the High Court repelled the appellant's contention that the fee was in the nature of tax and held that since no services were rendered by the Panchayat to the respondent the levy of Permission Fee was illegal. The High Court has granted to the appellants a Certificate of Fitness under Article 133 (1) (a) of the Constitution to appeal to this Court.

5. Section 69 (1) (a) of the Act provides that a Gram Panchayat shall levy in the village a house-tax. By Section 2 (15), as it stood when the High Court delivered its judgment, 'house' meant a building or hut fit for human occupation, whether as a residence or otherwise, "having a separate principal entrance from the common way, "and included" any shop, workshop or warehouse or any building used for garaging or parking buses or as a bus-stand". The High Court held that buildings other than factory premises were not a 'house' within the meaning of the Act because their separate principal entrances were situated on the roads belonging to the respondent and not on the common way as required by Section 2 (15). As regards the factory buildings, the High Court held that the Legislature had included shops, workshops and warehouses but not factories within the definition of a 'house' and therefore factory buildings were also not a 'house' within the meaning of the Act. The demand of house-tax was accordingly held illegal.

6. By the Andhra Pradesh Gram Panchayats (Amendment) Act, 16 of 1974, the State Legislature has amended the definition of 'house' with retrospective effect so as to eliminate the impediments on which the High Court rested its judgment. If the amendment is lawful and valid, it will be unnecessary to consider whe-

ther the High Court was right in reading the way it did the definition of 'house' as contained in the un-amended Section 2 (15).

6A. Section 2 of the Amending Act provides:

"2. For clause (15) of Section 2 of the Andhra Pradesh Gram Panchayats Act, 1964 (hereinafter referred to as the principal Act), the following clause shall be and shall be deemed always to have been substituted, namely:—

"(15) 'house' means a building or hut fit for human occupation, whether as a residence or otherwise, and includes any shop, factory, workshop or warehouse or any building used for garaging or parking buses or as a bus-stand cattle shed (other than a cattle shed in an agricultural land), poultry shed or dairy shed;"

6B. Section 4(a) of the Amending Act provides:

4. Notwithstanding anything in any judgment, decree or order of any court or other authority,—

(a) anything done or any action taken, including any tax levied and collected, in the exercise of any power conferred by or under the principal Act shall be deemed, to be and to have always been, done or taken or levied and collected in the exercise of the powers conferred by or under the principal Act as amended by Section 2 of this Act, as if the principal Act as amended by this Act were in force on the date on which such thing was done or action was taken, or tax was levied and collected; and all arrears of tax and other amounts due under the principal Act as amended by this Act at the commencement of this Act, may be recovered as if they had accrued under the principal Act as amended by this Act;"

7. The new definition of 'house' which is to be read retrospectively into the Act meets effectively both the objections by reason of which the High Court held that the buildings constructed by the respondent were not a 'house'. By the Amendment, the old clause: "having a separate principal entrance from the common way" is dropped and the definition of 'house' is reframed to include

a 'factory'. It is clear and is undisputed that the buildings constructed by the respondent — the colony buildings as well as the factory buildings— answer fully the description of a 'house' and are squarely within the new definition contained in Section 2 (15).

8. We see no substance in the respondent's contention that by re-defining the term 'house' with retrospective effect and by validating the levies imposed under the unamended Act as if, notwithstanding anything contained in any judgment, decree or order of any court, that Act as amended was in force on the date when the tax was levied, the Legislature has encroached upon a judicial function. The power of the Legislature to pass a law postulates the power to pass it prospectively as well as retrospectively, the one no less than the other. Within the scope of its legislative competence and subject to other constitutional limitations the power of the Legislature to enact laws is plenary. In *United Provinces v. Atiqa Begum*, 1940 FCR 110 = (AIR 1941 FC 16) Gwyer C. J. while repelling the argument that Indian Legislatures had no power to alter the existing laws retrospectively observed that within the limits of their powers the Indian Legislatures were as supreme and sovereign as the British Parliament itself and that those powers were not subject to the "strange and unusual prohibition against retrospective legislation." The power to validate a law retrospectively is, subject to the limitations aforesaid, an ancillary power to legislate on the particular subject.

9. The State legislature, it is significant, has not overruled or set aside the judgment of the High Court. It has amended the definition of 'house' by the substitution of a new section 2 (15) for the old section and it has provided that the new definition shall have retrospective effect, notwithstanding anything contained in any judgment, decree or order of any court or other authority. In other words, it has removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances. If the old Section 2 (15)

were to define 'house' in the manner that the amended Section 2 (15) does, there is no doubt that the decision of the High Court would have been otherwise. In fact, it was not disputed before us that the buildings constructed by the respondent meet fully the requirements of Section 2 (15) as amended by the Act of 1974.

10. In *Tirath Ram Rajindra Nath v. State of U. P.*, AIR 1973 SC 405 = (1973 Tax LR 1951) the Legislature amended the law retrospectively and thereby removed the basis of the decision rendered by the High Court of Allahabad. It was held by this Court that this was within the permissible limits and validation of the old Act by amending it retrospectively did not constitute an encroachment on the functions of the judiciary.

11. The decisions on which the respondent relies are clearly distinguishable. In the *Municipal Corporation of the City of Ahmedabad v. The New Shrock Spg. & Wvg. Co. Ltd.*, AIR 1970 SC 1292 the impugned provision commanded the Corporation to refuse to refund the amount illegally collected by it despite the orders of the Supreme Court and the High Court. As the basis of these decisions remained unchanged even after the amendment, it was held by this Court that the legislature had made a direct inroad into the judicial powers. In *Janapada Sabha, Chhindwara v. The Central Provinces Syndicate Ltd.*, AIR 1971 SC 57 the Madhya Pradesh Legislature passed a Validation Act in order to rectify the defect pointed out by this Court in the imposition of a cess. But the Act did not set out the nature of the amendment nor did it provide that the notifications issued without the sanction of the State Government would be deemed to have been issued validly. It was held by this Court that this was tantamount to saying that the judgment of a court rendered in the exercise of its legitimate jurisdiction was to be deemed to be ineffective. The position in *State of Tamil Nadu v. M. Rayappa Gounder*, AIR 1971 SC 231 was similar. In that case the re-assessments made under an Act which did not provide for re-assessments were attempted to be validated

without changing the law retrospectively. This was considered to be an encroachment on the judicial functions.

12. In the instant case, the Amending Act of 1974 cures the old definition contained in Section 2 (15) of the vice from which it suffered. The amendment has been given retrospective effect and as stated earlier the legislature has the power to make the laws passed by it retroactive. As the Amending Act does not ask the instrumentalities of the State to disobey or disregard the decision given by the High Court but removes the basis of its decision, the challenge made by the respondent to the Amending Act must fail. The levy of the house-tax must therefore be upheld.

13. Under Article 246 (3) read with Entry 49 in List II, Seventh Schedule of the Constitution, the State legislatures have exclusive power to make laws with respect to "Taxes on lands and buildings." Section 69 (1) (a) of the Act authorises Gram Panchayats to levy house-tax in the villages under their respective jurisdiction. The Gram Panchayat of Kuthbullapur has accordingly levied house-tax on the buildings constructed by the respondent including the factory buildings. It needs to be clarified that by Rule 6 of the "Rules relating to levy of House-tax", machinery and furniture are to be excluded from consideration for the purpose of assessment to house-tax. Thus, the tax is on buildings only and does not transgress the scope of Entry 49.

14. This clarification became necessary in view of the respondent's contention that the State legislature has no power under Entry 49, List II, to levy tax on the lands and buildings owned or occupied by a factory. Entry 36 in List III relates to "Factories" and Entry 47 in that List relates to "Fees in respect of any of the matters in this List, but not including fees taken in any court". It is urged on behalf of the respondent that these specific Entries in regard to the particular subject matter exhaust the power to impose levies on factories and since the power is limited to the imposition of fees on fac-

tories, the legislature has no competence to impose a tax on the lands or buildings of a factory. It is true that the various entries in the legislative Lists must receive a broad and liberal construction and Entry 36 in List III may therefore cover every aspect of the subject matter of "Factories". But the State legislature has not authorised the levy of house-tax on factories in the compendious sense. The new definition of 'house' includes a 'factory' but the house-tax is levied only on the buildings occupied by the factory and not on the machinery and furniture. The State legislature has the legislative competence to do so under Entry 49 in List II.

15. It was urged by Mr. Nautnit Lal on behalf of one of the interveners that 'Factory' is a compendious expression and since a factory consists of the building, the machinery and the furniture, the legislature cannot split up the personality of the factory and tax one part of it only. There is no substance in this contention because the power to tax a building can be exercised without reference to the use to which the building is put and it is irrelevant that the building is occupied by a factory which cannot conduct its activities without the machinery and furniture. What falls legitimately within the scope of a legislative Entry can lawfully form the subject matter of legislation.

16. We cannot entertain the respondent's argument that without a proper budget, the Gram Panchayat cannot impose a tax. Such an argument was not made in the High Court and it involves an investigation into the fact whether the Gram Panchayat had or had not prepared a budget. Nor can we entertain the respondent's submission that Section 4 (b) and (c) of the Act of 1974 is invalid. Under clause (b), no suit or other proceeding is maintainable or can be continued in any court or before any authority for the refund of any tax. Under clause (c), no court shall enforce any decree or order directing the refund of any such tax. No suit has been filed by the respondent for the refund of tax and no decree or order has been passed by any court or authority for the refund of

any tax. This Court does not answer academic questions.

17. The position in regard to the so called 'Permission Fee' is entirely different. In the first place, the Act of 1964 itself makes a distinction between the power to impose a tax and the power to impose a fee. Section 69 (1) and Section 69 (3) (i), (ii), (iii) empower the Gram Panchayats to levy taxes while Section 69 (3) (v) and (vi) provide for the levy of fees. Sections 92, 109 (2), 111, 121 (5), 122 and Section 131 of the Act also provide for the imposition of specific fees. There is no provision in the Act empowering the Gram Panchayats to levy fees on the permission to construct a building, which is what the second appellant has purported to do in the instant case.

18. In fact, there is no provision in the Act under which it is necessary to obtain the permission of the Gram Panchayat for constructing a building. Section 131 (2) of the Act which authorises the levy of fees for every licence or permission is therefore not attracted. Section 125 (1) requires that the permission of the Gram Panchayat must be obtained for constructing or establishing a factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power or in which it is proposed to install any machinery or manufacturing plant driven by steam, water or other power as aforesaid. This provision may possibly support a levy of Permission Fee on the factory buildings, but there is no provision in the Act at all requiring the permission of the Gram Panchayat for the construction of other buildings. Counsel for the appellants wanted to derive sustenance to the imposition of Permission Fee from the provision contained in Section 217 (2) (xvi) but that clause only empowers the Government to make rules "as to the regulation or restriction of building and the use of sites for building". In the absence of any provision in the parent statute requiring the permission of the Gram Panchayat for the construction of non-factory buildings, the rule-making power of the Government

cannot be exercised so as to impose the requirement of a permission, in respect of such buildings.

19. But there is a broader ground on which the levy of Permission Fee must be struck down. Fees are a sort of return or consideration for services rendered, which makes it necessary that there should be an element of quid pro quo in the imposition of a fee. There has to be a correlation-ship between the fee levied by an authority and the services rendered by it to the person who is required to pay the fee. 1954 SCR 1005 = (AIR 1954 SC 282); (AIR 1975 SC 846 = (1975 Tax LR 1455)). There is in this case, not a word showing such a correlation-ship. In the counter-affidavit which the appellants filed in the High Court in reply to the respondent's writ petition, nothing at all was stated as to the expenses incurred or likely to be incurred by the Gram Panchayat in rendering any actual or intended service to the respondent. There may be something in the grievance of the Gram Panchayat that the mighty respondent and others following the respondent's lead have been persistently refusing to pay taxes which has made it impossible for the Gram Panchayat to render any services. But the true legal position as stated by Mukherjea J. in the Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt 1954 SCR 1005 at p. 1042 = (AIR 1954 SC 282 at p. 296) is that "it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services." In the total absence of any data showing such a correlation-ship, the levy of Permission Fee has to fail.

20. One cannot take into account the sum total of the activities of a public body like a Gram Panchayat to seek justification for the fees imposed by it. The expenses incurred by a Gram Panchayat or a Municipality in discharging its obligatory functions are usually met by the imposition of a variety of taxes. For justifying the imposition of fees the public authority has to show what

services are rendered or intended to be rendered individually to the particular person on whom the fee is imposed. The Gram Panchayat here has not even prepared an estimate of what the intended services would cost it.

21. Learned counsel for the appellants contended that the Gram Panchayat lays roads for providing access to new buildings, that it provides for drainage and lights and that it scrutinises the plans submitted for intended constructions and, if necessary, it advises the applicants in order that the proposed construction may conform to the regulations. We are unable to accept that these services are rendered individually to the respondent. The laying of roads and drainage or the supply of street lights are a statutory function of public authorities and it is difficult to hold, in the absence of any material, that any of such services as have been mentioned to us have, in fact, been rendered to the respondent. The very circumstance that the Permission Fee is levied at a certain percentage of the capital value of the buildings shows that the Gram Panchayat itself never intended to correlate the fee with the services rendered or intended to be rendered by it. There is therefore no warrant for the levy of Permission Fee, not even on factory buildings, assuming for the sake of argument that the permission of Gram Panchayat is necessary for the construction of factory buildings.

22. It was alternatively contended on behalf of the appellants that the Permission Fee though called a fee is really in the nature of a tax on buildings and may be upheld as such. It is impossible to accept this contention. That the Permission Fee is not a tax on buildings is clear from the fact that the fee may be required to be paid even if a building does not eventually come into existence. The scheme under which the Permission Fee is attempted to be levied is that it becomes payable at the time when the permission to construct a building is applied for. The levy does not depend upon whether a building has been in fact constructed with the result that whether a building is

constructed or not, the fee has to be paid. In other words, the Permission Fee is in the nature of a levy on a proposed activity and is not a tax on buildings.

23. Thus, the levy of house-tax is lawful but the levy of Permission Fee has to be struck down as being illegal. Accordingly the appeal is allowed partly but since the success is divided, there will be no order as to costs.

Appeal allowed partly.

AIR 1975 SUPREME COURT 2045

(From: Allahabad)*

V R. KRISHNA IYER, R. S. SARKARIA AND A. C. GUPTA, JJ.

Uttar Pradesh Government Appellant v. Sabir Hussain, Respondent.

Civil Appeal No. 174 of 1968, D/- 30-4-1975.

(A) Government of India Act (1935), Section 240 (3) — Constitution of India Art. 311 (2) — Protection afforded by Section 240 (3) and Article 311 (2) — Substantially same — Reference to dismissal in Section 240 — Includes removal.

A comparative study of Section 240 (3) and Article 311 (2) would show that the protection afforded by these provisions, is in nature and extent, substantially the same. Of course, the word "removed", which appears in Article 311 (2), does not find mention in Section 240 (3). But this does not mean that Section 240 (3) did not cover a case of "removal". It is by now well settled that from the constitutional standpoint, "removal" and "dismissal", stand on the same footing except as to future employment. In the context of Section 240 (3), 'removal' and 'dismissal' from service, are synonymous terms, the former being only a species of the latter. Moreover, according to the principle of interpretation laid down in Section 277 of the 1935 Act, the reference to dismissal in Section 240 would include a reference to remo-

*(Second Appeal No. 155 of 1959, D/- 17-8-1967 All—Luck Bench.)

GS/GS/B931/75/CWM

val. AIR 1948 PC 121, AIR 1954 SC 369 and AIR 1958 SC 300 Rel. on

(Para 11)

(B) Government of India Act (1935), Section 240 (3) — "Reasonable opportunity" — Test — Report, findings and "comments" of Enquiring Officer not supplied — Order of removal held illegal.

The broad test of "reasonable opportunity" is whether in the given case the show cause notice issued to the delinquent servant contained or was accompanied by so much information as was necessary to enable him to clear himself of the guilt, if possible, even at that stage, or, in the alternative to show that the penalty imposed was much too harsh and disproportionate to the nature of the charge established against him.

(Para 13)

In the instant case the impugned order of removal proceeded on an acceptance of the report of enquiry proceedings and comments of the Enquiry Officer. No copy of the report, findings and "comments" of the Enquiring Officer, was supplied to the delinquent servant. No copy of the enquiry report and allied documents was given to him, even when he applied for the same in order to file an appeal to the higher authorities against the order of removal.

Held, that the High Court was right in holding that the delinquent servant was not given a reasonable opportunity to show cause against the action proposed to be taken against him and that the non-supply of the copies of the material documents had caused serious prejudice to him in making a proper representation. There was a disobedience of the mandate of Section 240 (3) of the Government of India Act, 1935 and the impugned order stood vitiated on that score alone. S.A. No. 155 of 1959 D/- 17-8-1967 (All) Affirmed.

(Para 17)

Cases Referred: Chronological Paras

AIR 1969 SC 198 = (1969) 1 SCR 317
6, 7

AIR 1969 SC 1294 = (1970) 1 SCR 251
= 1969 Lab IC 1547 7, 13

AIR 1958 SC 36 = 1958 SCR 828
7, 11

AIR 1958 SC 86 = 1958 SCR 595 7

AIR 1958 SC 300 = 1958 SCR 1080
7, 11

AIR 1954 SC 369 = 1955 SCR 26 11

AIR 1953 SC 250 = 1953 SCR 655 6

AIR 1948 PC 121 = 75 Ind App 225
7, 11

Mr. G. N. Dikshit Sr. Advocate, (Mr. O. P. Rana Advocate with him), for Appellant; Mr. R. P. Agarwala, Advocate Amicus Curiae, for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal is directed against a judgment of the High Court of Allahabad declaring that the orders dated 15-8-1949 and 18-5-51, of the respondent's removal from service were illegal.

2. The respondent was employed as Assistant Jailor at the Central Prison, Benaras. Auditing of the accounts revealed certain shortages. The respondent was charge-sheeted in respect of the same, and dismissed from the post on 4-7-1942. He made representations to the authorities against his dismissal. Ultimately, the Government reinstated him on 15-6-1948 but by the same order suspended him with retrospective effect from the date of his dismissal. On the basis of the enquiry held earlier into the charges against him, he was removed from service on August 15, 1949. The respondent then filed suit No. 144/396 of 1952 in the Court of Munsif, Lucknow, claiming a declaration that the suspension order, dated June 15, 1948, and the removal order dated, 15-8-1949, and the Government Order, dated 18-5-1951, upholding the removal in appeal, were illegal, ultra vires and contrary to the rules. The plaintiff further stated that he would file a separate suit for the recovery of the arrears of pay, to which he was entitled in respect of the period from 4-7-42 to 10-8-1949.

3. The suit was resisted by the State on various grounds. The trial court dismissed his suit. The First Appellate Court dismissed his appeal.

4. The plaintiff preferred a second appeal in the High Court. Before the learned Judge of the High Court, who heard the appeal, it was contended, inter alia that copies of

the Enquiry Officer's report and findings were not supplied to the plaintiff and therefore, he was not afforded a reasonable opportunity of showing cause in terms of Article 311 (2) of the Constitution. In substance, the learned Judge seems to have accepted this contention when he concluded that "in the absence of furnishing a copy of the report, it could not be said that the plaintiff had been afforded a reasonable opportunity to show cause." He, however rested this conclusion also on the ground "that no cause could properly be shown without a copy of the proceedings being handed over as provided in Rule 5-A of the Punishment & Appeal Rules for Subordinate Services notified by the State Government under Notification No. 2627/II-266 dated August 3, 1932", (hereinafter referred to as the Appeal Rules). In the result, he allowed the appeal and declared the impugned orders, dated 15-8-1949 and 18-5-1951 to be void. He did not think it necessary to record any finding with respect to the suspension order, dated June 15, 1948, as the same had merged in the removal orders. Hence this appeal by special leave by the State.

5. The plaintiff respondent has not appeared before us despite notice. Mr. R. P. Aggarwala has assisted us as amicus curiae.

6. Shri Dikshit, the learned Counsel for the appellant contends that the High Court was wrong in holding that the impugned order of removal violated the provisions of Rule 5-A of the Appeal Rules. It is pointed out that the application of Rule 5-A to the employees of Jail Department was expressly excluded by Rule 6 of the Appeal Rules. It is further submitted that since the removal in question was a pre-constitutional removal, no protection of Article 311 (2) of the Constitution could be claimed by the respondent. Even Section 240 (3) of the Government of India Act, 1935, according to the Counsel, would not afford any protection because the word 'removal' did not find mention in that section. 'Removal', says the Counsel, is something different from 'dismissal' and the authors of the Government of India Act were aware of this differ-

ence when they did not include it in the protective provisions of Section 240. Since the impugned order, dated 15-8-1949, was only an order of removal as distinguished from dismissal, Section 240 (3) was not attracted and no opportunity to show cause against the intended removal was required to be given to the servant. It is further submitted that in any case, the respondent had no right to be supplied with a copy of the report and the findings of the Enquiry Officer on the ground that it was a requirement of natural justice. In support of his contentions, learned counsel has cited Suresh Koshy George v. University of Kerala, (1969) 1 SCR 317 = (AIR 1969 SC 198), Satish Chander Anand v. Union of India 1953 SCR 655 = (AIR 1953 SC 250) and State of Uttar Pradesh v. Mohammad Nooh, 1958 SCR 595 = (AIR 1958 SC 86).

7. On the other hand, Shri. R. P. Aggarwala submits that even if Rule 5-A of the Appeal Rules was not applicable, the respondent was entitled to the protection of Section 240 (3) of the Government of India Act, 1935. According to Counsel, the word 'dismissal' used in Section 240 (3) was wide enough to cover a case of removal as a punishment. It is maintained that 'removal' and 'dismissal' in the context of Section 240 (3) are synonymous terms. The argument proceeds that since the respondent was not furnished with a copy of the enquiry report and the findings recorded therein, the opportunity, if any given, was not a 'reasonable opportunity' as required by the mandatory provisions of S. 240 (3). Even after making the order of removal, — it is stressed — the authorities despite written requests made by the respondent, did not supply a copy of those documents to enable him to file an effective appeal/representation under the service rules to the appropriate authority. This intransigent attitude, says the learned amicus curiae, was also violative of the procedure prescribed in Government circular No. 47/B8EC, dated 13-12-47. (Ex. PW 1/2) and the fundamental principles of natural justice embodied therein. Reliance in this behalf has been placed on High Commr. of India v. I. M.

Lall, 75 Ind App 225 = (AIR 1948 PC 121); Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 = (AIR 1958 SC 36) Khem Chand v. Union of India, 1958 SCR 1080 = (AIR 1958 SC 300) State of Gujarat v. R. G. Teredesai, (1970) 1 SCR 251 = (AIR 1969 SC 1294). Counsel further distinguished the decision in Suresh Koshy George's case (supra).

8. The first point to be considered is whether the safeguard in Section 240 (3) of the Government of India Act 1935, was available to a civil servant in a case of 'removal' from service as a punishment? In other words, was the protection afforded by Section 240 (3) less extensive than the one given by Article 311 (2) of the Constitution?

9. Section 240 (3) was in these terms:

"No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause."

10. Article 311 (2) (after the 15th Amendment) runs thus:

"No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such enquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry."

11. A comparative study of Section 240 (3) and Article 311 (2) would show that the protection afforded by these provisions, is in nature and extent, substantially the same. Of course, the word 'removed', which appears in Article 311 (2), does not find mention in Section 240 (3). But this does not mean that Section 240 (3) did not cover a case of 'removal'. It is by now well settled that from the constitutional standpoint, 'removal' and 'dismissal', stand on the same footing except as to future employment. In the context of Section 240 (3), 'removal' and 'dismissal' from service, are synonymous terms, the former being only a species of the latter. Moreover, according to the principle of interpretation laid down in Section 277 of the 1935 Act, the reference to dismissal in Section 240 would include a reference to removal, (see *High Commr of India v. I. M. Lall* (supra); *Shyam Lal v. The State*, 1955 SCR 26=(AIR 1954 SC 369) *Parshottam Lal Dhingra v. Union of India* (supra), *Khem Chand v. Union of India* (supra).)

12. It is thus clear that despite the non-mention of the word 'removed' in Section 240 (3), it was obligatory for the removing authority, as soon as it tentatively decided, as a result of the enquiry, to inflict the punishment of 'removal', to give to the employee a 'reasonable opportunity' of showing cause against the action proposed to be taken in regard to him.

13. It is to be noted that the section requires not only the giving

of an opportunity to show cause, but further enjoins that the opportunity should be "reasonable". What then is "reasonable opportunity" within the contemplation of Section 240 (3)? How is it distinguished from an opportunity which is not reasonable? The question has to be answered in the context of each case, keeping in view the object of this provision and the fundamental principle of natural justice subversed by it. As pointed out by this Court in *State of Gujarat v. Teredesai* (supra), 'the entire object of supplying a copy of the report of the enquiring officer is to enable the delinquent officer to satisfy the punishing authority that he is innocent of the charges framed against him and that even if the charges are held to have been proved the punishment proposed to be inflicted is unduly severe. If the enquiry officer had also made recommendations in the matter of punishment, that is likely to affect the mind of the punishing authority even with regard to penalty or punishment to be imposed on such officer. The requirement of reasonable opportunity, therefore would not be satisfied unless the entire report of the Enquiry officer including his views in the matter of punishment are disclosed to the delinquent servant.' Thus the broad test of "reasonable opportunity" is, whether in the given case, the show cause notice issued to the delinquent servant contained or was accompanied by so much information as was necessary to enable him to clear himself of the guilt, if possible, even at that stage, or, in the alternative, to show that the penalty proposed was much too harsh and disproportionate to the nature of the charge established against him.

14. Now let us apply this test to the facts of the present case. The case of the defendant State in the written statement (as extracted by the Munsif in his judgment) was:

".....that the accounts of the Civil Prison Benaras for the years 1939 to 1947 were audited by the Senior Departmental Auditor who detected heavy shortage whereupon the matter was thoroughly investigated and the I. G. ordered charge-sheets to be framed against the plaintiff which

was accordingly done and the Superintendent, Central Prison, Benaras submitted the proceedings of those charges along with his comments and explanation of the plaintiff whereupon the I. G. of Prison found the plaintiff guilty of those charges and ordered his removal."

15. It is clearly discernible from what has been extracted above that the order of the removal in question proceeded on an acceptance of the report of enquiry proceedings and 'comments' of the Enquiry Officer (Superintendent). Evidently the Inspector-General who made the impugned order was influenced and guided both with regard to the proof of charges and the prescribing of the type of punishment by the report and "comments" (which term will cover "recommendations") of the Enquiring Authority.

16. Further, it is an uncontroverted fact found by the courts below that no copy of the report, findings and "comments" of the Enquiring Officer, was supplied to the delinquent servant. Another undisputed fact is that no copy of the enquiry report and allied documents was given to him, even when he applied for the same in order to file an appeal to the higher authorities against the order of removal. The servant was told that he was not entitled to those copies excepting a copy of the impugned order of punishment, and that too, on payment of Rs. 3/- as copying charges.

17. In view of these stark facts, the High Court was right in holding that the plaintiff (respondent) was not given a reasonable opportunity to show cause against the action proposed to be taken against him and that the non-supply of the copies of the material documents had caused serious prejudice to him in making a proper representation. There was a disobedience of the mandate of Section 240 (3) of the Government of India Act, 1935 and the impugned order stood vitiated on that score alone. Reference to Rule 5-A of the Appeal Rules, made by the High Court in support of its conclusion, was unnecessary because application of that Rule to the employees of the Jail Department had been ex-

pressly excluded by Rule 6 of the Appeal Rules. Moreover, Rule 5-A was inserted in 1953, while we are dealing with a removal order made in 1949.

18. It was contended before us by Mr. R. P. Agarwala that the removal order, dated 18-5-1951, passed by the Government on the respondent's appeal, was also invalid because in violation of the basic principles of natural justice and fair play, copies of the proceedings, report and findings of the Enquiring Officer were not supplied to the plaintiff to enable him to file an effective appeal. There is undoubtedly force in this contention, but we think it unnecessary to decide this point as the order of removal, dated 15-8-1949, being, void ab initio due to non-compliance with the requirements of Section 240 (3), the appellate impugned order would automatically fall with it.

19. Before parting with this judgment, we place on record our appreciation of the valuable assistance rendered by the learned counsel on both sides, particularly the amicus curiae, Shri Aggarwala.

20. The appeal fails and is dismissed without any order as to costs.
Appeal dismissed.

AIR 1975 SUPREME COURT 2049

V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.

Sher Mohammad, Petitioner v. The State of West Bengal, Respondent.

Writ Petn. No. 522 of 1974, D/- 8-1-1975.

(A) Maintenance of Internal Security Act (1971), Section 3 (4) — Order of detention by District Magistrate — Order communicated to Central Government beyond seven days of the order and before approval of State Government — Order held invalid as there was not sufficient compliance with the statutory requirement — There had been infringement of procedural safeguard.

(Paras 4, 5)

BS/BS/A160/75/AGT

Mr. H. S. Marwah Advocate, Amicus Curiae, for Petitioner; Mr. S. C. Majumdar, Advocate, and Mr. G. S. Chatterjee, Advocate of M/s. Sukumar Basu & Co., for Respondent.

The following Judgment of the Court was delivered by:

KRISHNA IYER, J.:— The detenu, petitioner, challenges his detention on various grounds but Shri H. S. Marwah, appearing as amicus curiae, has raised big contentions and small, some of which do not merit consideration and others need not be dealt with since, on a short point, the petition must succeed.

2. The scheme of the Maintenance of Internal Security Act, 1971 (Act No. 26 of 1971) (hereinafter called the MISA, for short) is in keeping with Article 22 of the Constitution and emphasizes the various stages at which there will be consideration of the need for the detention by different authorities, such as the District Magistrate, the State Government and, ultimately, the Central Government. For the effective exercise of this power a scheme has been built into the statute. We are concerned at present with the power vested in the Central Government under Section 14 (1) (b) to direct release of the detenu. We may extract the provision here:

"14 (1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified—

x x x x x x

(b) notwithstanding that the order has been made by State Government, or by the Central Government."

With a view to posting the Central Government with the detention and the grounds therefor, Section 3 (4) provides thus:

"3. Power to make orders detaining certain persons.

x x x x x x

(4) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made

and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order." (emphasis, ours)

3. A fair reading of Section 3 indicates that the State Government may directly issue an order of detention or, if it is done by a lesser authority, approve of such detention order as provided in the statute. Sub-section (4) of Section 3, which we have extracted, obligates the State Government to communicate, within seven days of the order of detention it makes or it approves, that fact to the Central Government, together with the grounds on which the order has been made and other relevant particulars. Even assuming that the order is made by the District Magistrate and is approved by the State Government, the communication has to be made to the Central Government within the time specified. This procedural mandate is inviolable except on peril of the order being voided.

4. In the present case it is obvious that the detention order was made on November 21, 1972 by the District Magistrate and approved by the State Government on December 2, 1972. It is curious that on the State's own showing the communication to the Central Government in compliance with Section 3 (4) of the MISA has been made on December 1, 1972. This date is beyond seven days of the District Magistrate's order and it could not have been in compliance with the seven days' spell after the approval by the State Government, that having been done only a day after the alleged communication to the Central Government. It is thus plain that the State Government could not have communicated the approval to the Central Government before the approval itself was made. Secondly, if what it communicated was the order of the District Magistrate, it was not sufficient compliance with the statutory requirement. Moreover it was beyond the seven days' period.

5. In short, there has been an infringement of the procedural safeguard. This Court has, in several rulings held that the liberty of the

citizen is a priceless freedom, sedulously secured by the Constitution. Even so, during times of emergency, in compliance with the provisions of the Constitution, the said freedom may be curtailed, but only in strict compliance with statutory formalities which are the Vigilant concern of the courts to enforce.

6. We have pointed out how in the present case there has been a failure on the part of the State Government to comply with Section 3 (4). Judicial engineering prevents of breaches of Constitutional dykes protecting fundamental freedoms.

7. The order of detention is invalid and the detenu is liable to be released. The rule is made absolute. Rule made absolute.

AIR 1975 SUPREME COURT 2051

(From:— AIR 1971 Tripura 40)

A. N. RAY, C. J., K. K. MATHEW AND Y. V. CHANDRACHUD, JJ.

M/s. Howrah Insurance Co., Ltd.
Appellant v. Shri Sochindra Mohan Das Gupta, Respondent.

Civil Appeal No. 1611 (N) of 1971,
D/- 20-8-1975.

(A) Civil P. C. (1908), S. 150 — Transfer of business— Power of transferee Court— Surety bond executed in favour of District Judge, successors and assigns in respect of pending suit — Suit transferred to Subordinate Judge — Latter can enforce bond.

Where a surety bond was executed by the interim receiver and the surety in favour of the District Judge, Agartala, his successors, successors-in-office, and assigns for the purposes of a mortgage suit pending before him and the District Judge transferred the suit to the Subordinate Judge, Agartala, under the Tripura (Courts) Order, 1950, the latter would be the 'successor' though not in office, of the District Judge for the purposes of enforcing the surety bond and by virtue of Section 150, Civil P. C. the Subordinate Judge is entitled to exercise the same powers in the matter of the enforcement of the bond as the

District Judge himself. AIR 1971 Tripura 40, Affirmed. (Paras 10, 11)

(B) Civil P. C. (1908), Section 145
(c) — Liability of surety — Extent of.

Where by the surety bond the surety rendered itself liable as a surety for the fulfilment of the conditions imposed on the Receiver under the orders passed by the Court, the order for the recovery of damages obtained against the Receiver can be executed against the surety to the extent to which it rendered itself personally liable under the terms of the bond. (Para 11)

(C) Civil P. C. (1908), O. 40, R. 3— Receiver in mortgage suit —Receiver executing surety bond whereby he rendered himself retrospectively liable for any loss caused by his default to mortgaged property from date of his taking possession — Property damaged by fire prior to execution of bond due to receiver's default — Receiver is liable. AIR 1971 Tripura 40, Affirmed. (Para 12)

Mr. S. V. Gupte, Sr. Advocate, (M/s. D. N. Mukherjee and G. S. Chatterjee, Advocates with him) for Appellant; Mr. P. K. Chatterjee, Sr. Advocate (Mr. Rathin Das Advocate with him) for Respondent.

Judgment of the court was delivered by

CHANDRACHUD, J.:— By a deed of mortgage dated February 10, 1943 the respondent mortgaged a tea garden called the "Ishanchandrapur Tea Estate" to M/s. Das Bank Ltd. On January 19, 1950 the Bank instituted Mortgage Suit No. 2/1950 against the respondent on the Original Side of the Tripura High Court, for recovering the amount due under the mortgage. On reorganisation of the Judicial Administration in Tripura, the suit was transferred to the court of the District Judge, Agartala. On January 20, 1950 the Bank applied for the appointment of a Receiver. On the District Judge directing that the Bank should nominate a Receiver in terms of clause 12 of the mortgage deed, first the Secretary of the Bank and later another employee called Adhir Ranjan Dutta was appointed as the Receiver subject to his furnishing security in the sum of Rs. 50,000. The Receiver took possession of the estate

on 22nd January but since the security was not furnished, the court directed on an application of the respondent that the Receiver should furnish the requisite security within the time allowed to him. On February 26, 1950 the tea garden was damaged by a fire which destroyed over 3,000 tea saplings. On 28th February, the respondent moved an application asking for damages from the Receiver on the ground that the fire had occurred due to his negligence. The respondent also renewed his request that the receiver be asked to furnish security.

2. On August 26, 1950 the appellant M/s. Howrah Insurance Co. Ltd. executed a surety bond in the sum of Rs. 50,000 in favour of Shri R. M. Goswami, District Judge, Agartala, his successors, successors-in-office and assigns. The bond was approved and accepted by the District Judge on October 10, 1950.

3. By virtue of the powers conferred by the Tripura (Courts) Order of 1950 which came into force on December 31, 1950 the District Judge transferred the mortgage suit to the court of the Subordinate Judge, Agartala. The transferee court was created under the Order of 1950.

4. The application filed by the respondent on February 28, 1950 for damages was heard along with the mortgage suit. The learned Subordinate Judge decreed the suit on May 31, 1956, but he also allowed the respondent's application for damages to the extent of Rs. 32,525. He directed that the Receiver should pay the amount within two months failing which the amount should be recovered from the security of Rs. 50,000. Civil Miscellaneous First Appeal No. 22 of 1956 filed by the Receiver against that order was dismissed for default by the Judicial Commissioner, Tripura on December 18, 1959. But, he allowed the respondent's cross-objections and enhanced the damages to Rs. 41,525.

5. On October 4, 1961 respondent filed in the Court of the Subordinate Judge, Execution Petition No. 39 of 1961 against the Receiver and the appellant praying that execution do issue against the appellant as directed by the Court. The appellant

filed his objections to that petition but the learned Judge rejected the objections and directed that the damages awarded to the respondent be recovered from the appellant. The appellant filed an appeal against that order but it was dismissed by the learned Judicial Commissioner on June 29, 1970. This appeal by special leave is directed against that judgment.

6. Learned counsel appearing on behalf of the appellant has raised two contentions: (1) The Subordinate Judge who tried the suit is incompetent to enforce the surety bond executed by the appellant as he is neither the successor nor the successor-in-office nor the assign of the District Judge; and (2) Under the terms of the bond, the appellant is not answerable for the loss caused to the tea garden by fire.

7. Both of these contentions turn on the terms of the surety bond and it is therefore necessary to have a look at that bond.

8. The bond is executed both by the Receiver and the appellant in favour of "Sri Ramani Mohan Goswami the District Judge of Agartala, his successors, successors-in-office and assigns". By the bond, the executants bound themselves jointly and severally in the whole of the amount of Rs. 50,000 up to the District Judge, Agartala, his successors, successors-in-office and assigns. The bond, though executed on August 26, 1950, relates back to January 22, 1950 being the date when the Receiver took possession of the property.

9. It is urged that the bond can be enforced only by or at the instance of the District Judge, Agartala, or his successors, successors-in-office or assigns and the Subordinate Judge, Agartala not being either of these, it is incompetent for him to enforce the bond. We see no substance in this contention. The Subordinate Judge of Agartala may not be the successor-in-office of the District Judge because "successor-in-office" would mean successor of the District Judge in the post or office of the District Judge. But the Subordinate Judge, Agartala is, for the purposes of the present proceedings, a successor of the District Judge who was seized of the suit and who transferred it to the Subor-

minate Judge under the Tripura (Courts) Order of 1950. The surety bond was executed in and for the purposes of the particular proceedings which were pending before the District Judge, in order that the bond should be enforceable at the instance of the presiding officer of the court. "Successor", therefore, must in the context mean the court which for the time being is seized of the proceedings.

10. Under Section 150 of the Code of Civil Procedure, save as otherwise provided, where the business of any Court is transferred to any other Court, the transferee Court has the same powers and is entitled to perform the same duties as those respectively conferred and imposed by the Code upon the transferor Court. The surety bond was a part of the proceedings pending before the District Judge and on the transfer of the suit the entire proceedings, including the bond, stood validly transferred to the Court of the Subordinate Judge. Thus, by virtue of Section 150, the Subordinate Judge was entitled to exercise the same powers in the matter of the enforcement of the bond as the District Judge himself.

11. Section 145 (c) of the Code of Civil Procedure provides, to the extent material, that where any person has become liable as a surety for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against the surety to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees. By the surety bond, the appellant rendered itself liable as a surety for the fulfilment of the conditions imposed on the Receiver under the orders passed by the court. Therefore, the order for the recovery of damages obtained by the respondent against the Receiver can be executed against the appellant to the extent to which it rendered itself personally liable under the terms of the bond.

12. There is no substance in the second contention either. Under

the bond, the appellant rendered itself liable "in respect of any loss or damage occasioned by any act or default of the Receiver in relation to his duties as such Receiver as aforesaid." The fire having been caused due to the Receiver's negligence in the performance of his duties, the appellant is liable to make good the loss caused to the tea garden by the fire. Learned counsel for the appellant however urged that the appointment of the Receiver was limited to the stock-in-trade, machinery and moveables in the tea garden and to the factory premises and since the Receiver owed no obligation in relation to the tea garden, the appellant would not be liable for the loss caused thereto by the fire. Reliance is placed in support of this argument on the words "as aforesaid" which qualify the words "in relation to his duties". The surety bond has, undoubtedly, to be construed strictly but it is impossible to accept the contention that the Receiver owed no duty or obligation in respect of the tea garden. He was put in possession of the tea garden in his capacity as a Receiver and indeed parties had made contentions from time to time as to whether the tea garden was managed by the Receiver economically and efficiently. The surety bond would therefore cover the loss occasioned to the tea garden due to the Receiver's default. It is significant that though the bond was executed six months after the tea garden was damaged by the fire, it was given retrospective operation with effect from January 22, 1950 being the date on which the Receiver had taken possession of the mortgaged property including the tea garden.

13. For these reasons we confirm judgment of the learned Judicial Commissioner and dismiss this appeal with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2054

(From: 1971 Ker. L. T. 318)

**A. ALAGIRISWAMI, N. L.
UNTWALIA AND S. MUR-
TAZA FAZL ALI JJ.****Ernakulam Mills Ltd., Appellant
v. State of Kerala, Respondent.****Civil Appeal No. 628 of 1971,
D/- 19-8-1975.****(A) Land Acquisition Act (1894),
Section 18 — Land owner not making
reference because of groundless
misconception of fact of his own making — He cannot take advantage of
his own lapse. (Constitution of India,
Art. 226).**

Certain land was acquired by the Government as far back as 1947. The award was made by the Collector but the landowner for some reason or the other imagined that there was an express promise or an implied agreement to reconvey the land and did not move the Collector for making a reference to the Court for determining the compensation. On writ petition by the land owner for a writ of mandamus against Government to reconvey the land to him.

Held that the landowner suffered from groundless misconception of fact which was of his own making and therefore he could not be allowed to take advantage of his own lapse. That would be no ground for concluding that any promise was made by the Government. The writ petition must fail. 1971 Ker L. T. 318 Affirmed. (Para 9)

V. A. Seyid Mohammad, Sr. Advocate, (Mr. A. S. Nambiar, Advocate, with him), for Appellant; Mr. T. S. Krishnamoorthy Iyer, Sr. Advocate. (M/s. K. M. K. Nair and N. Sudhakaran, Advocates with him) for Respondent.

Judgment of the Court was delivered by:

S. M. FAZL ALI, J.:— This is an appeal against the judgment of the High Court of Kerala by certificate of fitness granted by the said High Court under Art. 133 (1) (a) of the Constitution as it stood at the relevant time. The facts leading to the present appeal may be succinctly stated as follows.

2. The appellant is an owner of 69-5/8 cents of land comprised in Survey Nos. 1178/2, 1195/2 and 1103/4 of Ernakulam village. The Government acquired a large tract of land including the land in dispute for the formation of the Foreshore Road at Ernakulam. The appellant's land was also acquired and the sheet-anchor of the case of the appellant has been the correspondence between it and the officers of the Government by which some sort of assurance is said to have been given to the appellant that the land would be returned to it, if it was not required by the Government. A series of letters which will be dealt with hereafter between the appellant and the Government or its officers followed during the course of about 17 years culminating in the final refusal by the Government to return the land to the appellant on the ground that it was required by it for some public purpose. The appellant has based his claim on the promissory estoppel which, according to it, is spelt out from the letters of the Government, incorporating the alleged agreement between the appellant and the Government for return of its land. It was argued by the appellant that it was in view of the clear assurance given by the Government that the land would be returned to it that the appellant did not choose to file an application before the Collector for making a reference to the Court for enhancing the compensation awarded, which, according to the appellant, was wholly inadequate.

3. In view of the refusal by the Government to return the land to the appellant, the appellant filed a petition for a writ of mandamus in the High Court of Kerala praying that a direction or a writ may be issued commanding the Government to reconvey the land to the appellant. The Government resisted the writ petition before the High Court mainly on the ground that there was absolutely no assurance or promise held out by the Government although the correspondence showed that there was some thinking in the mind of the Government regarding the possibility of derequisitioning the land. The High Court considered

the legal aspect of the promissory estoppel and held that no writ could be granted. On facts also the High Court negatived the case of the appellant and held that from the evidence produced before it no solemn promise or agreement to return the land to the appellant was proved.

4. In support of the appeal Dr. V. A. Seyid Muhammad appearing for the appellant submitted two points before us. In the first place he contended that from the correspondence produced by the appellant there was a solemn promise by the Government to return the land to the appellant and it was on the basis of this representation that the appellant did not move the Collector for making a reference to the Court for determining the compensation which was grossly low. Having gone through the various letters placed before us by the learned counsel for the appellant, we are unable to hold that these letters make out a case of any agreement or a promise on the part of the Government to reconvey the land acquired by it to the appellant.

5. To begin with reliance was placed on Ext. P-1 which is the starting point of the correspondence between the appellant and the Government. This document is a letter dated January 13, 1947 and appears at p. 5 of the printed Paper Book. The relevant part of this letter may be quoted thus:

"The proposal to acquire all the lands in the area involved has been confirmed. But portions of high level parambas not required for the road, foot-paths, drains, etc. to be constructed, are proposed to be returned to the present owners after the reclamation is over, after realising from them the compensation which will be paid to them for the acquisition of the land, inclusive of 15 per cent solatium and the proportionate cost of reclamation and any other items of expenditure which may have to be incurred in the course of the reclamation. This will not, however, apply to lands which Government consider, are marshy, or paddy fields or portions lying to the west of the road. The Diwan Peishkar has been instructed to inform the

owners of high level parambas accordingly."

A perusal of this letter would clearly reveal the fact that the letter is nothing more than a mere proposal or a hint thrown by the Government to the appellant that in case the Government did not require the land the same may be returned to the owners. Dr Seyid Muhammad laid great stress on the two statements made in this letter. In the first place he submitted that it was clearly stated that portions of high level parambas would not be required for the road and secondly that the Diwan Peishkar had been instructed to inform the owners of high level parambas accordingly, from which it could be spelt out that the Government had made up its mind to return the lands situated on a higher level such as the land of the appellant. We are, however, unable to agree with the contention put forward by the learned counsel for the appellant. The first part of the letter makes the stand of the Government clear, namely, that the final orders of the Government regarding the procedure for acquisition had been passed. A hint was, however, thrown that if the high level parambas etc. were not required they might be returned. We are unable to find any promise or commitment on the part of the Government to reconvey the lands acquired by it.

6. Another letter on which reliance was placed was Ext. P-6 which is at p. 18 of the printed Paper Book. This letter was written by the appellant to the District Collector, Ernakulam. Reliance was placed on the third paragraph of this letter which runs thus:

"It was agreed at the time of acquisition that the area acquired from us would be returned to us soon after the work of the road was over. So, even though the compensation paid was very low, we did not appeal against the award"

This was undoubtedly a statement made by the appellant in his own favour and was actually based on the letter Ext. P-1 which was construed by the appellant to be an agreement. This letter, however, cannot bind the Government unless there was a clear or solemn promise on the part of the

Government to reconvey the lands acquired by it.

7. Exhibit P-2 which is a letter written by the Collector, Ernakulam, to the appellant clearly shows that the Government had made no commitment to reconvey the land at any time. This letter which was sent in reply to Ext. P-6 runs thus:

"I am to inform you that your request can be considered only after the completion of the work of the Foreshore area. I, therefore, request you to renew the request in June, 1960".

The Collector has carefully chosen the words to indicate that the request of the appellant would be considered after the completion of the work of the Foreshore area. There was thus neither any promise nor any representation.

8. Another letter on which reliance was placed is Ext. P-7 a letter written by the appellant to the District Collector; Ernakulam, in which the appellant itself renewed its request to arrange for the return of the land acquired. One important feature of this letter is that the appellant itself understood the correspondence between it and the Government as a bare proposal. The words used by the appellant, namely, "He replied to us saying that the matter was receiving attention" clearly show that the matter was only receiving the attention of the Government and there was no promise made by the Government regarding reconveyancing of the land.

9. This is all the evidence that was relied upon by the learned counsel for the appellant in support of his plea that a promissory estoppel was made out in this case. We are, however, unable to accept the contention of the appellant that there was at any time any promise or agreement made between the appellant and the Government for reconveying the land. Thus the position is that the land was acquired by the Government as far back as 1947, the award was made by the Collector but the appellant for some reason or the other imagined that there was an express promise or an implied agreement to reconvey the land and did not

move the Collector for making a reference to the Court for determining the compensation. If the appellant did not move in this matter it was because he suffered from groundless misconception of fact which was of the appellant's own making and therefore it could not be allowed to take advantage of its own lapse. Thus that would be no ground for holding that any promise was made by the Government. The Government never prevented the appellant from approaching the Collector for making a reference to the Court for determining the compensation, and if the appellant appeared to be over-conscious of his rights he is to blame himself if he fails.

10. In the view that we take in this case, it is not necessary for us to examine the legal position whether in a case of promissory estoppel a writ of mandamus will lie.

11. The result is that the appeal fails and is dismissed but in the peculiar circumstances of this case we make no order as to costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2056
V. R. KRISHNA IYER AND N. L. UNTWALIA, JJ.

Moni Lal Roy Choudhury, Petitioner v. The State of West Bengal, Respondent.

Writ Petn. No. 14 of 1975. D/- 31-3-1975.

(A) Maintenance of Internal Security Act (1971), S. 3—Detention under—Writ against—Plea of alibi—Interference by Supreme Court. (Constitution of India, Art. 32).

Where the incidents alleged were such, that if true, they would have been sufficient for the subjective satisfaction of the detaining authority that it was necessary to detain the person concerned for preventing him from acting in a "prejudicial manner", but a plea of alibi was set up on his behalf.

GS/FS/B319/75/SAR

Held that ordinarily, in cases of preventive detention, such questions are outside the purview of the Supreme Court in writ proceedings against the order of detention.

(Para 1)

Judgment of the Court was delivered by

KRISHNA IYER, J.:— Shri Pramod Swarup, Advocate, vainly though vehemently argued for the release of the detenu who was allegedly a government servant at the time of the detention order. The order was passed on May 4, 1974 and the grounds of detention, in compliance with the statutory requirement, were communicated. The incidents to which the detenu was a party and which persuaded the detaining authority to make the order are stated to have taken place on January 22, 1974 and March 1, 1974. Obviously, the incidents are such as, if true, would have been sufficient for the subjective satisfaction of the District Magistrate concerned. But the plea put forward is that the detenu was a government servant and attending office on the alleged dates. Para. 7 of the counter-affidavit filed on behalf of the State explains how, notwithstanding the entry of attendance in the office register, the detenu was involved in criminal incidents and eye witnesses' evidence was available for the detaining authority in this behalf. It is not for us to investigate the alibi of the detenu. The jurisprudence of preventive detention ordinarily keeps this area out of bounds and out of the purview of this Court.

2. No other ground meriting consideration has been urged. We see no reason to disturb the order of detention. The Rule is vacated and the petition dismissed.

Petition dismissed.

AIR 1975 SUPREME COURT 2057

(From: Allahabad)*

A. N. RAY, C. J., K. K. MATHEW, V.
R. KRISHNA IYER AND S. MURTAZA FAZL ALI, JJ.

M/s. Mahabir Jute Mills Ltd., Gorakhpur, Appellant v. Shibban Lal Saxena and others, Respondents.

Civil Appeal No. 781 of 1973, D/- 30-7-1975.

(A) Constitution of India, Article 226 — Administrative order if should be speaking order.

It is well-settled that while the rules of natural justice would apply to administrative proceedings, it is not necessary that the administrative orders should be speaking orders unless the statute specifically enjoins such a requirement. But it is desirable that such orders should contain reasons when they decide matters affecting rights of parties. (Para 3)

(B) U. P. Industrial Disputes Act (28 of 1947), Section 4-K — Order of Government under Section 4-K being purely administrative need not be speaking order — Order not vitiated for absence of reasons. (Para 3)

(C) U. P. Industrial Disputes Act (28 of 1947), Section 4-K — Discretion of Government to make a reference of industrial dispute — Interference by High Court under Art. 226 of Constitution. (Constitution of India, Article 226). Spl. Appeal No. 914 of 1963, D/- 8-5-1972 (All), Reversed.

S. 4-K gives a wide discretion to the State Government to act under certain circumstances. If the Government on the basis of the materials before it, comes to the conclusion that no real dispute existed and it was not expedient to make a reference one can hardly find fault with the order of the Government passed under S. 4-K. The fact that the Government had taken into consideration the secret report of the Additional Regional Commissioner along with other material in refusing to make a reference cannot be a valid ground to set aside the order of the Government. Even if the High Court thought that the impugned order of the Government suf-

*(Spl. Appeal No. 914 of 1963, D/- 8-5-1972—All.)

ferred from any legal infirmity all that it could have done was to have asked the Government to reconsider it but it had no jurisdiction to direct the Government how to act and how to exercise its statutory discretion. Spl. Appeal No. 914 of 1963, D/- 8-5-1972 (All) Reversed. (Paras 5 and 10)

(D) U. P. Industrial Disputes Act (28 of 1947), Section 3 — Government Notification under — Limited nature of functions of Board of Conciliation indicated — Chairman not showing his report to other members — Principles of natural justice not violated.

The procedure prescribed for the Board does not involve any adjudicatory process but is purely of an exploratory nature and what the Board has to do is to make an effort to bring about an amicable settlement, between the management and the workers, and if it fails to do so it has to send a detailed report to the Government. That is the limited area within which the Board has to function. There is no provision in the notification or in Section 9 U. P. Industrial Disputes Act which enjoins that the report submitted by the Chairman or any other members should be shown to one another. This also does not appear to be necessary.

(Para 6)

Where the Board had conducted a full inquiry and heard the parties before making the report, there is no violation of the principles of natural justice because the Chairman did not show his secret report to the other members of the Board. AIR 1970 SC 150 and AIR 1967 SC 1269, Distinguished.

(Paras 6 & 8)

(E) Constitution of India, Articles 133 and 226 — High Court in its writ jurisdiction setting aside order of Government refusing to make reference of industrial dispute and directing it to reconsider matter — High Court's order quashed in appeal under Article 133 — Order of reference made by Government as a result of High Court's order also falls to the ground even in the absence of any prayer by the appellant.

(Paras 11, 12)

Cases Referred: Chronological Paras
AIR 1971 SC 40 = (1971) 1 SCR 791

AIR 1970 SC 150 = (1970) 1 SCR 457 7

AIR 1970 SC 1205 = (1970) 3 SCR 370 12

AIR 1967 SC 1269 = (1967) 2 SCR 625 9

M/s. S. V. Gupte and A. K. Sen, Sr. Advocates (M/s. E. C. Agarwala and Promod Swarup, Advocates with them), for Appellant; M/s. K. R. Chowdhari and S. L. Sethia, Advocates (for Nos. 1 and 2.), Mr. G. N. Dikshit, Sr. Advocate, (Mr. O. P. Rana, Advocate with him), (for Numbers 3 and 4). for Respondents.

Judgment of the Court was delivered by:

FAZL ALI, J.:— This is an appeal by the management of M/s. Mahabir Jute Mills situated at Gorakhpore by a certificate granted by the High Court of Allahabad under Article 133 of the Constitution of India. M/s. Mahabir Jute Mills Mazdoor Sabha was formed some time in the year 1946 and soon thereafter when Shibban Lal Saxena one of the respondents was elected as President of the Labour Union of the Mill disputes arose between the workers and the Company as a result of which Shibban Lal Saxena sent notice to the management on December 31, 1946 threatening a general strike. Thereafter several disputes arose between the parties which were sometimes settled, sometimes re-opened and in this appeal we are not concerned with those matters. In the previous disputes the order of the management retrenching some workers was upheld by the Regional Conciliation Officer and against that Shibban Lal Saxena served a notice of strike listing 18 demands and calling upon the management to reinstate the retrenched workers and pay them bonus. This notice was given on March 31, 1954. On April 16, 1954 a total strike was launched and Shibban Lal Saxena left for China. During his absence it appears that the management arrived at some sort of settlement with the working President of the Union and the dispute for the time being was resolved on July 11, 1954. Shibban Lal Saxena, however, returned from China and with his re-entry into the Union matters assumed serious proportions and the disputes reached a

high pitch. Mr. Saxena is alleged to have excited the workers and wanted to re-open the agreement reached between the management and the working President of the Union on July 11, 1954. He also started an agitation and the workers responded to the go-slow call given by Mr. Saxena as a result of which the production of the Company came down from 500 cuts to 300 cuts resulting in huge losses to the Company as alleged by the management. It is further alleged that Mr. Saxena had delivered a number of inflammatory speeches as a result of which the management charge-sheeted two workers for wilful jamming of bobbins in the Spinning Section as a result of which the spinning work came to a stop. On January 4, 1955 the management held an inquiry against the two workers and three other workers who appeared to be in sympathy with them were also charge-sheeted for their stay-in-strike. This strike continued right up to January 13, 1955 in spite of the efforts of the management to arrive at a settlement. This was followed by a charge-sheet which was served by the management on various workers on February 5, 1955. Mr. Saxena protested to the management saying that the charge-sheets were absolutely baseless. A notice was put on the main gate of the Mill on February 22, 1955 informing that an inquiry would be held on February 25, 1955 and after inquiry which the respondents described as a mere farce a large number of workers were served dismissal notices. It appears that out of 1000 workers all of them had been dismissed from service but 200 workers who apologised were reinstated and taken back. In view of these developments the Union invoked jurisdiction of the Regional Conciliation Officer under clause 4 (1) of the Government Notification dated July 14, 1954 passed under Section 3 of the U. P. Industrial Disputes Act, 1947. A Conciliation Board consisting of the Additional Regional Conciliation Officer as the Chairman and Shibban Lal Saxena and Shri Arora representing the labour and the management respectively as members was constituted. The Conciliation

Board heard the case but unfortunately no settlement could be arrived at. Consequently the reports of the members of the Board forwarded to the Labour Commissioner were placed before the Government. Mr. P. C. Kulshreshtha, the Additional Regional Conciliation Officer and Chairman of the Board sent a secret report to the Labour Commissioner recommending that the allegations made by the workers against the management were baseless and should not be entertained. After considering the reports, the Government of U. P. by its order dated February 28, 1956 refused to make a reference to the Industrial Tribunal on the ground that it was not expedient to do so. There was some controversy before the Single Judge of the High Court on the question as to when the order of the Government was received by the workers and the High Court accepted the plea of the workers that there was sufficient delay in communicating the order of the Government to the workers as a result of which a writ petition was filed before the High Court after a year and a half. But the High Court found that the petitioners were not guilty of laches. This matter is a closed issue and need not detain us.

2. A writ petition was eventually filed on May 15, 1958 for quashing the order of the Government dated February 28, 1956 and for directing a fresh reference. The writ petition was allowed by the order of the Single Judge dated October 7, 1963. Thereafter the management went up in special appeal to the Division Bench of the Allahabad High Court which decided the appeal on May 8, 1972 and quashed the order of the Government and directed it to reconsider the same in the light of the observations made by the High Court. It would thus appear that this writ petition was pending in the High Court for as many as fourteen years with the result that a strange situation has developed today. By the time the appeal has been heard by this Court more than seventeen years have elapsed when the impugned order of the Government was passed and almost twenty years after the management had dismissed 800 workers. It

is said that the management after dismissal of the old workers had appointed new workers who had by now put in about twenty years of service. We are constrained to observe that labour matters should have been given top urgency and should not have been allowed to be prolonged for such a long period in the High Court, otherwise the inordinate delay results in a situation causing embarrassment both to the Court and to the parties. It is, therefore, very necessary and in the fitness of things that such matters should be given top priority and should be disposed of by the High Court within a year of the presentation of the petition.

3. The learned Single Judge while allowing the petition set aside the order of the Government and directed the Government to make a reference to the Industrial Tribunal after ignoring the secret report sent by the Assistant Regional Conciliation Officer. Another reason which the Single Judge gave was that as the order of the Government did not state any reasons and was not a speaking order it was legally invalid and was fit to be quashed. The Division Bench of the High Court in appeal has not accepted, and in our opinion, rightly, this part of the order of the High Court which was set aside. The Division Bench held as the order of the Government was purely an administrative order, unless there was any provision which required the Government to give reasons for the order, the same could not be vitiated for the absence of the reasons. The High Court observed thus:

"The function of the Government is administrative. In law administrative decisions are not generally required to be accompanied by a statement of reasons. There is nothing in the Industrial Disputes Act or the notification aforesaid requiring the State Government to state its reasons in support of its conclusions. There was nothing particular in the present case impelling the issuance of such a direction to the State Government."

We find ourselves in complete agreement with the view taken by the

High Court on this point. In a diverse society such as ours the Government has to work through several administrative agencies which have got a very wide sphere and if every administrative order is required to give reasons it will bring the governmental machinery to a standstill. It is well-settled that while the rules of natural justice would apply to administrative proceedings, it is not necessary that the administrative orders should be speaking orders unless the statute specifically enjoins such a requirement. But we think it desirable that such orders should contain reasons when they decide matters affecting rights of parties. The Division Bench of the High Court however has set aside the order of the Government refusing to make a reference to the Industrial Tribunal and directed it to reconsider the matter on the following three grounds:

(1) that the Government took into consideration the secret report which has seriously prejudiced and coloured its decision;

(2) that in accordance with the principles of natural justice the Regional Conciliation Officer should have shown the secret report to the other members of the Conciliation Board so that they may have an opportunity to rebut the same; and

(3) that the Government order was based purely on the secret report sent by the Additional Regional Conciliation Officer as also the report of the Labour Commissioner.

In the aforesaid order of the Division Bench of the High Court certain mandatory directions have been given to the Government to ignore the secret report as also the report of the Labour Commissioner and to consider the reports of the other members of the Conciliation Board, namely, Shibban Lal Saxena and Mr. Arora. The Division Bench of the High Court has, however, granted the certificate of fitness by its order dated April 9, 1973.

4. Coming to the first ground which weighed with the High Court in setting aside the order of the Government refusing to make a reference to the Industrial Tribunal it seems to us that the High Court has proceeded

on a complete misconception of the real position and on a premise which is wrong on a point of fact. Having perused the materials placed before us, we find that there is no reliable material on the record at all to show that the Government order referred to above was based mainly on the secret report of the Additional Regional Conciliation Officer or of the Labour Commissioner. The order does not say so: it only recites that the reference to the Industrial Tribunal was refused because the Government did not think it expedient to make a reference. The High Court, however, completely overlooked the specific averment made in the counter-affidavit filed by the Government before the High Court which is at p. 32 of Volume II of the Paper Book. In paragraph-29 of this counter-affidavit, while rebutting the allegations made by the petitioner it was stated thus:

"That with respect to the contents of para 38 of the said affidavit it is stated that the opinion of the Government that it was not expedient to refer the dispute to adjudication was formed after the matter was fully considered by the State Government. The report of the Labour Commissioner submitted through his letter No. 7241/I-CR-CB-5 (147)/1955, dated 22nd October, 1955, was also before the Department concerned. A true copy of the said letter of the Labour Commissioner is Annexure III to this affidavit.

"The Government took the decision after considering the said report and other surrounding circumstances. It is denied that there was any discrimination against the petitioner Union. Each case was duly considered on its merits and only those cases were dropped which in the opinion of the Government were not fit for reference."

This averment which has not been proved to be false manifestly shows that the Government before making the impugned order had considered all the aspects including the report of the Chairman and the members of the Conciliation Board, the Labour Commissioner and other surrounding circumstances. In these circumstances

the finding of the Division Bench of the High Court that the order of the Government was based merely on the secret report of the Chairman or that of the Labour Commissioner is not sustainable. We fail to understand on what basis the High Court has presumed that the Government acted solely on the secret report of the Regional Conciliation Officer.

5. Under Section 4-K of the U. P. Industrial Disputes Act the statute confers the power on the Government to refer any industrial dispute if it is of the opinion that such a dispute exists or that any matter is connected with, or relevant to, the dispute. The section runs as follows:

"Where the State Government is of opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing refer the dispute or any matter appearing to be connected with, or relevant to, the dispute to a Labour Court if the matter of industrial dispute is one of those contained in the First Schedule, or to a Tribunal if the matter of dispute is one contained in the First Schedule or the Second Schedule for adjudication:

Provided that where the dispute relates to any matter specified in the Second Schedule and is not likely to affect more than one hundred workmen, the State Government may, if it so thinks fit, make the reference to a Labour Court."

This section, therefore, gives a wide discretion to the State Government to act under certain circumstances. If the Government on the basis of the materials before it, comes to the conclusion that no real dispute existed and it was not expedient to make a reference one can hardly find fault with the order of the Government passed under Section 4-K of the U. P. Industrial Disputes Act. There can be no doubt that while the secret report of the Additional Regional Conciliation Officer and the report of the Labour Commissioner, like other circumstances, had to be considered by the Government in making its overall assessment of the situation, there was no reason for excluding the secret report submitted by the Additional Regional Conciliation Officer at all. In these circumstances the

first ground on which the Division Bench has set aside the Government order in refusing to refer the matter to the Industrial Tribunal is not legally sound and cannot be sustained.

6. As regards the second ground, the main contention of Mr. Gupte learned counsel for the appellant has been that the High Court was in error in applying the principles of natural justice to a matter like this, and submitted that the cases relied upon by the Single Judge of the High Court regarding the application of the principles of natural justice to administrative proceedings cannot be invoked in the facts and circumstances of this case. To begin with we have to examine the ambit and scope of the Conciliation Board and the procedure adopted by it by virtue of the provisions contained in the notification issued by the Government under Section 3 of U. P. Industrial Disputes Act. The relevant portion of the notification runs thus:

"5. Functions of Boards and submission of Memorandum or Report.

(1) Upon reference of a dispute to the Conciliation Board under Cl. 4 it shall be its duty to endeavour to bring about a settlement of the dispute, and for this purpose the Board shall, in such manner as it thinks fit, and without delay, investigate the dispute and all matters affecting the merits and just settlement thereof, and may do all such things as it thinks fit for the purpose of inducing the parties to come to an amicable settlement.

(2) In any case where the Conciliation Board is successful in bringing about an amicable settlement between the parties it shall prepare a memorandum stating the terms of settlement arrived at and the Chairman shall send copies thereof to the State Government, the Labour Commissioner, U. P. and the parties concerned.

(3) Where no amicable settlement can be reached on one or more than one issue, the Chairman shall, within seven days (excluding holidays but not annual vacations observed by courts subordinate to the High Court) of the close of the proceedings, send to the State Government and

the Labour Commissioner, a full report setting forth the steps taken by the Board for ascertaining the facts and circumstances relating to the dispute and for bringing about an amicable settlement thereof.

(4) The memorandum under sub-clause (2) or the report under sub-clause (3) shall be submitted by the Chairman within thirty days (excluding holidays but not annual vacations observed by courts subordinate to the High Court) of the date on which the reference was made to the Board;

Provided that the State Government may extend the said period from time to time.

(5) The memorandum under sub-clause (2) or the report under sub-clause (3) shall be signed by the Chairman and such members as may be present:

Provided that the memorandum under sub-clause (2) shall also be signed by the parties to the dispute:

Provided that nothing in this clause shall be deemed to prevent any member of the Board from submitting a dissenting report."

A perusal of this notification would clearly show that the jurisdiction of the Conciliation Board is very limited. The procedure prescribed for the Board does not involve any adjudicatory process but is purely of an exploratory nature and what the Board has to do is to make an effort to bring about an amicable settlement between the management and the workers, and if it fails to do so it has to send a detailed report to the Government. That is the limited area within which the Board has to function. Nevertheless it is not disputed in this case that the Conciliation Board had held a full investigation in the matter, heard the parties and framed as many as 33 issues after going into the matter and then the Chairman and the members sent their reports. Thus before making the reports, all the rules of natural justice were fully complied with: the parties were given hearing, their points of view were fully considered and in fact the representatives of the management and that of the labour were the members of the Board. There is no provision in the notification or in the U. P. Industrial

Disputes Act which enjoins that the report submitted by the Chairman or any other members should be shown to one another. This also does not appear to be necessary. The High Court seems to think that because the Chairman did not show his secret report to the other members of the Board, this has resulted in the violation of the principles of natural justice. We are, however, unable to agree with this line of reasoning. The principles of natural justice are no doubt very essential but they have got their own limits and cannot be stretched too far.

7. We would now like to deal with some of the cases which have been referred to in the judgment of the High Court and which are also relied upon by Mr. Chowdhri, counsel for the respondents. In the first place reliance was placed on *A. K. Kraipak v. Union of India*, (1970) 1 SCR 457 = (AIR 1970 SC 150) where this Court observed as follows:

"The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries."

This Court, however, took care to point out as follows:

"What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

The facts in *Kraipak's* case are quite different from the facts in the present case. In *Kraipak's* case the main grievance of the petitioner was that in the Selection Board which was constituted for recommending the promotion of the State Officers to the Indian Forest Service Cadre the Chief Conservator of Forests was also a member of the Board, although he himself was also a candidate for promotion to the Indian Forest Service Cadre. Thus what happened was that the Chief Conservator of Forests acted as a Judge in his own cause. This was undoubtedly a gross violation of the principles of natural justice, because the very person who stood as a candidate also sat in the Selection Board which had to decide his own future as that of his rivals. Such is, however, not the case here. The Conciliation Board had completed its proceedings and the stage at which, according to the High Court, the rules of natural justice had to be applied was the stage of submitting the report. Full hearing was given to the parties concerned. Thus all the indicia of the principles of natural justice were present on the facts of the present case. In these circumstances we are satisfied that *Kraipak's* case (1970) 1 SCR 457 = (AIR 1970 SC 150) could not be called into aid in support of the reasons given by the High Court. The procedure adopted in *Kraipak's* case was obviously so abhorrent to the notions of justice and fair-play that rules of natural justice were at once attracted.

8. Reliance was also placed on *Union of India v. J. N. Sinha*, (1971) 1 SCR 791 = (AIR 1971 SC 40) where also it was pointed out by this Court:

"Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

In the present case we have already pointed out that neither clause (5) of the notification referred to above nor Section 3 of the U. P. Industrial Disputes Act contained any provision which required that the members of

the Conciliation Board were to show their reports to one another. All that was required was that they should send their reports to the Government through the Labour Commissioner. This was undoubtedly done. We are, therefore, unable to see any infraction of the rules of natural justice in the present case.

9. Reliance was also placed on the decision of this Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, (1967) 2 SCR 625 = (AIR 1967 SC 1269). This case also does not appear to be of any assistance to the respondents, because in that case the entire procedure of inquiry held was in violation of the rules of natural justice. That, however, is not the position here.

10. It was then contended by Mr. Gupte that after quashing the order of the Government refusing to make a reference and asking it to reconsider the same it was not open to the High Court to have given peremptory directions so as to circumscribe the statutory jurisdiction of the Government under Section 4-K of the U. P. Industrial Disputes Act. In our opinion this contention is well-founded and must prevail. Even if the High Court thought that the impugned order of the Government suffered from any legal infirmity all that it could have done was to have asked the Government to reconsider it but it had no jurisdiction to direct the Government how to act and how to exercise its statutory discretion which was conferred on it by Section 4-K of the U. P. Industrial Disputes Act. There was absolutely no warrant for the High Court in prohibiting the government from considering the secret report of the Additional Regional Conciliation Officer or that of the Labour Commissioner. The Government was fully entitled to consider the matter in all its comprehensive aspects and the secret report of the Chairman of the Conciliation Board or that of the Labour Commissioner were undoubtedly relevant materials which the Government could have considered. The High Court could not debar the Government from considering those matters nor could it compel the Government to exercise its discretion in a

particular manner. In these circumstances we are satisfied that the order of the High Court is not legally sustainable and must be quashed.

11. The other point which arises for consideration is as to the relief which could be granted to the appellant. Mr. Gupte, counsel for the appellant, submitted that after the judgment of the High Court the Government had passed another order dated February 6, 1973, by which it has in consonance with the directions given by the High Court made a reference to the Industrial Tribunal. It was submitted that it was not at all proper for the Government to have revived a dead issue after more than twenty years and further as the order of the Government was based on the order of the High Court, if the order of the High Court was quashed the order of the Government making a reference to the Industrial Tribunal would fall automatically. We find ourselves in agreement with the learned counsel for the appellant. There can be no doubt that the order of the Government dated February 6, 1973 is undoubtedly based on the order passed by the Division Bench of the High Court. This is proved by a letter written by Mr. Vishnu Prakash Up Sachiv (Deputy Secretary), U. P. Government, to the Manager of the appellant Mills. The relevant portion of the letter after being translated in English runs thus:

"I am directed to say that their Lordships of the High Court in their Judgment in Special Appeal No. 1963/915 (914 of 1963 ?) *State v. Shri Shibban Lal Saxena (M/s. Mahabir Jute Mills Sahjanwa)* have ordered that the Government after taking the dissenting reports from both the parties should consider on the question whether the aforesaid dispute should be referred for adjudication.

Therefore you are requested that within 10 days from the date of the receipt of this letter to send your dissenting report and whatever further you want to say on your behalf to the Government."

A perusal of this letter clearly shows that the Government did not exercise its independent decision under Section 4-K of the U. P. Industrial

Disputes Act but was guided mainly by the judgment of the High Court and the directions given in Special Appeal filed in the High Court. If the order of the High Court is quashed, then it will undoubtedly materially affect the decision of the Government in making a reference to the Industrial Tribunal. Had the Government made the reference uninfluenced by the High Court's directions the legal situation would have been different.

12. The learned counsel for the respondents submitted that no prayer was made by the appellant for quashing the order of the Government for making a reference to the Industrial Tribunal. It was however, not necessary for the appellant to make such a prayer because if the High Court's order is quashed, then any subsequent proceeding which comes into existence as a result of the High Court's order would fall to the ground as a logical corollary of our finding. The learned counsel for the respondents after due consideration submitted that he would have no objection if the Government order for making a reference is quashed provided the Government's discretion to make a fresh reference to the Industrial Tribunal on the dispute is not fettered. We would, however, like to make it clear that the Government has ample discretion to make a reference to the Industrial Tribunal under Section 4-K of the U. P. Industrial Disputes Act if it so thinks fit. This Court in *Western India Match Co. Ltd. v. Western India Match Co. Workers Union*, (1970) 3 SCR 370 = (AIR 1970 SC 1205) clearly held that even if a reference was refused by the Government that will not debar the Government from making a reference at a later time if it is satisfied that in the changed circumstances a reference is necessary.

13. For the reasons given above, we allow the appeal, quash the order of the High Court dated May 8, 1972 and as a consequence of this we also set aside the order of the Government dated February 6, 1973 for making a reference to the Industrial Tribunal. In the peculiar circumstances of this case, however,

we make no order as to costs throughout.

Appeal allowed.

AIR 1975 SUPREME COURT 2063†

(From: GAUHATI)*

A. N. RAY C. J., H. R. KHANNA, K. K. MATHEW, M. H. BEG AND Y. V. CHANDRACHUD JJ.

Civil Appeals Nos. 140-143 of 1973: Supdt. of Taxes, Dhubri and others, Appellants v. M/s. Onkarmal Nathmal Trust, Respondent.

Civil Appeals Nos. 262-275 of 1973: Supdt. of Taxes, Dhubri and others, Appellants v. Assam Jute Supply Co. Ltd., etc., Respondents.

Civil Appeal No. 687 of 1973: Supdt. of Taxes, Dhubri and others, Appellants v. M/s. Lakshmichand Indra Chand, Respondent.

Civil Appeals Nos. 1761-1762 of 1973: Supdt. of Taxes, Tinsukia and others, Appellants v. Thanai Tea Estate, Respondent.

Civil Appeals Nos. 140-143, 262-275, 687 and 1761-1762 of 1973, D/- 1-5-1975.

(A) Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act (10 of 1961) Sections 7, 9, 11 — Non-submission of return by assessee under Section 7 (1) — Non-issue of notice under Section 7 (2), within 2 years from end of return period — Best judgment assessment under Section 9 (4) — Not permissible — Injunction order obtained by assessee against State in writ proceedings challenging validity of Act — Not a waiver of statutory provision. (Evidence Act (1872), Section 115).

The Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act 1954 was declared by the Supreme Court to be ultra vires the Constitution. The new Act as duly passed and assented to by the President was to remain in force with retrospective effect from 24-4-1954 upto 31-3-1962. The new Act was held by the High Court to be ultra vires on 1-8-1963. On certificate duly granted, the State of Assam filed on 4-3-1964 an appeal before the Supreme Court. On 28-10-1964 interim stay of the operation of the judgment of the High Court was granted.

†(Note: The judgments are printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the leading judgment.)

Where, however, the Judges differ in their views, the majority view is given first irrespective of the order in which the judgments appear in the certified copy—Ed.)

*(Civil Rule Nos. 441 to 444 of 1968; 80, 82, 646 and 652 of 1969; 49 of 1969; 403 and 404 of 1969, D/- 25-9-1972; 28-9-1972; 25-5-1972; 22-3-1973, respectively, (Gau).

GS/HS/B932/75/SSG

This stay was made absolute on 29-1-1965. The State appeal was allowed on 1-4-1968 following AIR 1964 SC 925. It was only after 29-1-1965 that the demand notices under Section 7 (2) of the new Act were issued which were much beyond the expiry date of two years from the date when the return should have been filed. The assessee challenged these demand notices in the High Court as illegal and beyond the jurisdiction of the State. The State contended that because of the operation of the injunction order of the High Court as obtained by the assessee in earlier writ petitions during the period 10-8-1961 to 1-8-1963, the State could not issue any notice and that the notices were valid because they were issued within 2 years from 28-10-1964 when the Supreme Court granted the interim stay. The High Court held that the notices were barred by limitation in terms of Section 7 (2) of the new Act. On appeals by Special leave.

Per Majority (K. K. Mathew J. and H. R. Khanna J. Contra)

Held (1) that it was not impossible for the State to issue notices under Section 7 (2) within 2 years of the end of the return period. Although the assessee obtained injunction restraining the State from taking proceeding under the Act, the State did not ask for variation or modification of the injunction order and as such it could not take advantage of its own wrong and lack of diligence. The State was guilty of default.

(Paras 17, 65)

(2) that the State had no power under S. 9 (4) to pass an order for best judgment assessment. The period of two years under Section 7 (2) was a fetter on the power of the authority and was not just a bar of time. No assessment could be legally made under Section 9 (4) without service of a notice under Section 7 (2) within two years in case where the assessee had not submitted any return under Section 7 (1). The service of notice within two years of the end of the return period was an imperative requirement for initiation of assessment proceeding as also for re-assessment proceeding under the Act. Thus, the notices of demand were illegal. AIR 1970 SC 2057 Followed.

(Paras 18, 19, 21, 22, 63, 71, 73, 75)

(3) that it could not be said that the assessee waived service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them in writ petitions challenging the validity of the new Act. There could not be any waiver of a statutory requirement or provision which went to the jurisdiction of assessment. The injunction order did not amount to waiver of statutory provision. The assessee was not taking advantage of any act of theirs in impeaching the statute which they were entitled to. Doctrine of waiver Explained. Case law Discussed.

(Paras 23, 24, 27, 28, 30, 67 to 69)

Cases Referred:	Chronological	Paras
1971 AC 850 (HL (E))	25, 26, 27, 54	
AIR 1970 SC 2057 = (1970) 1 SCR 780	20,	
	21, 74	
AIR 1964 SC 925 = (1964) 5 SCR 975	4,	
	35, 60	
AIR 1961 SC 232 = (1961) 1 SCR 809	33	
AIR 1947 PC 197 = 74 Ind App 223	25, 52	
AIR 1935 PC 79 = 62 Ind App 100	24	
(1921) 1 KB 64 = 90 LJKB 113	70	
(1920) 28 CLR 305 (Aus)	55	
1911 AC 217 = 80 LJPC 178	55	
1908 AC 493 = 78 LJPC 1	56	
(1903) 194 US 553 = 48 L ed 1115	29	
(1880) 13 Ch. D. 696 = 49 LJ Ch. 415	30	
(1848) 1 Exch 651 = 154 ER 277	53	
(1872) 7 Ch App 259	55	

Mr. L. N. Sinha, Solicitor General (In CAs. Nos. 140-143, 687 and 1761-62 of 1973; Mr. Moinul Haque Choudhry, Sr. Advocate (In CAs. Nos. 262, 275/73), Mr. S. N. Choudhary, Advocate with them) for Appellants; M/s. A. K. Sen and B. Sen, Sr. Advocates (Mrs. Leila Seth, M/s. U. K. Khaitan and J. P. Bhattacharjee, Advocates of M/s. Khaitan and Co. with them), for Respondents (In CAs. Nos. 140-143, 262, 263, 267 and 270, 275 of 1973); Mr. Sachin Choudhary Sr. Advocate, (M/s. Prasanta K. Goswami, S. R. Agarwala, Advocates and M/s. P. H. Parekh, Mrs. S. Bhandare and Miss Manju Jetley, Advocates of M/s. Bhandare Parekh and Co. with him), for Respondents (In CAs. Nos. 1761-62 of 1973) and Interveners (In CAs. Nos. 140 to 143 of 1973).

The Judgment of the Court was delivered by

A. N. RAY, C. J. (for himself and on behalf of Y. V. Chandrachud J.):— These appeals by special leave raise the question of the validity of notices of demand under the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1961 hereinafter referred to as the New Act.

2. The Assam Taxation (on Goods Carried by Road or Inland Waterways) Act, 1954 hereinafter referred to as the Old Act was passed by the Assam Legislature in 1954. On 26 September, 1960 this Court declared the Old Act to be ultra vires the Constitution on the ground that prior sanction of the President was not taken. On 6 April, 1961 the New Act was passed by the Assam Legislature. The New Act was published in the Gazette on 15 April, 1961. The New Act was to remain in force with retrospective effect from 24 April, 1954 up to 31 March, 1962.

3. On 28 July, 1961 the New Act was challenged by about 485 assessee in the Assam High Court. The High Court passed an order staying all proceedings. The order staying proceedings continued till the New Act was held ultra vires the Constitution by the High Court. On 1 August, 1963, the High Court held the New Act to be ultra

vires. On 1 August, 1963 the High Court granted certificate of fitness to appeal to this Court.

4. On 13 December, 1963 on a writ application filed by M/s Khyerbari Tea Co. Ltd. this Court held the New Act to be valid. The decision of this Court is reported in (1964) 5 SCR 975 = (AIR 1964 SC 925) Khyerbari Tea Co. Ltd. v. The State of Assam.

5. On 4 March, 1964 the State of Assam on the strength of the certificate granted by the High Court filed an appeal in this Court against the judgment of the High Court dated 1 August, 1963. On 28 October, 1964 this Court granted interim stay of the operation of the judgment of the High Court dated 1 August, 1963. On 29 January, 1965 the interim stay granted by this Court was made absolute subject to the condition that the assessment proceedings in respect of 485 respondents would continue but no levy would be made, and the respondents could initiate assessment proceedings in respect of those assessees. On 1 April, 1968 this Court accepted the appeals filed by the State Government.

6. It is only after the State obtained interim order from this Court on 29 January, 1965 that notices under Section 7 (2) of the New Act were issued. These appeals challenged the validity of those notices. In Civil Appeals No. 140-143 of 1973 notice under Section 7 (2) of the New Act was issued on 4 March, 1965 for the return of the quarter 1 January to 31 March, 1962. In Civil Appeal No. 687 of 1973 notice under Section 7 (2) of the New Act was issued on 4 March, 1965 for the return of the quarter 1 January to 31 March, 1962. In Civil Appeals No. 262-275 of 1973 notice under Section 7 (2) of the New Act was issued on 2 August, 1965 for the return of the quarter 1 October 1961 to 31 December, 1961. In Civil Appeals Nos. 1781-1762 of 1973 notice under Section 7 (2) of the New Act was issued on 30 February, 1965 for the return of the quarter 1 October, 1961 to 31 December, 1961. The respondent-assees challenged these demand notices in the High Court on the ground that the notices were illegal and beyond the jurisdiction of the State. The broad contention of the asseses was that the State could issue notices within two years from the expiry of the return period and none of the notices was within the time mentioned in the New Act, and therefore, the State had no jurisdiction to issue the notices. The State, on the other hand, contended that from 10 August, 1961 to 1 August, 1963 there was an order of the High Court staying all proceedings, and, therefore, it was not possible to issue any notice until the State was permitted by orders of this Court to commence proceedings.

7. The High Court accepted the contention of the asseses. The High Court held that the notices were barred by limitation in terms of the provisions contained in

Section 7 (2) of the New Act. Each of the challenged notices was much beyond the date of expiry of two years from the date when return should have been filed. The High Court held that the provisions contained in the Limitation Act do not apply to legislation of the type of the New Act.

8. Section 3 of the New Act is the charging section. Under that section tax is levied on (a) manufactured tea and (b) jute in bales carried by means mentioned therein. The period and the rate for taxes are specified in the Schedule. The tax levied on manufactured tea shall be realised from the producer. The tax levied on jute shall be realised from the dealer.

9. Section 7 of the New Act speaks of return. There are four sub-sections of Section 7. The first sub-section requires every producer and dealer to furnish returns of manufactured tea carried in tea containers and jute carried in bales in such form and to such authority as may be prescribed. The second sub-section states that in case of any producer or dealer who, in the opinion of the Commissioner, is liable to pay tax for any return period or a part thereof, the Commissioner may serve within two years of the expiry of the aforesaid period, a notice in the prescribed form requiring him to furnish a return of goods carried and such producer or dealer shall thereupon furnish the return within the date and to the authority mentioned in the notice. The notices in the present appeals are issued under this sub-section (2) of Section 7 of the New Act. The third sub-section states that the returns, during the first year of operation of the New Act, shall be furnished for such period and within such time as may be notified by the Commissioner and thereafter quarterly and within thirty days of completion of the quarter in respect of which the returns are to be filed. The fourth sub-section states that if any producer or dealer discovers any omission or other error in any return furnished by him he may furnish a revised return at any time before assessment is made on the original return.

10. Section 9 of the New Act speaks of assessment. There are four sub-sections of Section 9. Sub-section (1) states that if the Commissioner is satisfied that a return furnished by a dealer or a producer under Section 7 in respect of any period is correct and complete, he shall, by an order in writing, assess the producer or dealer and determine the tax payable by him on the basis of such return. Sub-section (2) states that if the Commissioner is not satisfied that a return furnished under Section 7 is correct and complete, he shall serve on the producer or dealer a notice requiring him, on the date and hour and place mentioned therein, either to attend in person or to produce or cause to be produced any evidence on which he may rely in support of his return. Sub-section (3) states that on the day men-

tioned in the notice under sub-section (2) or as soon afterwards as may be, the Commissioner, after hearing such evidence as the producer or dealer may produce and such other evidence as the Commissioner may require, shall, by an order in writing, assess the producer or dealer and determine the tax payable by him on the basis of such assessment. Sub-section (4) states that if a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of Section 9, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment. It is provided that before making assessment the Commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of Section 9.

11. The Rules under the New Act are framed under Section 32 of the New Act. Rule No. 6 states that every dealer or producer shall furnish returns of the total gross weight of jute or tea carried to the Superintendent in Form I. Rule No. 8 states that the notice referred to in sub-section (2) of Section 7 may be issued to dealer or producer who have failed to submit returns within the period mentioned in sub-section (3) of Section 7. The notices shall be in Form II. Rule No. 9 states that every dealer or producer shall submit to the superintendent every quarter a return so as to reach that officer on or before the dates mentioned therein, 30 April, 30 July, 30 October and 30 January are the dates on or before which the producer or dealer shall submit return for the quarters preceding these dates, viz., quarters ending 31 March, 30 June, 30 September and 31 December respectively.

12. Form No. I under Rule No. 6 mentions the name of the dealer, the return period and the details of net weight carried and amount of tax. Form No. II under Section 7 (2) and Rule No. 8 state that whereas the person notified carried manufactured tea or jute as the case may be, during the period ending on the date mentioned therein and whereas the carrier is liable to pay tax he is required to furnish a return.

13. The New Act received the assent of the President on 6 April, 1961. It was notified in the Gazette on 12 April, 1961. The New Act was deemed to have had effect as from 24 April, 1954 and remained in force till 31 March, 1962. Section 3 of the New Act refers to the Schedule which specifies the period and rate of tax. The rates vary from year to year. In view of the fact that the New Act became retrospective with effect from 1954. Section 7 (3) of the New Act provided that returns during the first year of operation of the New Act "shall be furnished for such period and within such time as may

be notified by the Commissioner and thereafter quarterly and within thirty days of completion of the quarter in respect of which the returns are to be filed." It therefore follows that the return for the years during which the New Act became retrospective in operation was to furnish in accordance with the notification to be issued by the Commissioner under Section 7 (3) of the New Act. The present appeals do not concern that aspect of the New Act. After the New Act came into existence returns were to be furnished by the producers and dealers on 30 April, 30 July, 30 October and 30 January for the preceding quarters. The provisions contained in Section 7 (1) of the New Act enjoined dealers and producers to furnish returns on the dates mentioned in the Rules for the appropriate quarters. The provisions of Section 7 (2) of the New Act contemplate cases where the Commissioner may serve within two years of the expiry of the return period a notice upon producer or dealer who, in the opinion of the Commissioner, is liable to tax for any return period or a part thereof.

14. On behalf of the State the Solicitor General raised three contentions. First, that for the period 1 October, 1961 to 31 December, 1961 or for the period 1 January 1962 to 31 March, 1962 the State could not issue any notice by reason of stay of proceedings granted by the High Court on 10 August, 1961. It was said that when this Court on 28 October, 1964 granted interim stay of operation of the High Court judgment dated 1 August, 1963 it was possible for the State to issue notice. The State issued notice within two years from 28 October, 1964. It was also said that if the period of two years be counted from 18 December, 1963 when this Court pronounced the New Act to be valid in the case of Khyerbari Tea Co. Ltd. (supra) the notices would be within the period of two years from 18 December, 1963. It was emphasised by the Solicitor General that an act of Court granting stay of the proceedings should not be permitted to act adversely to the interest of the State against whom the injunction was granted.

15. The second contention of the Solicitor General was that Section 9 (4) of the New Act confers power on the Commissioner to assess to the best of his judgment if a producer or dealer fails to furnish a return as required by Section 7 or having made the return fails to comply with the terms of the notice issued under Section 9 (2) of the New Act. The notice under Section 9 (2) of the New Act refers to cases where if the Commissioner is not satisfied with the return furnished under Section 7 he serves a notice on the assessee to produce evidence in support of the return. The Solicitor General leaned heavily on the words "if a producer or dealer fails to make a return as required by Section 7" and contended that Section 7 (1) of the New Act required the producer or dealer to make a return and that Section 7 (2) of the

New Act did not itself require the producer or dealer to make a return but only clothed the Commissioner in certain circumstances to call for a return. Therefore, the Solicitor General submitted that the condition precedent to the exercise of power under Sec. 9 (4) of the New Act is a default with reference to Section 7 (1) of the New Act and not the issue of a notice under Section 7 (2) of the New Act. The Solicitor General submitted that at best Section 7 (1) of the New Act regulates the exercise of the power created by Section 9 (4) of the New Act but is not the source and condition of the power.

16. The third contention of the Solicitor General was that by obtaining and enjoying the benefit of an injunction for the relevant period expiring within the period of two years prescribed by Section 7 (2) of the New Act the respondent must be deemed to have waived the benefit of Section 7 (2) of the New Act. This was amplified to mean that the interim injunctions in the present cases were founded on the postulate that the action restrained during the pendency of the proceedings would be and could be taken if the ground of attack ultimately failed on the conclusion of the proceedings. The Solicitor General further submitted that a party who obtained such an injunction could not set up a plea arising solely from the injunction issued and ultimately dissolved. It was said that by reason of such injunction if a preliminary step like a notice within a particular period became impossible, it must be deemed to have been waived just as any provision intended for the protection of the property owner may be waived by him by a course of conduct where it would be unjust to permit it to be set up.

17. The first contention on behalf of the State that it became impossible for the State to issue notice under Section 7 (2) of the New Act within two years of the expiry of the period of return is unsound on principle and facts. The maxim *lex non cogit ad impossibilia* means that the law does not compel a man to do that which he cannot possibly perform. In the present appeals, the applications were moved in the High Court for stay of proceedings. The respondents challenged the validity of the Act, and, therefore, asked for an injunction restraining the State from taking proceedings under the Act. At no stage, did the State ask for variation or modification of the order of injunction. It is well known that if it is brought to the notice of a Court that proceedings are likely to be barred by time by reason of any order of injunction or stay the court passes such suitable or appropriate orders as will protect the interest of the parties and will not prejudice either party. Even when certificate to appeal to this Court was granted on 1 August, 1963, the State did not ask for any order for stay of operation of the judgment. That is quite often done. For the first time, on 10 August, 1964 the State filed an applica-

tion for stay of operation of the judgment of the High Court. The State did not take steps at the appropriate time. This Court on 28 October, 1964 granted an interim order staying the operation of the High Court judgment. The interim order was made absolute on 28 January, 1965 with certain conditions. The State cannot take advantage of its own wrong and lack of diligence. The State cannot contend that it was impossible to issue any notice within the period mentioned in Section 7 (2) of the New Act. The State did not endeavour to obtain appropriate orders to surmount the difficulties by reason of the injunction against taking steps within the time contemplated in Section 7 (2) of the New Act. The State is guilty of default. The State had remedies open to take steps by asking for modification of the order. The State had to assert the right that the State was entitled to demand taxes and the respondent was liable to pay the same. The State followed the policy of inactivity. Inactivity is not impossibility. The order of injunction is not to be equated with an act of God or an action of the enemy of the State or a general strike.

18. The second contention of the State that the State has power under Section 9 (4) of the New Act to pass an order of best judgment assessment is unmeritorious. The provisions contained in S. 7 of the New Act indicate these steps. A producer or dealer is to furnish a return for the preceding quarter on 30 April, 30 July, 30 October and 30 January. Where a producer or dealer is liable to pay tax for any return period and he does not furnish a return, the Commissioner may, within two years of the expiry of the period, serve a notice requiring him to furnish a return. The provisions contained in Section 9 (4) of the New Act with regard to best judgment assessment apply where a producer or dealer fails to make a return or having made the return fails to comply with the terms of the notice under Section 9 (2) of the New Act. A notice under Section 9 (2) of the New Act is served where the Commissioner is not satisfied with the return furnished under Section 7 of the New Act. The words "if a producer or dealer fails to make a return as required by Section 7" occurring in Section 9 of the New Act apply to failure to make a return as contemplated by both sub-sections (1) and (2) of Section 7 of the New Act. To accede to the contention of the Solicitor General that the words "if a producer or dealer fails to make a return as required by Section 7" occurring in Section 9 of the New Act apply only to a return under sub-section (1) of Section 7 of the New Act is to read new words into the legislation. In order to have the best judgment assessment under Section 9 (4) of the New Act, there must be first a failure to furnish a return under Section 7 (1) of the New Act or a failure to furnish a return after notice under Section 7 (2) of the New Act. Further, the contention of the Solicitor General means that there will never

be any question of limitation of time with regard to service of notice by the Commissioner to file a return. Section 7 (2) of the New Act is a Section conferring power and jurisdiction on the authorities to tax by calling upon the producer or dealer to file a return within the time mentioned therein. If a return under Section 7 (1) is not made, the service of a notice under Section 7 (2) of the Act is the only method for initiation of valid assessment proceedings under the Act. The period of two years under Section 7 (2) of the New Act is a fetter on the power of the authority and is not just a bar of time. No assessment can be legally made under Section 9 (4) of the New Act without service of a notice under Section 7 (2) of the New Act within two years in case where the assessee has not submitted any return under Section 7 (1) of the New Act.

19. The words "if a producer or dealer fails to make a return as required by Section 7" occurring in Section 9 of the New Act make it clear that Section 9 can come into operation only when there is a failure to comply with the requirements of Section 7 and not the requirements only under sub-section (1). Reference may be made to Section 11 of the New Act. Section 11 deals with escaped assessment. There is a time limit for initiating an escaped assessment under Section 11 of the New Act. The time limit is two years from the end of the return period. It is the scheme of the Act that the service of notice within two years of the return period is an imperative requirement for initiation of assessment proceeding as also re-assessment proceeding under the Act.

20. This Court in State of Assam v. D. C. Choudhuri (1970) 1 SCR 780 = (AIR 1970 SC 2057) considered the provisions of Assam Act IX of 1939. Sections 19 and 20 of the Assam Act of 1939 are *pari materia* with Sections 7 and 9 of the New Act. Section 19 (1) of the Assam Act of 1939 required persons whose agricultural income exceeded the limit of taxable income prescribed to furnish within thirty days as specified in the notice a return. Section 19 (2) of the Assam Act of 1939 stated that in the case of any person whose total agricultural income is, in the opinion of the Agricultural Income Tax Officer, of such amount as to render such person liable to payment of agricultural income-tax for any financial year, the Agricultural Income Tax Officer may serve in that financial year a notice requiring him to furnish a return. Section 20 (4) of the Assam Act of 1939 provided that if persons failed to make a return under sub-section (1) or sub-section (2) of Section 19 or failed to comply with terms of a notice under sub-section (2) of Section 20 or to produce any evidence required under sub-section (3) of Section 20, the Agricultural Income Tax Officer shall make the assessment in the best of his judgment. Section 30 of the Assam Act of 1939 provided that if for

any reason the Agricultural income has escaped assessment for any financial year the Agricultural Income Tax Officer may at any time within three years of the end of that financial year serve on the person liable to pay tax a notice as fully mentioned therein and may proceed to assess or re-assess as stated in the Section.

21. In the Assam case (AIR 1970 SC 2057) (supra) the assessee received a notice in 1961 to furnish returns for the years 1949-50 to 1953-54. The assessee did not submit any return. Thereafter they received a notice of demand for payment of tax on the basis of best judgment assessment under Section 20 (4) of the Assam Act. The assessee were not served with any notice under Section 19 (2) of the Assam Act which provided for a notice to be served on the assessee during the respective financial year, nor under Section 30 of the Assam Act which dealt with escaped assessment. The purchasers of the tea estate were similarly served with assessment orders under Section 20 (4) of the Assam Act. The purchasers were also not served with any notice under Section 19 (2) or Section 30 of the Act. This Court held that if no return was made pursuant to the general notice under Section 19 (1) of the Act, assessment could be made against an assessee under Section 19 (2) of the Act serving an individual notice during that financial year. Once that financial year was over and no return was made in response to general notice under Section 19 (1) of the Act and no individual notice was served under Section 19 (2) of the Act there could arise a case of escaped assessment. The only way to bring escaped assessment income to tax was to initiate proceedings where notice in accordance with Section 30 was served within three years of the end of that financial year. No such proceedings were initiated in that Assam case (supra), and, therefore, the assessment orders were quashed. The Assam case is an authority for the proposition that if no notice is served in accordance with the provisions of the Act there cannot be any initiation of assessment proceedings and there would be no jurisdiction to assess.

22. In the present case the notices of demand were illegal. The best judgment assessment which was made under Section 9 (4) of the New Act would be attracted only if there was a failure to furnish a return as contemplated in sub-sections (1) and (2) of Section 7 or failure to comply with the terms of the notice under Section 9 (2) of the New Act.

23. The third contention of the Solicitor General is that the respondents waived service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them. Waiver is either a form of estoppel or an election. The doctrine of estoppel by conduct means that where one by words or conduct wilfully

causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only a rule of evidence. One cannot found an action upon estoppel. Estoppel is important as a step towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

24. In *Dawson's Bank Limited v. Nippon Menkwa Kabushika Kaisha*, 62 Ind App 100 = (AIR 1935 PC 79) the distinction between estoppel and waiver was explained by stating that estoppel is not a cause of action, but waiver is contractual and may constitute a cause of action. The reason stated there is that waiver is an agreement to release or not to assert a right. There is no such thing "as estoppel by waiver".

25. The two decisions on which the Solicitor General relied in support of the application of the principle of waiver in these appeals are *Vellayan Chettiar v. Province of Madras*, 74 Ind App 223 = (AIR 1947 PC 197) and *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.*, 1971 AC 850. In *Vellayan Chettiar's* case (supra) it was held where the Secretary of State took objection to the sufficiency of Notice under Section 80 of the Code of Civil Procedure in his written statement, but raised no issue on the point when issues were settled, and took no objection during the trial, the Court held that another defendant was not competent to raise this issue at a later stage as the Secretary of State had waived notice. A notice under Section 80 of the Code of Civil Procedure is procedural with regard to institution of a suit. A notice under Section 80 of the Code of Civil Procedure is not a part of the cause of action. In the notice under Section 80 of the Code of Civil Procedure the cause of action has to be stated.

26. In the case of *Kammins Ballrooms Co.* 1971 AC 850 (supra) the tenants made a request for a new tenancy. The landlords stated that they would oppose an application to the court for such new tenancy. When the tenants filed an application for

grant of a new tenancy, the landlords filed an answer but took no objection to the application being premature. Thereafter the landlords wrote to the tenants that they would make a preliminary objection that the application was premature. The County Court Judge held that S. 29 (3) of the relevant Act which provided time for making the applications went to the jurisdiction of the court and would not be the subject of estoppel or waiver. The Court of Appeal affirmed that decision. The House of Lords affirmed the decision on a different ground. The majority view of the House of Lords was that the requirements of Section 29 (3) of the Act were only procedural and the landlords had a right to ignore or object to the tenant's premature application but could not waive that right. The majority view further held that the landlords had not waived their right to object that the application was bad. In a statute dealing with landlords and tenants, rights and obligations are created for landlords and tenants. A procedural requirement imposed for the benefit or protection of one party alone has sometimes been construed as subject to implied exception that it can be waived by the party for whose benefit it is imposed. In that context, 'waive' means that the party has chosen not to rely upon the non-compliance of the other party with the requirement, or has disentitled himself from relying upon it either by agreeing with the other party not to do so or because he has so conducted himself that it would not be fair to allow him to rely upon the non-compliance.

27. A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent. A procedural provision may be waived by conduct or agreement. In the case of *Kammins Ballrooms Co.* 1971 AC 850 (supra) it was said that waiver arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is inconsistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be legal consequence of what he did. He is sometimes said to have "waived" the alternative right as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition. This is also sometimes described as "election" rather than "waiver". Another type of waiver debars a person from raising a particular defence to a claim against him. It arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it.

28. In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be

any waiver of a statutory requirement or provision which goes to the jurisdiction of assessment. The origin of the assessment is either an assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction does not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act relates to the exercise of jurisdiction under the Act in all cases. Revenue statutes are based on public policy. Revenue statutes protect the public on the one hand and confer power on the State on the other.

29. The decision in *William Shepard v. O. E. D. Barron* (1903) 194 U. S. 553 = 48 L. Ed. 1115 on which the Solicitor General relied for the proposition that the constitutionality of a rule of assessment can be waived does not have any application in the present case. In the American decision (*supra*) an objection against the frontage rule of assessment for a public improvement, prescribed by the State laws, was not allowed to be urged to defeat the collection of the assessments. The reason was that the abutting owners who petitioned for the improvement under the Act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement for the purpose of inducing the issuance and purchase of country improvement bonds to the effect that the work had been properly done. In the American decision (*supra*) the work was done at the instance and request of the owners. The Court found an implied contract arising from facts that the party at whose request and for whose benefit the work had been done would pay for it in the manner provided for by the Act under which the work was done.

30. It is against principle to suggest that the appellants did anything wrong or they are taking advantage of anything wrong. *Jessel, M. R. in Re. Hallett's Estate Knatchbull v. Hallett* (1880) 13 Ch. D. 696 at p. 727 said "Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly". The respondents were entitled to impeach the statute under which they were made liable. The respondents have done no wrong. The respondents are not taking any advantage of any act of theirs. The State was entitled to resist the respondents. The State did so by contending that the Act was valid, but the State took no steps during the pendency of the litigation to take directions from the Court to serve notices of demand upon the appellants to keep alive the right of the respondents.

31. For these reasons, the contentions of the Solicitor General fail. The appeals

are dismissed. Parties will pay and bear their own costs.

K. K. MATHEW J. (for himself and on behalf of H. R. Khanna J.):— In these appeals, by special leave, the question for consideration is whether the High Court of Assam was right in quashing the notices issued to the respondents on the dates specified in each of the writ petitions filed by the respondents.

32-33. The notices were issued under the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1961 (hereinafter called 'the Act') passed by the legislature of Assam on 6-4-1961 with retrospective effect from 24-4-1954 and published in the gazette on 15-4-1961. The Act was to be operative upto 31-3-1962. It was passed consequent upon the declaration of the invalidity of the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1954, by this Court in *Atiabari Tea Co. Ltd. v. The State of Assam* (1961) 1 SCR 809 = (AIR 1961 SC 232). The respondents challenged the validity of the Act before the High Court of Assam in writ petitions and they applied for injunction restraining the appellants from taking any proceedings under the Act. Interim orders of injunction were passed on various dates. The appellants opposed the interim orders of injunction. A common order was passed by the Court on 18-9-1961 making the orders absolute and restraining the appellants from taking any proceedings under the Act. Thereafter, in some of the cases the appellants did not oppose the orders of interim injunction as it would have been a futile exercise and the interim orders in these cases were also made absolute.

34. The High Court allowed the writ petitions on 1-8-1963 and declared the Act ultra vires the powers of the legislature and granted certificates of fitness to appeal to this Court.

35. *M/s. Khyerbari Tea Co. Ltd.* and another approached this Court under Article 32 of the Constitution praying for a declaration that the Act was ultra vires the powers of Assam Legislature and this Court by its judgment dated 13-12-1963 held that the Act was valid—see *Khyerbari Tea Co. Ltd. v. The State of Assam* (1964) 5 SCR 975 = (AIR 1964 SC 925).

36. Against the decision of the High Court declaring the Act ultra vires, the State of Assam filed appeals before this Court on 4-3-1964 and applied for stay on 10-8-1964 and interim stay of the order of the High Court declaring the Act ultra vires was granted on 28-10-1964 and the orders of stay were made absolute on 29-1-1965. This Court allowed the appeals filed by the appellants on 1-4-1968 declaring the Act to be valid.

37. Notices were issued by the Superintendent of Taxes to the respondents on various dates specified in the respective writ petitions after this Court passed orders stay-

ing the operation of the order of the High Court for filing the returns for the quarters mentioned in the writ petitions. These were the notices that the respondents successfully challenged before the High Court.

38. The question which arose for consideration before the High Court of Assam was, whether, since no notices were issued within the time specified in Section 7 (2) of the Act, the respondents could be called upon to file returns.

39. Before we proceed to consider the question, it is necessary to set out the relevant provisions of the Act.

40. The Act is an Act to levy a tax on goods carried by vehicles. Section 3 (1) is the charging section and it says that subject to the provisions of the Act, there shall be levied a tax on (a) manufactured tea and (b) jute in bales carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except railways and airways in such manner and in respect of such period and at such rate as specified in the schedule. Sub-sections (1) and (2) of Section 7 read:

"(1) Every producer and dealer shall furnish returns of manufactured tea carried in tea containers and of jute carried in bales in such form and to such authority as may be prescribed.

(2) In the case of any producer or dealer who, in the opinion of the Commissioner, is liable to pay tax for any return period or a part thereof, the Commissioner may serve within two years of the expiry of the aforesaid period, a notice in the prescribed form upon him requiring him to furnish a return of goods carried and such producer or dealer shall thereupon furnish the return within the date and to the authority mentioned in the notice."

Section 9 (4) provides:

"If a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of this Section, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment;

Provided that before making assessment the Commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of this section."

41. There is no dispute between the parties that the two-year period specified in Section 7 (2) expired on 31-12-1963 and that all the impugned notices were issued after the expiry of that period.

42. The High Court was of the view that since no notices were issued to the respondents by the Commissioner within the period specified in Section 7 (2), the respon-

dents were not liable to furnish returns. The High Court held that the issue of notices within the period specified in the sub-section was a condition for the exercise of the power to call for returns.

43. The learned Solicitor General appearing for the appellants submitted that it was on account of orders of injunctions passed by the High Court that notices could not be issued to the respondents by the Commissioner and that before the period for the issue of notice under Section 7 (2) expired, namely, 31-12-1963, the High Court had declared the Act to be ultra vires the powers of the legislature which completely disabled the Commissioner from issuing the notices within the period specified in the sub-section.

44. According to the Solicitor General, Section 7 (2) postulates ability on the part of the Commissioner to issue notices during the two-year period as required by the sub-section and therefore it cannot apply to a case where it was rendered impossible for the Commissioner to issue the notices within that period by an act of the Court. He submitted that the liability to submit the return was created by Section 7 (1) and that issue of notice under Section 7 (2) was only a step in the procedure for making the assessment and therefore if a dealer failed to make the return in accordance with Section 7 which, of course, would include the liability created by Section 7 (1) to file the return, it would be open to the appropriate officer to assess the dealer to the best of his judgment under Section 9 (4) and therefore, even if no notice under Section 7 (2) was issued within the two-year period, that would not in any way disable the officer concerned to make a best-judgment-assessment under Section 9 (4). He further submitted that by obtaining and enjoying the benefit of the orders of injunction, the respondents must be deemed to have waived their right to insist upon the notices within the period specified in Section 7 (2). He contended that after having successfully prevented the Commissioner from issuing the notices within the period by obtaining the orders of injunction, the respondents should not be heard to say that they were entitled to notices within period specified in Sec. 7 (2) of the Act.

45. On the other hand, it was argued on behalf of the respondents that issue of notice within the period specified in Sec. 7 (2) was a condition for the exercise of the jurisdiction to make the assessment and as no notices were issued within the period specified in Sec. 7 (2), the condition precedent for the liability to file returns was not fulfilled and there was, therefore, no liability for the respondents to file returns, or power in the authorities to make assessments. In other words, the argument for the respondents was that Section 7 (1) by itself did not create any liability to submit the return within any period, that the liability to submit the return

could arise only when the Commissioner issues the notice within the period specified in Section 7 (2) and, since no such notices were issued to the respondents before the expiry of two years from the date specified in Section 7 (2), the Commissioner became *tunctus officio* both for the reason that the period of two years specified in Section 7(2) had expired and also for the reason that the operation of the Act came to an end and that they could not, therefore, be assessed to tax. They also contended that by approaching the High Court and obtaining orders of injunctions, they never waived their right to insist upon the notice within the period. They submitted, by approaching the Court and obtaining the orders of injunction, they were exercising their rights as ordinary citizens and no inference of waiver of their right to the notices within the period specified in Section 7 (2) would be permissible.

46. The question for consideration is whether, the respondents, after having obtained the orders of injunction from the Court restraining the appellants from taking any proceedings under the Act and thereby prevented the Commissioner from issuing the notices during the period, could, thereafter, insist upon the notices within that period as a condition for their liability to file the returns or for the authorities for making the assessments, and whether the Commissioner could have issued the notices before the appeals were preferred against the order of the High Court declaring the Act as invalid and stay of that order was obtained from this Court.

47. The respondents obtained the orders of injunction from the Court which, the Court would not have issued, had the Court known at the time that the Act was *intra vires* the powers of the legislature as it ultimately turned out to be by the decision of this Court. The Court issued the orders of injunction on the basis of its view that the respondents had a *prima facie* case; but when ultimately this Court declared that the Act was valid, justice requires that the respondents should not be allowed to set up the contention that they were entitled to get the notices within the period during which the injunction orders operated or within the period during which the judgment of the High Court declaring the Act *ultra vires* remained in operation. In other words, the respondents, after having successfully prevented the Commissioner from issuing notices by virtue of the orders of injunction obtained by them from the High Court, should not be heard to say that they were entitled to notices as they themselves made it impossible for the Commissioner to issue the notices within the period by obtaining the orders of injunction. When the orders of injunction were passed by the Court restraining the appellants from taking any proceedings under the Act, could the Commissioner have issued the notices? Clearly not. If it was impossible for the Commissioner to issue the notices to the respon-

dents within the period by virtue of the orders of injunction, could the law insist upon the issue of the notices within that period? Again, the answer must be 'no'. And, the Commissioner could not have issued the notices after the High Court, by its order, declared the Act to be invalid until the operation of that order was stayed by this Court.

48. The law in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling performance of that which is impossible. . . . where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has not remedy over, there the law will in general excuse him: and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse." (see *Broom's Legal Maxims*, 10th ed. (1939 pp. 162-163). The same principle has been stated in *Craies on Statute Law* (6th ed., p. 268):

"Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, *Lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse".

49. We think the circumstance that the appellants were prevented by the orders of injunction from taking any proceedings under the Act coupled with the fact that the High Court declared the Act to be invalid, made it impossible for the Commissioner to issue the notices within the period specified in Section 7 (2). There is no reason to distinguish between an Act of God or King's enemies preventing an act being done and the circumstances here which put it beyond the control of the Commissioner to issue the notices.

50. It was argued for the respondents that issue of notices within the period specified in Section 7 (2) was a condition for liability to file the return and since no notices were issued within the period, the liability to file the return did not arise and the Court cannot extend the time for issuing the notices.

51. Let us assume that the provision for issue of notice within the period specified in Section 7 (2) was mandatory and was a condition precedent for the liability to file the returns. Even so, the respondents could have waived the benefit of it and, in fact, they did waive it by their conduct. In other words, even if the issue of notices within the period provided in Section 7 (2) was mandatory and no liability to file the returns

arose until the notices were issued, the respondents could have waived the benefit of the notices as the issue of notices was only for the benefit of the respondents and did not subserve any principle of public policy.

52. In *Vellavan Chettiar v. Province of Madras*, AIR 1947 PC 197 the question arose whether notice under the provision of Section 80 of the Civil Procedure Code was mandatory and could be waived by the party entitled to it. The Privy Council said that although the provision for issue of notice was mandatory, the party which was entitled to the benefit of notice could waive it. The language of Section 7 (2) is, no doubt, mandatory, but the sub-section was not enacted on the basis of any public policy. Its purpose is only to give a dealer notice of his duty to submit the return created by sub-section (1) of Section 7. Whenever a statute makes the performance of an act within a specified period mandatory and it is seen from the provisions of the statute that the performance of the act within the period is solely for the benefit of a party and no question of public policy is involved in its performance within period, it has been held that the party entitled to insist upon its performance within the period can waive it. As the issue of notice within the period specified in Section 7 (2) is clearly for the benefit of the dealer and if he, by his conduct, evinces an intention that he will not insist upon it, then it will be inconsistent with all notions of justice to hold that he should be allowed to insist upon it. The respondents clearly knew when they applied and obtained the orders of injunction that the Commissioner would be disabled from issuing the notices under Section 7 (2) during the period of the operation of the orders of injunction. And the law made it impossible for the Commissioner to issue the notice as long as the order of the High Court declaring the Act as invalid remained in operation. How then could the Commissioner have issued the notices to the respondents within the period specified in Section 7 (2)?

53. In *Graham v. Ingleby* (1848) 1 Exch 651 at pp. 655-56, the question was whether the statute 4 Anne, c. 16, Section 11, which enacted that "no dilatory plea shall be received in any court of record, unless the party offering such plea, do by affidavit, prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true" was for the benefit of a party and could be waived. The defendant pleaded in abatement, and purported to verify the plea by an affidavit, but the words "before me" were omitted from the jurat. The plaintiff replied by traversing the plea, made up the issue and delivered it, with notice of trial for the ensuing Liverpool Assizes. Also both parties took further steps in the action.

Pollock C. R. said:

"The affidavit is bad, by reason of the omission of the words 'before me' in the jurat.

It is the same as if there had been no affidavit. With respect to the other question.... Suppose there had been no affidavit whatever, and the plaintiff had replied, joining issue, and a trial had taken place, the event of which was a verdict in favour of the defendant, upon which judgment was entered up, could the whole proceedings have been set aside because there was no affidavit? It is clear that they could not. The question then is, what is the meaning of the statute of Anne? In my opinion, that Act had not any public policy for its object, but solely the protection of plaintiffs against the delivery and effect of dilatory pleas. It enacts, that no such plea shall be received, unless verified by affidavit. If a plaintiff chooses to waive that provision, which is introduced for his benefit, he cannot afterwards sign judgment for want of such affidavit...."

Parke B. said:

"I concur in opinion with the Lord Chief Baron. The present affidavit is equivalent to no affidavit. The question then is, what is the meaning of the statute of Anne, which requires an affidavit of verification as a condition precedent to a valid plea in abatement? If that enactment be intended for the sole benefit of plaintiffs; then the maxim applies "Quilibet potest renunciare juri pro se introducto". It is evident that the requirements of that statute are solely for the benefit of plaintiffs, and in order to prevent them from being delayed in their suits; and that they have no reference whatever to other suitors or to the rest of the Queen's subjects. It follows, that although an affidavit is so defective as to amount to no affidavit, a plaintiff may, if he choose, waive the benefit of his right, and join issue on the plea and go to trial; and if he does so, he cannot afterwards avail himself of the provisions of the statute. So, if he should demur to this plea, he would, in like manner, waive the benefit of the statute. If it were otherwise, the inconvenience would be great, as already pointed out.

54. These observations were quoted with approval by Lord Pearce and their correctness affirmed by Lord Diplock in *Kammins Co. v. Zenith Investments* 1971 AC 850 (H. L. (E)). Lord Diplock made it clear that 'waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. He observed that there is a type of waiver which arises in a situation where a person is entitled to alternative rights inconsistent with one another as when he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them and the law holds him to his choice even though he was unaware that this would be the legal consequence of what he

did. He then said that there is a second type of waiver which debars a person from raising a particular defence to a claim against him when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it.

55. Isaacs J. in delivering the judgment of the High Court of Australia in *Craine v. Colonial Mutual Fire Insurance Co. Ltd.* (1920) 28 CLR 305 at p. 327 said:

“..... ‘Waiver’ is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions (see per James LJ in *Pilcher v. Rawlins* (1872), 7 Ch. App. 259, at p. 268 et seq. It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has ‘approved’ so as to prevent him from ‘reprobating’—in English terms, whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny to him a later election to the contrary (see per Lord Shaw in *Pitman v. Crum Ewing*, (1911) AC 217, at p. 239. His knowledge is necessary, or he cannot be said to have approved or elected.”

56. In *Corporation of Toronto v. Russell*, 1908 AC 493, the Judicial Committee held that where a notice in writing of intention to purchase compulsorily was required to be given to the owner of lands, the provision being entirely for his benefit, he might waive it.

57. The High Court granted the orders of injunction on the basis that there was a *prima facie* case for the respondents. The High Court held that the Act was invalid on the basis of its view that it was *ultra vires* the powers of the State Legislature. But when this Court declared that the High Court was wrong and that the Act was valid, justice requires that neither the order of injunction nor the order of the High Court declaring the Act invalid should prejudice the rights of the parties as ultimately declared. No act of a court should prejudice a party. That is the first principle of justice. It was the orders of injunction and the order declaring the Act as *ultra vires* which made it impossible for the Commissioner to issue the notices within the period specified in Section 7 (2). When this Court, by its judgment, upheld the appellants’ contention that the Act was valid, how could the appellants be put in the position which they would have occupied had the High Court not passed those wrong orders, except by dispensing with the necessity of issuing notices within the time? The principle of restitution requires that the party prejudiced by a wrong order of the Court should be put in the position which he or it would have occupied had the wrong order not been passed.

58. It was contended on behalf of the respondents that the appellants should have specifically told the High Court at the time the injunction orders were made absolute that if the Commissioner was not permitted to issue the notices within the period specified in Section 7 (2), it would be impossible for the appropriate authority to call for the returns and make the assessments and that at any rate the appellants should have subsequently applied to the Court for modification of the injunction orders to the extent of permitting the Commissioner to issue the notices within the period and the failure of the appellants to do so shows lack of diligence on their part and that the Court should not help parties who were not diligent in their conduct.

59. We do not think there is any substance in the argument. It was after consideration of the arguments of both sides that the court made the interim orders of injunction absolute on 18-9-1961 stating that the appellants were restrained from taking any proceedings under the Act. Thereafter in some applications for injunctions, the appellants did not enter appearance and object to interim orders of injunction being made absolute, knowing full well that since the Court had passed a considered order on 18-9-1961, it would be futile to urge further objections to the grant of injunction by the Court. That apart, the Commissioner had time to issue the notices from 1-8-1963 when the High Court declared the Act to be *ultra vires* till 31-12-1963 when the two-year period expired. But as the Act was declared bad, it was impossible for him to issue the notices within the period. Nor is there any substance in the argument of the respondents that the appellants should have approached this Court when this Court by its judgment in *Khyerbari Tea Co. Ltd.* case (supra) declared the Act to be *intra vires* and moved the Court for stay of the operation of the judgment of the High Court. We think that the appellants were bound to appeal to this Court against the order of the High Court declaring the Act as invalid in order to get rid of the effect of that judgment as that judgment was binding between the parties to it notwithstanding the decision in *Khyerbari Tea Co. Ltd.* case (supra) that the Act was valid. The appellants were, therefore, entitled to a reasonable period for filing appeals and for applying for stay of the judgment of the High Court declaring the Act to be *ultra vires*.

60. It may be recalled that the judgment in *Khyerbari Tea Co. Ltd.* case (AIR 1964 SC 925) (supra) was rendered on 18-12-1963 and the appellants preferred the appeals to this Court on 4-3-1964. How is it possible to say that the appellants were guilty of laches when it is seen that they filed the appeals within the period of limitation prescribed by law? We have to judge the rights of the parties on the basis of the law and cannot allow ourselves to be swayed by any sentimental considerations.

61. We think the respondents were bound to file the returns even though the notices were not issued to them within the period specified in Section 7 (2). The liability to file the return was created by Section 7 (1) and as the requirement of notice within the period specified in Section 7 (2) could not have been insisted upon by the respondents for the reasons which we have given, the authority empowered to make the assessment under Section 9 (4) was competent to do so. We think the High Court went wrong in allowing the writ petitions.

62. We would, therefore, set aside the orders of the High Court, dismiss the writ petitions and allow the appeals without any order as to costs.

M. H. BEG, J.:— I have had the advantage of going through the judgments of the learned Chief Justice and my learned Brother Mathew. I regret that I am compelled to reach a conclusion which amounts to holding that the taxing authorities will, in the circumstances of these cases, have no right whatsoever left to assess the respondents for taxes which they were found finally entitled to realise when this Court held the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1961, (hereinafter referred to as 'the Act'), to be valid on 13-12-1963. Under the provisions of the Act which we have to interpret, this seems to be the inevitable result. As my approach is perhaps slightly different from the one adopted by My Lord the Chief Justice, I will state my reasons also.

63-64. If it shocks one's conscience to think that the mere fact that the High Court's orders prohibiting the Commissioner from proceeding under the Act should completely frustrate the intentions of a statute which was ultimately found by this Court to be quite valid and existing for the relevant period in the eye of law, it should disturb one's equanimity no less that those who represented or advised the taxing authorities of the State should not have brought to the notice of the High Court the great loss to the exchequer of the State and the possible automatic victory which the respondents may secure by mere lapse of time. The High Court would, I have no doubt, have suitably modified its orders to meet the requirements of law and justice in such cases if the possible consequences of its orders had been brought to its notice.

65. In agreement with My Lord the Chief justice, I do not think that taxing authorities of the State were faced with a situation which could approximate to one where an "Act of God" had robbed them of the power to act or that they could not possibly have done anything at all within the time fixed by Section 7, sub-section (2) of the Act. I fully share the view that the taxing authorities were inexcusably non-chalant or unconcerned about the possible consequences of their neglect or inactivity upon the revenues

of the State. It was at least the duty of the party adversely affected to have brought the relevant provisions of the law to the notice of the Court before it issued the injunctions, or, at any rate, even afterwards but within the time prescribed for the notice under Sec. 7 (2) of the Act. A party affected cannot go to sleep over its rights and then attempt to shift the blame on to the Court for the consequences which flow from the orders passed so that it may be able to plead: "Actus Cuius Neminem Gravabit" (An act of the Court shall prejudice no man"). Such a plea appears to me to be disingenuous. It cannot apply to a case where the damage done to the powers of the taxing authorities was attributable to their own remissness or to that of their legal advisers.

66. The next question is: Did the acts or conduct of the petitioners-respondents or anything else in the case operate as a waiver or an estoppel which prevented them from agitating the serious question whether the right of the taxing authorities to realise any tax from them under the Act had become extinguished by lapse of time with the Commissioner's power to issue notices prescribed by Section 7 (2) of the Act?

67. If a waiver is a matter of agreement and not of an inference from any misleading conduct, the parties concerned must apply their minds to the subject matter of what is waived by an agreement between them before any alleged waiver can arise. It is contended here on behalf of the State that it must be assumed that the respondents waived their right to get a notice under Section 7 (2) of the Act when they obtained the injunctions from the High Court. The authorities cited on behalf of the appellant, which have been discussed by my learned Brother Mathew, do afford grounds for contending that a compliance with a provision intended for the benefit of a party may be waived by the party for whose protection it is designed. But, even in such cases, I think it must be at least present to the mind of the party waiving a right by adopting a course of action what the underlying assumption is or what the consequence of its conduct is going to be. One can only make an assumption on which an injunction rests if it flows necessarily from the language of the Court's order or anything else on record. But, there is nothing here either in the Court's orders or anywhere else on record to provide a basis for such an assumption.

68. Furthermore, the waiver, even where both sides have agreed to waive the operation of a statutory provision, cannot extend to a case in which the effect may be either to oust the jurisdiction conferred by statute or to confer a jurisdiction which, according to the statute, is not there. In other words, if a notice under Section 7 (2) of the Act is a condition precedent to the exercise of jurisdiction to make the best judgment

assessment, I do not think that the doctrine of waiver will confer jurisdiction so as to enable parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. If, on the other hand, want of notice under Section 7 (2) of the Act is not a condition precedent to the exercise of jurisdiction to make a best judgment assessment — and, that seems to me to be the crux of the matter on this question — it does not appear to me to be necessary to resort at all to a doctrine of a dubious or deemed waiver. In that case, waiver or no waiver, the power to assess would subsist. And, as that power has to be exercised quasi-judicially, the taxing authorities could issue a notice to show cause why they should not assess on such materials as they have, even if their power to issue a notice asking for a return under Section 7 (2) may have been lost by lapse of time. The power to issue a suitable notice to show cause according to rules of natural justice when a quasi-judicial function has to be exercised, can be, as we have repeatedly held, implied and read into the nature of the function to be performed even if it is not expressly mentioned.

69. Again, I do not see what representations the petitioners-respondents had either made or could be deemed to have made by any silence of theirs so as to mislead the taxing authorities. The presumption is that everybody knows the law whether this be so or not in fact. Hence, no “estoppel in pais” or equitable estoppel, as contemplated by Section 115 Evidence Act, could arise here. Also, there could be no “estoppel by record” as it was neither actually nor constructively in issue whether the party obtaining an injunction in its favour was or was not to get the benefit of lapse of the time prescribed for a notice under Section 7 (2) of the Act. And, therefore, there could be no decision, actual or constructive, on such an issue. That issue could only arise after the time prescribed had expired whatever be the reason why a party could not act during the prescribed time.

70. We have been reminded by both sides of what Rowlatt, J., an outstanding authority on law relating to taxation, said in *Cape Brandy Syndicate v. I. R. C.* (1921) 1 KB 64 at p. 71:

“.....in a taxing Act one has to look at what is clearly said. There is no room for any intentment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”.

I do not think that this was meant to exhaust all principles of interpretation or construction of every type of provision in a taxing statute or to apply to every situation which may arise. In a system, such as ours, where the constitutionality of all statutes, including taxing statutes, can be subjected to judicial review other principles also are, not

infrequently, invoked. If, however, Section 9 (4) of the Act is to be literally interpreted on this point, we cannot read into it, by implication, an obstacle to the best judgment assessment which is not there. It reads as follows:

“9 (4) If a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of this Section, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment;

Provided that before making assessment the Commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of this Section”.

71. It will be seen that Section 7 deals with “returns” whereas Section 9 deals with “assessment”, and Section 9 (4) deals specifically with the power to make the best judgment assessment. On a reading of Section 9 (4), it appears that the two conditions for an exercise of jurisdiction under it are alternative conditions linked with the disjunctive “or”. A failure to comply with the terms of the notice issued under Section 7 (2) is only one of these two alternative sets of conditions. And, this set of conditions comes into existence only after the issue of the notice under Section 7 (2) which initiates the proceedings. It is, however, difficult to see how a mere failure to make a return by itself amounts to initiation of proceedings. Even if the first part of Section 9 (4) could conceivably apply to a party after the expiry of two years, during which period a dealer or producer “may” get a notice under Section 7 (2) of the Act to make return, yet, the proceedings will have to be commenced by some kind of notice that could, as indicated above, be a notice in exercise of an implied power to observe rules of natural justice although it could not, after the lapse of the prescribed time, be technically a notice under Section 7 (2) of the Act. Assuming that the power to issue notice under Section 7 (2) is not mandatory but only directory, inasmuch as the Commissioner “may” issue the required notice, and, furthermore, even assuming, for the purposes of argument, that such a notice, meant for the benefit of a party can be and has been waived by it, yet, I fail to see how an assessment under Section 9 (4) could escape the bar created by Section 11 of the Act. This Section shows that a notice to make a return within two years of the expiry of the return period is a condition precedent to exercise jurisdiction to assess. And, such a notice could only be one under Section 7 (2) of the Act.

72. Section 11 of the Act, which seems to clinch the crucial issue, reads as follows:

"11. If in consequence of definite information which has come into his possession, the Commissioner is satisfied that any producer or dealer, though liable to pay tax in respect of any period, has nevertheless failed to make the return required of him or that tea or jute chargeable to tax has escaped assessment in any period or has been under-assessed, the Commissioner may, at any time within two years of the expiry of that period, serve on the producer or dealer liable to pay tax a notice requiring him to furnish within such period, as may be mentioned in the notice, a return of manufactured tea in tea containers or jute in bales carried, in the prescribed form and may proceed to assess or re-assess the producer or dealer and the provisions of this Act shall, so far as may be, apply accordingly:

Provided that the tax shall be charged at the rate at which it would have ordinarily been charged, had there been no escape or evasion".

73. If this provision imposes a limitation upon the power of the Commissioner to assess in every case of escaped assessment, whatever may be the reason for the escape, the best judgment proceedings against the respondents would be barred by the passage of two years after the return period. This result must, on the language of Section 11, flow from it, and not from mere failure of the Commissioner to issue a notice under Section 7 (2) of the Act, which the Commissioner "may" only serve within two years of the expiry of the return period.

74. Here, I may refer to *State of Assam v. D. C. Choudhuri* (1970) 1 SCR 780 = (AIR 1970 SC 2057) where, inter alia, Section 30 of the Assam Agricultural Income-tax Act, which was found to correspond to Section 34 of the Indian Income-tax Act, 1922, was relied upon by this Court to hold that there is a bar against the proceedings for escaped assessment. Section 30 of the Act reads as follows:

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate or has been the subject of undue relief under this Act, the Agricultural Income-tax Officer may, at any time within three years of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 19, and may proceed to assess or reassess such income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided....."

75. If we compare Sec. 11 of the Act before us with Section 30 of the Assam

Agricultural Income-tax Act, we find that, although, the language of Section 11 of the Act before us is somewhat different from that of Section 30 of the Assam Agricultural Income-tax Act, yet, the effect is the same. On the language of Section 11 of the Act before us, it is evident that every case where tea or jute chargeable to tax has escaped assessment for any period or has been under-assessed, the Commissioner must take action within two years of the expiry of the return period. I think it is this part of the Act which will operate as a bar to the jurisdiction of the Commissioner to tax any escaped assessment beyond two years of the return period. Therefore, quite apart from the question whether on the mere language of Section 7 (2) and Section 9 (4) a failure to issue a notice under Section 7 (2) of the Act within the return period constitutes a bar to proceedings under Section 9 (4) of the Act I do not see how a failure to issue such a notice would not become a bar due to the clear provisions of Section 11 of the Act. This bar, at any rate, is against exercise of jurisdiction to assess beyond the prescribed period. The notice here is part of the procedure for assessment. There is no power given to issue it beyond the period fixed. There is no provision of the Act making anything like Section 5 or Section 14 of the Limitation Act applicable to proceedings for escaped assessment under the Act. We cannot, by an exercise of our judicial power of interpretation defeat the clear effect of the enacted law. If the law was badly drafted or has revealed a gap which its makers did not foresee, the remedy of the State lies elsewhere.

76. I would, therefore, in agreement with My Lord the Chief Justice, dismiss these appeals, but, in the circumstance of these cases, award no costs to either side.

ORDER

In accordance with the judgments of the majority, the appeals are dismissed. The parties will pay and bear their own costs.

Appeals dismissed.

AIR 1975 SUPREME COURT 2079

(From: Bombay)

Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA, JJ.

Civil Appeal No. 132 of 1968: Vishnu Mahadeo Pendse, Appellant v. The Rajen Textile Mills (P.) Ltd. and another, Respondents.

Civil Appeal No. 133 of 1968: Parashram Mahadeo Pendse, Appellant v. The Rajen Textile Mills (P.) Ltd., and another, Respondents.

Civil Appeals Nos. 132 and 133 of 1968, D/- 1-5-1975.

IS/IS/B935/75/SAR

(A) Transfer of Property Act (1882), Section 108 (c) — Lease for a term — Third person getting in to possession under title alleged to be derived from lessee under certain transfers — Lessor questioning validity of transfers and suing the third person for possession — Lessor cannot succeed till the expiry of the term of the lease.

P (Plaintiffs) granted a lease of their lands for 99 years in favour of B Mills a Company. The Company was ordered by the Court to be wound up. Thereupon the assets of the Company including the leasehold interest were sold in auction and purchased by one M. At M's request the liquidator executed a conveyance of the leasehold lands in favour of R. P thereupon filed a suit for possession of the lands against R, on the ground that the purchase by M in the winding up proceedings and the conveyance subsequently executed in favour of R were void in law under the provisions of the Bombay Tenancy and Agricultural Lands Act of 1948.

Held that the suit would not lie. If according to the contention of the Plaintiff (P) the auction sale in M's favour in the liquidation proceedings and the subsequent conveyance in favour of R (the defendant in the present suit) were held to be void the logical result would be that the leasehold interest would continue to be vested in the B Mills and till the expiry of the term of the lease (99 years) the Plaintiff (P) would not be entitled to the possession of the lands. (Para 4)

[The above view accords with the well-known principle that in a suit for possession the plaintiff can succeed only on the strength of his own title and not on the weakness of the defendant's title. — Ed.]

(B) Civil P. C., O. 1 R. 3 — Necessary parties — Suit for possession — Defendant deriving title from auction purchaser in liquidation proceedings of Company — Plaintiff suing for declaration that the auction proceedings and the subsequent conveyance by auction purchaser to defendant were void in law under a certain act — Liquidator is necessary party and in his absence, suit for declaration must fail. (Para 4)

(C) Bombay Tenancy and Agricultural Lands Act (1948), Sections 27, 28 and 63 — Scope of — Sub-division, sub-letting and assignment of land by tenant prohibited — Violation of Section 27 making the tenancy liable to termination — Section does not ipso facto terminate the tenancy on assignment of the leasehold land — Lessor cannot sue for possession unless he has terminated the tenancy. (Para 5)

(D) Bombay Tenancy and Agricultural Lands Act, 1948, Section 88 (1) (b) — "Land held for benefit of industrial or commercial undertaking" — Meaning — Land held on lease by industrial or commercial undertaking is land held for benefit of such undertaking though it is used for agricultural purposes. The expression, "lands held on lease for benefit of an industrial or commercial undertaking" includes lands held on lease by an industrial or commercial undertaking, though such lands are used for agricultural purposes. Under Section 88 (1) (b) the prohibition of assignment of leasehold interest, under Sections 27, 28 and 63 of the Act, does not apply to such lands. (Para 6)

Judgment of the Court was delivered by:

GUPTA, J.— These two appeals brought on certificate of fitness granted by the High Court of Bombay arise out of two suits for possession. Civil Appeal No. 132 of 1968 has its origin in the suit instituted by appellant Vishnu Mahadeo Pendse as plaintiff. Parashram Mahadeo Pendse, appellant in Civil Appeal No. 133 of 1968, instituted the other suit. The respondents Rajen Textile Mills (P) Ltd., and Shri L. N. Madhwani Director of the said Company, were the defendants in both the suits.

2. The facts giving rise to these appeals are briefly these. The lands of Survey Nos. 181 and 182A, owned by Vishnu Mahadeo Pendse, and the lands of Survey Nos. 176, 179A and 179B owned by Parashram Mahadeo Pendse, situate within the Municipal limits of Barsi in District Sholapur, were leased out by the owners to Barsi Spinning and Weaving Mills Ltd. (hereinafter referred to as

Barsi Mills); both leases were for a period of 99 years with effect from January 1, 1943. On an application of a creditor of Barsi Mills, the High Court of Bombay made a winding up order on November 10, 1953. On October 5, 1954 all the assets of Barsi Mills including their tenancy rights in the said lands were sold by auction and purchased by one K. N. Madhwani. At the request of the auction purchaser the liquidator executed a conveyance of the lands in favour of the respondent Rajen Textile Mills (P) Ltd. (hereinafter referred to as the respondent Mills) on August 9, 1955. Some time in 1957 the appellants started proceedings in the Court of the Mamlatdar under Section 31 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the 1948 Act) for possession on the ground that they required the lands for personal cultivation. The Mamlatdar dismissed the application for possession on the view that the respondents were trespassers and as such that court had no jurisdiction. Then in 1961 the appellants instituted suits Nos. 15 and 16 of 1961, out of which these appeals arise in the Court of the Civil Judge, Senior Division at Sholapur, for recovery of possession of the lands and for several other incidental reliefs. The case made in the plaints was (1) that the lease-hold rights of Barsi Mills in the lands were personal rights and not capable of being transferred by a liquidator in winding up proceedings, (2) that the auction sale and the conveyance in favour of the respondent Mills were contrary to the provisions of Sections 27 and 28 of the 1948 Act and therefore invalid, and (3) that the auction purchaser not being an agriculturist, the auction sale and the subsequent conveyance were void under Section 63 of the 1948 Act. The trial court decreed the suits on the view that the auction sale and the conveyance contravened the provisions of Sections 27, 28 and 63 of the 1948 Act. The respondents preferred appeals to the Bombay High Court challenging the decision of the trial court; the High Court allowed the appeals and dismissed the suits. The High Court was of the view that (1) there was no term in the lease pro-

hibiting Barsi Mills from transferring their lease-hold rights nor was there any law prohibiting such transfers, and (2) the lands in dispute were held on lease for the benefit of an industrial undertaking, namely Barsi Mills, within the meaning of Section 88 (1) (b) of the 1948 Act; Section 88 specifies the lands and areas to which the 1948 Act did not apply.

3. Mr. Patel, learned counsel for the appellants, raised two contentions: (1) the lands are agricultural lands and as such Section 88 (1) (b) which excluded from the operation of the 1948 Act lands held on lease for the benefit of an industrial or commercial undertaking has no application, and (2) having regard to the proviso to Section 43C of the 1948 Act the auction sale and the subsequent assignment of the lease-hold rights were void.

4. Before we proceed to consider the merits of these contentions, it seems to us that the suits for possession must fail on a preliminary ground, as urged by Mr. Bal, counsel for the respondents. In the plaint the plaintiff in each case asks for a declaration that the auction sale and the conveyance are both void. Giving effect to this contention means that the leases in favour of Barsi Mills remain live leases and Barsi Mills continue to be the tenant of the lands. If this is the position, the suits for possession are premature because the leases for 99 years have not yet run out. Further, the declaration asked for cannot be made in the absence of the liquidator representing Barsi Mills, but Barsi Mills have not been impleaded in the suits. It is well-known that a company until it is dissolved retains its distinct entity, though in the case of a company in liquidation the administration of its affairs passes to the liquidator. Clearly therefore these suits for possession are not maintainable.

5. On the merits also, the suits are bound to fail. The appellants' contention is that the auction sale and the conveyance were void in view of Sections 27, 28 and 63 of the 1948 Act. Section 27 prohibits sub-division, sub-letting and assignment of land by a tenant and any

such act in violation of the provisions of this section makes the tenancy "liable to termination." Section 28 bars attachment, seizure or sale in execution of a decree or order by civil courts of any interest in the land held by the tenant. Section 63, as it stood at the relevant time, barred transfer of land in favour of a person who was not an agriculturist unless sanctioned by the prescribed authority. It will be seen that any act contrary to the provisions of Section 27 does not ipso facto terminate the tenancy but only makes the tenancy liable to termination. It is not claimed that the tenancy held by Barsi Mills was terminated before the suit was instituted.

6. Apart from this, Section 88 (1) (b) of the 1948 Act makes it clear that the aforesaid provisions could have no manner of application. Section 88, so far as it is relevant, is in these terms:

Sec. 88 (1): "Nothing in the foregoing provisions of this Act shall apply:—

(a) x x x x

(b) to lands held on lease for the benefit of an industrial or commercial undertaking;

x x x x"

There is no dispute that the lands in question were held on lease for the benefit of Barsi Mills which was an industrial undertaking. Section 88 remained in force from the time the 1948 Act came into operation till August 1, 1956 when it was replaced by a new section, introduced by the amendment Act No. XIII of 1956. The auction sale and the conveyance having taken place before August 1, 1956, Ss. 27, 28 and 63 of the Act did not apply to the lands in dispute which were held on lease by Barsi Mills. Mr. Patel for the appellants argued that as the respondent Mills were using the lands largely for agricultural and not industrial purposes, Section 88 (1) (b) itself had no application. Admittedly, the respondent Mills had built a few structures on the lands and used a large part of the remaining area for agricultural purposes. It is difficult to see why a land held on lease by an industrial or commercial undertaking, if used for agricultural purposes, would not be land

held for the benefit of such industrial or commercial undertaking. But apart from this, there is an obvious answer to this contention as pointed out by counsel for the respondents. The lands in question were given on lease to Barsi Mills in 1943 when the Bombay Tenancy Act, 1939 was in operation. That Act defined 'land' as meaning land which was used for agricultural purposes including, inter alia, the sites of farm buildings appurtenant thereto. The definition of land in the 1948 Act, so far as it is material for the present purpose, is: "land" means land which is used for agricultural purposes, and includes...

(a) the sites of farm buildings appurtenant to land used for agricultural purposes, and

(b) the sites of dwelling houses occupied by agriculturists, agricultural labourers or artisans and land appurtenant to such dwelling houses.

x x x x"

Therefore, when Section 88 (1) (b) speaks of lands held on lease for the benefit of an industrial or commercial undertaking it means lands used for agricultural purposes held on lease by an industrial or commercial undertaking. Section 88 (1) (b) excludes inter alia the application of Sections 27, 28 and 63 of the Act to lands used for agricultural purposes if such lands are held by an industrial or commercial undertaking as lessee. Thus it is plain that lands used for agricultural purposes by an industrial or commercial undertaking are directly covered by Section 88 (1) (b). It is not necessary to refer to the proviso to Section 43C which was inserted in the principal Act by the amending Act XIII of 1956. The auction sale and the conveyance having taken place long before the proviso was engrafted cannot be affected by it.

7. For the reasons stated above these appeals fail and are dismissed with costs: one hearing fee.

Appeals dismissed.

AIR 1975 SUPREME COURT 2083

(From: Bombay)*

**M. H. BEG, P. N. BHAGWATI AND
R. S. SARKARIA, JJ.****Balumal Jamnadas Batra, Appellant
v. State of Maharashtra, Respondent.****Criminal Appeal No. 74 of 1971, D/-
29-8-1975.**

(A) Customs Act (1962), S. 123 — Applicability — Accused found in possession of goods on 21-4-1967 — Goods notified as provided in Section 123 (2) in the Official Gazette of 26-8-1967 — Complaint filed on 30-10-1968 — Held as Section 123 (1) laid down only a procedural rule it could be applied when case came before Magistrate for trial who decided it on 15-7-1969.

(Para 5)

**(B) Customs Act (1962), Ss. 123, 135
(b) (ii) — Conviction under S. 135 (b) (ii) — Proof.**

On 21-4-1967, Police Officers of the Anti-Corruption and Prohibition Bureau, Greater Bombay, acting on information received, had searched room No. 10 at 56, Sheriff Deoji Street, Bombay. Eleven wooden boxes covered with jute cloth and secured by iron strips were found there. On opening them, six of them were found to contain cigarette lighters of "Imco Triplex Junior" brand "Made in Austria." Each of the six boxes were tightly packed with 1200 lighters. The remaining five boxes contained fifty sealed tins of flints for cigarette lighters which bore the following writing: "Tego Lighter Flints of Superior quality Made in Germany." On the wooden boxes containing the lighters were found written "Dubai" and "Made in Austria". The five boxes containing flints had the words "Dubai" and "Made in West Germany" inscribed on them. A rent receipt in the name of the accused in respect of room No. 10, which was occupied by the accused and a bill for the consumption of electricity were also seized from the custody of the accused. The accused did not admit the possession of the goods at all:

Held the very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into India very recently from another country. The inscriptions on them and writing on the boxes were parts of the state in which the goods in unopened boxes were found from which inferences about their origin and recent import could arise. The conduct of the accused, including his untruthful denial of their possession, indicated consciousness of their smuggled character

*(Criminal Appeal No. 1028 of 1969, D/- 25-1-1971—Bom.).

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or mens rea. In any case, there was some evidence to enable the Courts to come to the conclusion that the goods must have been known to the accused to be smuggled even if he was not a party to a fraudulent evasion of duty. Consequently, the accused had been rightly convicted only under Section 135 (1) (ii).

(Para 7)

Cases Referred: Chronological Paras

AIR 1974 SC 859 = 1975 Cri LJ 545 6

AIR 1972 SC 2136 = (1973) 2 SCJ 219 6

(1968) Criminal Appeal No. 195 of 1962,
D/- 2-4-1968 (SC) 7AIR 1962 SC 496 = 1962 Supp (1) SCR
364 = 1962 (1) Cri LJ 485 51962 Supp (1) SCR 358 = (1962) 2 SCJ
286 6AIR 1958 SC 915 = 1959 SCR 919 = 1958
Cri LJ 1429 6

N. H. Hingoorani and Mrs. K. Hingoorani, Advocates, for Appellant; Mr. S. B. Wad and M. N. Shroff, Advocates, for Respondent.

Judgment of the Court was delivered by

BEG, J.:— The appellant before us by special leave to appeal was convicted under Section 135 (b) (ii) of the Customs Act, 1962 (hereinafter referred to as 'the Act'), and sentenced to six months rigorous imprisonment and a fine of Rs. 2,000/-, and, in default, to three months further rigorous imprisonment. Goods in respect of which this offence was found to have been committed were also confiscated.

2. On 21-4-1967, Police Officers of the Anti-Corruption and Prohibition Bureau, Greater Bombay, acting on information received, had searched room No. 10 at 56, Sheriff Deoji Street, Bombay. This room was divided by partitions into three parts. In the central portion the police found the appellant and three other persons. This portion was again sub-divided with a locked connecting door fixed in the passage to the sub-divided part. This was opened by one of the two Godrej lock keys produced by the appellant from a side pocket of his trousers. Eleven wooden boxes covered with jute cloth and secured by iron strips were found there. On opening them, six of them were found to contain cigarette lighters of "Imco Triplex Junior" brand "Made in Austria". Each of the six boxes were tightly packed with 1,200 lighters. The remaining five boxes contained fifty sealed tins of flints for cigarette lighters which bore the following writing: "Tego Lighter Flints of Superior Quality Made in Germany". On the wooden boxes containing the lighters were found written "Dubai" and "Made in Austria". The five boxes containing flints had the words "Dubai" and "Made in West Germany" inscribed on them. A panchnama was

prepared before Panchas. A rent receipt in the name of the appellant in respect of room No. 10, in this house, of which a portion was occupied by the appellant, and a bill for the consumption of electricity were also seized from the custody of the appellant together with the Godrej lock and the keys produced by the appellant. Subsequently, the seized articles were made over to the Inspector of Central Excise and Customs, Marine and Prevention Division, Bombay, on 24-4-1967, under Section 110 of the Customs Act.

3. The value of 7,200 cigarette lighters was stated as Rs. 14,400/- and of 250 tins of flints as Rs. 15,000/- on which Customs duty of Rs. 15,840/- and Rupees 10,500/- respectively was alleged to be payable. In the complaint filed on 30th October, 1968, by the Assistant Collector of Central Excise, Marine and Prevention Division, Bombay, it is alleged that the cigarette lighters and flints were imported into India without an import licence and in contravention of provisions of Government of India, Ministry of Commerce & Industry, Import Control Order No. 17/55 dated 7-12-1955 (as amended) issued under S. 3 (2) of the Imports and Exports (Control) Act, 1947, which was to be deemed to be an order passed under Section 11 of the Act. It was submitted that the accused, having been concerned in a fraudulent evasion of payment of Rs. 26,340/- as customs duty to the Government, had committed offences punishable under Section 135 (a) and (b) of the Act. The goods were also, as a necessary consequence, said to be liable to confiscation under Section 111 (d) of the Act.

4. The appellant had denied being in possession of the offending goods although he had admitted the production of keys from his possession. He alleged that the portion of the room from which the goods were recovered was sub-let to Dwarumal and Kishen who had kept the goods there. The appellant's explanation had been disbelieved by the trying Magistrate as well as by the High Court. The production of the key which, according to the prosecution evidence, the appellant had at first refused to produce, proved that the portion in which the boxes were kept was in appellant's exclusive possession with all that was contained in it. It is possible that he may have sub-let other portions of the partitioned room to other persons, but there is no reason to doubt that the appellant was not only in possession of the boxes but knew something about the incriminating nature of their contents. Otherwise, why should he, at first, have refused to produce the key he had? Furthermore, the appellant had not given any evidence to show that his sub-tenants had

placed the boxes there, or that there was any reason why he should allow them to use the portion reserved by him for himself. His case rested on his bare assertions in a written statement. Of course, no one had come forward to state or allege that the goods found, in the circumstances stated above, had been imported without payment of duty. The only question argued before us was whether the presumption contained in Section 123 of the Act, corresponding to Section 128-A of the Sea Customs Act, 1878, or, any other provision of law would place the onus of proving innocent possession of these goods upon the appellant. Sec. 123 of the Act reads as follows:

"123. Burden of proof in certain cases—

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

5. It is true that lighters and flints were notified as provided in Section 123 (2), in the Official Gazette of 26-8-1967. Nevertheless, as the provisions of Section 123 (1) of the Act only lay down a procedural rule, they could be applied when the case came up for trial before the Presidency Magistrate who actually decided it on 15-7-1969. Indeed, the complaint itself was filed on 30-10-1968. It is immaterial that the appellant was found in possession of the goods on 21-4-1967. There is, however, another objection to the applicability of Section 123 (1) of the Act. It is that it would apply only to goods seized under the Act. It is contended that the goods in respect of which the appellant was prosecuted were not seized under the Act. Reliance was placed for this contention upon *Gian Chand v. State of Punjab*, 1962 Supp (1) SCR 364 = (AIR 1962 SC 496 = 1962 (1) Cri LJ 485).

6. Even if the goods with which we are concerned here were not seized under the Act, as provided by Section 111 of the Act, it is contended on behalf of the State that Section 106, read with Section 114 of the Evidence Act, was sufficient to enable the prosecution to ask the Court to presume that the appellant knew that the goods have been smuggled or imported in contravention of the law. The appellant had not produced evidence to show that the goods were legally brought

into India. Reliance was placed on behalf of the prosecution on: Collector of Customs, Madras v. D. Bhoormal, AIR 1974 SC 859 = (1975 Cri LJ 545); M/s. Kanungo and Co. v. The Collector of Customs, Calcutta, AIR 1972 SC 2136; Issardas Daulat Ram v. Union of India, 1962 Supp (1) SCR 358; Anant Gopal Sheorey v. State of Bombay, 1959 SCR 919 = (AIR 1958 SC 915 = 1958 Cri LJ 1429).

7. Learned Counsel for the appellant had, in his turn, relied upon State of Punjab v. Gian Chand, Criminal Appeal No. 195 of 1962, D/- 2-4-1968 (SC). He contended that it was necessary for the prosecution to prove: (1) that, the goods in question were actually smuggled or brought into the country without payment of customs duty at a time when payment of such duty had become obligatory; and, (2) that, the appellant was dealing with them knowing them to be smuggled goods. It was contended that mere possession by the accused of such goods could not enable the prosecution to apply Section 106 of the Evidence Act when the appellant could not know where the goods came from. It was urged that there was no evidence which could enable the appellant to know where the goods came from or when the goods were imported or that duty, if leviable, was not paid on them. The admissibility and sufficiency of the inscriptions on the goods and the writing on boxes in which they were found, for proving the place from where they came or when they were imported, were questioned. The contention was, that even if the appellant is deemed to be in possession with full knowledge of what the goods actually were, the Court could not go further and assume them to be smuggled or imported into the country from another country of their assumed origin after a time when the restrictions on their import had been imposed. Unfortunately, the appellant did not admit the possession of the goods at all. If he could have succeeded in explaining satisfactorily how he was an innocent receiver of such goods without knowing that they were illegally imported or smuggled he may have had a chance of getting the benefit of doubt. The very appearance of the goods and the manner in which they were packed indicated that they were newly manufactured and brought into this country very recently from another country. The inscriptions on them and writing on the boxes were parts of the state in which the goods in unopened boxes were found from which inferences about their origin and recent import could arise. The appellant's conduct, including his untruthful denial of their possession, indicated consciousness of their smuggled character or mens rea. In any case, there was some

evidence to enable the Courts to come to the conclusion that the goods must have been known to the appellant to be smuggled even if he was not a party to a fraudulent evasion of duty. Consequently, the appellant had been convicted only under Section 135 (1) (ii) of the Act. We do not find sufficient reason to interfere with this finding of fact or the sentence imposed. It would also follow that the goods were rightly confiscated.

8. Accordingly, this appeal is dismissed.

Appeal dismissed.

AIR 1975 SUPREME COURT 2085

(From: Allahabad)*

H. R. KHANNA, V. R. KRISHNA IYER
AND A. C. GUPTA, JJ.

Madan Lal, Appellant v. State of U. P. and others, Respondents.

Civil Appeal No. 678 of 1968. D/- 28-8-1975.

(A) Indian Forest Act (1927), S. 17 — Limitation for appeal — Starting point — "Date of order" means date of knowledge of the order passed without notice to and in absence of the appellant.

The Forest Act does not state what would happen if the Forest Settlement Officer made an order under Section 11 without notice to the parties and in their absence. In such a case, if the aggrieved party came to know of the order after the expiry of the time prescribed for presenting an appeal from the order, would the remedy be lost for no fault of his? It would be absurd to think so. It is a fundamental principle of justice that a party whose rights are affected by an order must have notice of it. This principle is embodied in O. 20, R. 1 of the Code of Civil Procedure; though the Forest Settlement Officer adjudicating on the Claims under the Act is not a Court, yet the principle which is really a principle of fair play and is applicable to all tribunals performing judicial or quasi-judicial functions must also apply to him. AIR 1965 SC 458, Explained; AIR 1961 SC 1500, Rel. on. (Paras 9 and 10)

Cases Referred: Chronological Paras
AIR 1965 SC 458 = (1963) Supp (2) SCR 373

AIR 1961 SC 1500 = (1962) 1 SCR 676 9
S. C. Agarwala and V. J. Francis, Advocates of M/s. Ramamurty and Co., for Appellant; G. N. Dikshit, Sr. Advocate (Mr. O. P. Rana, Advocate, with him), for Respondents.

*(Writ Petn. No. 150 of 1960. D/- 9-5-1966 — All (LB)).

IS/IS/D238/75/WNG

Judgment of the Court was delivered by

GUPTA, J.:— This appeal by certificate granted by the Allahabad High Court, Lucknow Bench, under Article 133 (1) (b) of the Constitution has its origin in a proceeding under the Indian Forest Act, 1927 (hereinafter referred to as the Act).

2. Appellant Madan Lal had preferred a claim under Section 6 of the Act in respect of certain plots of land in village Khamaria, Pargana Khairigarh, District Kheri which were included along with other land in a notification under Section 4 of the Act issued on April 3, 1954 declaring that the State Government had decided to constitute the said land a reserved forest. The Divisional Forest Officer, North Kheri Division, filed an objection to the claim of the appellant that he had Sirdari rights in the said plots. An inquiry into the claim was started by the Forest Settlement Officer under Section 7 of the Act and evidence of the parties was concluded on February 19, 1955. The case was adjourned for local inspection to March 3, 1955. The local inspection was not however held on the due date and was made instead on May 3, 1955 when the Forest Settlement Officer further directed that the case would be put up for orders, but it was not stated when. The record of the case shows that on May 9, 1955 the Forest Settlement Officer recorded an order under Section 11 (1) of the Act that the appellant had proved his claim, and directed the Divisional Forest Officer to "inform within 15 days whether he wants the land on payment of compensation or not." Section 11 (1) reads:

"In the case of a claim to a right in or over any land, other than a right-of-way or right of pasture, or a right to forest-produce or a water-course, the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part."

Sub-section (2) of Section 11 states:

"If such claim is admitted in whole or in part, the Forest Settlement Officer shall either—

(i) exclude such land from the limits of the proposed forest; or

(ii) come to an agreement with the owner thereof for the surrender of his rights; or

(iii) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894."

3. According to the respondents the order made by the Forest Settlement Officer admitting the claim of the appellant was passed without any notice to them and in their absence. The respondent's case is that they came to know of

this order on April 24, 1956 when the Forest Settlement Officer recorded another order stating:

"Claim has been admitted in this case. The case will be included in the list to be forwarded to the Government. When information from the Government is received in regard to the acquisition of land, further action will be taken under Section 11 (2) (iii) of the Indian Forest Act....."

4. The first respondent, State of Uttar Pradesh, filed an appeal through the Divisional Forest Officer (respondent No. 2) in the Court of the Deputy Commissioner, Lakhimpur-Kheri on July 20, 1956 under Section 17 of the Act. Section 17 allows an appeal to be preferred by any person who has made a claim under the Act or any Forest Officer or other person generally or specially empowered by the State Government in this behalf, against an order passed on such claim by the Forest Settlement Officer under Section 11. The section prescribes a time-limit of three months from the date of the order for presenting the appeal. The petition of appeal under Section 17 presented in this case shows that it was directed "against the order dated 24-4-1956" and the prayer made in the petition was: "This appeal be allowed and the orders of the Forest Settlement Officer admitting the claim of the respondent be set aside with costs....." The appellate tribunal repelling a contention raised by the claimant that the appeal was barred by limitation observed:

"Since the order dated 9-5-1955 was not delivered in the presence of the parties or after giving them any notice of date it cannot be said to have been delivered properly under the law. It is obvious that in case the Forest Settlement Officer had decided to pass an order determining the rights of the parties it was incumbent on him to have duly informed the parties concerned both of the date of the order and subsequently of its content. This was clearly not done."

In these circumstances it was held that the period of limitation should run from April 24, 1956 and not from the date of the first order. On the merits the appellate tribunal found on a consideration of the evidence that claim of 'Sirdari' rights over the land in question had no basis and allowed the appeal by its order dated April 20, 1959. The tribunal also set aside another order releasing the disputed land in favour of the claimant which was passed by the Forest Settlement Officer during the pendency of the appeal.

5. The claimant filed a writ petition in the High Court at Allahabad challenging the order of the appellate tribunal as without jurisdiction on two grounds:

first, the order passed on May 9, 1955 was set aside though the appeal was directed not against that order but against the order dated April 24, 1956 which was not an appealable order under the Act and, secondly, assuming the appeal was also directed against the earlier order, it was barred by limitation. On the first point the High Court took the view that since the prayer made in the petition of appeal was for setting aside the 'orders' of the Forest Settlement Officer admitting the claim, the appeal must be held to have been preferred against both the orders. As regards limitation, the High Court observed:

"In the present case, the facts found show that though this order was purported to be passed on the 9th May, 1955 on that date the parties were not present and no notice of that date had been given to the parties. The finding of the Deputy Commissioner is that the Divisional Forest Officer actually came to know of that order only on the 24th April, 1956 and this fact does not appear to have been challenged on behalf of the petitioner. In these circumstances, we think that, on the principles governing the administration of justice, it should be held that so far as the Forest Department was concerned, the order should be deemed to have been passed on the 24th April, 1956 and the right of appeal granted to the Department should be determined on that very basis. This is actually what the Deputy Commissioner did. If we were to accept the submission on behalf of the petitioner that the limitation for filing the appeal must be computed from the date put down by the Forest Settlement Officer in the order itself, it can result in material injustice to the parties because there can be cases where a Forest Settlement Officer may make an order, sign it and keep it in his own custody without pronouncing it or informing the parties concerned. The order may see the light of day only after the expiry of three months and thus this interpretation would result in all concerned parties being deprived of the right of appeal altogether." The learned Judges of the High Court added, "even if we were to hold that the appeal was time-barred," in the circumstances stated above, they would still not consider this to be "a fit case for interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution." On this view the High Court dismissed the writ petition on May 9, 1966. The appellant had also filed a revisional application to the State Government under Section 18 (4) of the Act against the order of the appellate tribunal which the State Government rejected by its order dated March 9, 1960. The writ petition refers to this unsuccessful revisional

application in stating the facts, but it contains no prayer for quashing or setting aside the order of the State Government.

6. In the appeal before us, counsel for the appellant pressed the same two grounds urged before the High Court, and also sought to raise several questions of fact and further made a grievance that the order passed by the State Government on the revision application did not state the reasons for rejection. On the question whether the appeal presented under Section 17 of the Act covered the order passed by the Forest Settlement Officer on May 9, 1955, it appears that the prayer made in the petition of appeal refers not only to 'orders' in the plural, but also describes them as orders admitting the claims of the respondent, though, of course, the order dated April 24, 1956 was not one admitting the claim and as such was not appealable. Thus though the date of the earlier order was not mentioned in the petition of appeal, there can be no doubt that the appeal was also directed against that order.

7. The other question is whether the appeal was in time. Section 17 provides a right of appeal from an order passed by the Forest Settlement Officer under Section 11 and lays down a time-limit of three months from the date of the order for presenting the appeal. In this case the order under Section 11 was recorded by the Forest Settlement Officer on May 9, 1955, and the appeal under Section 17 filed on July 20, 1956 was obviously long out of time if the impugned order could be said to have been made on May 9, 1955 when it was recorded. Counsel for the appellant relied on a decision of this Court, *Municipal Board, Pushkar v. State Transport Authority, Rajasthan*, (1963) Supp (2) SCR 373 = (AIR 1965 SC 458) as an authority for the proposition that equitable considerations have no place in interpreting provisions of limitation. This was a case under the Motor Vehicles Act, 1939. Section 64-A of that Act provides a right of revision from an order made by a State Transport Authority or Regional Transport Authority to the State Transport Appellate Tribunal and adds that no revisional application shall be entertained by the State Transport Appellate Tribunal "unless the application is made within thirty days of the date of the order." This Court observed that the words "date of the order" could not mean the date of the knowledge of the order in the absence of clear indication to that effect. If the decision stopped with the above observation it would have undoubtedly lent support to the appellant's contention, but the Court having made the observation went on to

consider the question what the expression "date of the order" meant. This is what the Court said:

"This still leaves open for investigation the problem as to what is the date of the order. According to the appellant the date when the Regional Transport Authority passed the resolution is the date of the order. Against this it is urged on behalf of the bus operators that it is the date when that resolution was brought into effect by the publication of the notification which should be considered to be the date of the order. In our opinion, the respondents' contention should be accepted. For, it is a fallacy to think that the date when the Regional Transport Authority passed the resolution was the date on which the fixation of the new-bus stand or the discontinuance of the old bus stand was ordered. It has to be remembered in this connection that Rule 134 itself contemplates that the fixation or alteration of bus-stands would be made by the notification. It is only on such notification that a notified bus stand comes into existence. So long as the notification is not made there is in law no effective fixation of a new bus stand or discontinuance of the old bus stand.

The matter may be considered from another aspect. Section 64-A provides for an application for revision by a person aggrieved by an order. It is the making of the order which gives rise to the grievance. In this case it is the fixation of the new bus stand and the discontinuance of the old bus stand by which the bus operators claim to have been aggrieved. It is easy to see that there is no real cause for grievance till such fixation and discontinuance of bus stands have been made by a notified order. In other words, the order has not been "made" till the notification has been published. Before that it is only an intention to make an order that has been expressed."

8. It is clear that the publication of the notification serves as notice to the aggrieved party and enables him to make an application under Section 64-A within the prescribed time limit. This case therefore does not support the appellant.

9. The Act we are concerned with does not state what would happen if the Forest Settlement Officer made an order under Section 11 without notice to the parties and in their absence. In such a case, if the aggrieved party came to know of the order after the expiry of the time prescribed for presenting an appeal from the order, would the remedy be lost for no fault of his? It would be absurd to think so. It is a fundamental principle of justice that a party whose rights are affected by an order must have notice of

it. This principle is embodied in O. XX, R. 1 of the Code of Civil Procedure; though the Forest Settlement Officer adjudicating on the claims under the Act is not a Court, yet the principle which is really a principle of fair play and is applicable to all tribunals performing judicial or quasi-judicial functions must also apply to him. The point has been considered and decided by this Court in *Harish Chandra v. Deputy Land Acquisition Officer*, AIR 1961 SC 1500. This was a case under the Land Acquisition Act, 1894 and the Court was considering the question of limitation under the proviso to Sec. 18 of that Act. Under Section 18 of the Land Acquisition Act a person who has not accepted the Collector's award can apply to the Collector requiring him to refer the matter for the determination of the Court. This application has to be made within six months from the date of the Collector's award in the case where the person interested was not present or represented before the Collector at the time when he made his award or had received no notice from the Collector of the award. Construing the expression "the date of the award" this Court observed:

"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair-play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way.

.....where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the order must mean either actual or constructive communication of the said order to the party concerned."

10. The High Court in the case before us was therefore right in holding that the impugned order should be deemed to have been passed on April 24, 1956 when the Forest Department came to know of the order and "the right of appeal granted to the Department should be determined on that very basis."

11. Counsel for the appellant sought to argue that the appellate authority was wrong in finding that the respondents had no notice of the order passed by the Forest Settlement Officer. We cannot permit the appellant to question the findings of fact in this appeal. As regards the order passed by the State Government on the revision petition filed

by the appellant, it appears that though the appellant referred to the said order in the writ petition there is no prayer in the petition for setting aside or quashing that order. As the validity of this order was not questioned before the High Court, the appellant cannot be allowed to raise the question at this stage.

12. In the result the appeal is dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2089

(From: Gujarat)*

A. ALAGIRISWAMI, N. L. UNTWALIA AND S. MURTAZA FAZL ALI, JJ.

J. K. Vasavada and others, Appellants v. Chandrakanta Chimanlal Bhavsar and another, Respondents.

Civil Appeal No. 1856 of 1970. D/- 23-8-1975.

(A) **Bombay Re-organisation Act (1960), S. 81 (6) — States Re-organisation Act (1956), Section 115 (7) — Rules of promotion — Rules framed by Gujarat State — Applicability to servants of Bombay State allotted to Gujarat State on re-organisation.**

The rule made by the Gujarat Government is not hit by Section 81 (6). AIR 1974 SC 1631, Followed. (Para 6)

Certain servants of the State of Bombay were allotted to the State of Gujarat on its formation on 1st May, 1960. They had passed all the prescribed departmental examinations as required by the rules of the State of Bombay and challenged the validity of certain orders of the Government of Gujarat. One of them was an order which provided that persons already promoted would have to pass the examination of G. D. C. & A. within a period of three years and, if they did not, their increment would be stopped until they passed the examination. It also laid down G. D. C. & A. as a necessary qualification for promotion. Another impugned order contained rules made under the proviso to Article 309 of the Constitution of India and laid down the qualification of G. D. C. & A. examination for promotion. It was argued that under the rules in force in the State of Bombay they were not required to pass this examination either for earning increments or for promotion and the rules and resolutions of the Government of Gujarat requiring the passing of the G. D. C. & A. examination contravened Section 81 (6) of the Bombay Re-organisa-

tion Act, 1960 which is in pari materia with Section 115 (7) of the States Re-organisation Act, 1956. It was also argued that the circular of the Central Government dated May 11, 1957 stating that so far as departmental promotion was concerned the decision of the Central Government was that "it would not be appropriate to provide any protection in the matter," cannot apply in relation to the provisions of the Bombay Reorganisation Act, 1960, which came into force subsequently. (Paras 3 & 6)

Held that it was under the proviso to Section 115 (7) that the circular of May 11, 1957 was issued by the Government of India. Under that circular it was open to the reorganised State of Bombay to make any rules for promotion of its servants which were not applicable to them before the formation of the reorganised State of Bombay. The reorganised State of Bombay could have made rules making the G. D. C. & A. a necessary qualification for promotion even though there was no such rule earlier. The power granted to the reorganised State of Bombay should be deemed to accrue to the successor States, that is, the States of Maharashtra and Gujarat. (Para 8)

Held further that the circular had certainly the force of law in the whole of the State of Bombay and, in view of the provisions of Section 87 of the Bombay Act the reference to the State Governments in the circular would include reference to the Governments of the State of Maharashtra and the State of Gujarat. Hence, even in terms of the circular the Gujarat Government was competent to make the rules which they had made. (Para 10)

Cases Referred: Chronological Paras
AIR 1974 SC 1631 = 1974 Lab IC 1103 6

Mr. V. M. Tarkunde, Sr. Advocate (M/s. V. N. Ganpule and P. C. Kapur, Advocates with him), for Appellants; Mr. S. T. Desai, Sr. Advocate, (M/s. Rajen Yash Paul and R. B. Datar, Advocates with him) (for Nos. 1, 3, 4-6 and 8); Mr. M. N. Shroff, Advocate (for No. 9) and Mr. M. V. Goswami, Advocate (for Nos. 11-54), for Respondents; Mr. S. T. Desai, Sr. Advocate (Mr. P. H. Parekh and Miss Manju Jaitley, Advocates with him), for Respondent No. 7 and Intervener (K. C. Swami and others).

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This appeal filed in pursuance of special leave granted by this Court by certain officers of the Co-operative Department of the Government of Gujarat is against the judgment of the High Court of Gujarat in a writ petition filed by the respondents.

*(Spl. Civil Appln. No. 231 of 1968, D/- 24-6-1969 (Gui)).

2. The appellants as well as the respondents (hereinafter called petitioners) were originally servants of the State of Bombay and were allotted to the State of Gujarat on its formation on 1st May, 1960. The petitioners alleged that they had passed all the prescribed departmental examinations as required by the rules of the State of Bombay and challenged the validity of certain orders of the Government of Gujarat. One of them was an order of May 10, 1962 which provided that persons already promoted would have to pass the examination of G. D. C. & A. within a period of three years and if they did not their increment would be stopped and if they have reached the maximum of the scale their pay would be reduced to the next lower stage, until they passed the examination. It also laid down G. D. C. & A. as a necessary qualification for promotion. Another impugned order was dated June 18, 1965 which contained rules made under the proviso to Article 309 of the Constitution of India and laid down the qualification of G. D. C. & A. examination for promotion. They also complained against an order dated January 23, 1968 that they should draw no further increments and what had been paid to them earlier without giving effect to that order should be recovered.

3. It is unnecessary to set out the impugned orders in extenso. For the purposes of this case it is enough to say that the main grievance of the petitioners before the High Court of Gujarat was the laying down of the qualification of G. D. C. & A. for purposes of earning increments as well as for promotion. They complained that under the rules in force in the State of Bombay they were not required to pass this examination either for earning increments or for promotion and the rules and resolutions of the Government of Gujarat laying down the passing of the G. D. C. & A. examination as a necessary qualification for promotion as well as for earning increments contravened Section 81(6) of the Bombay Reorganisation Act, 1960 which is in pari materia with Section 115(7) of the States Reorganisation Act, 1956. The appellants who were the respondents in the writ petition had passed the G. D. C. & A. examination and therefore been promoted earlier than the respondents who were the petitioners and had therefore been impleaded as parties to the writ petition.

4. As regards the complaint about the petitioners not being allowed to get future increments till they passed the examination and reduction by one stage of persons who had reached the maximum in their grade and the recovery of the amounts which they had already drawn,

they are no longer the subject-matter of any grievance because the State of Gujarat have removed those grievances by Note 1 to Regulation 13 (4) (iii) found in the order of the Government of Gujarat dated September 14, 1967 at pages 17 to 22 of the paper book. There is a certain amount of confusion in the records regarding this. As against the rule above referred to there is an order dated 23-1-1968 ordering recovery. But it was made clear during the course of the arguments that no recovery will be made. We are, therefore, concerned only with the question of the validity of the orders of the Government in so far as they laid down the qualification of G. D. C. & A. as one of the requisites for promotion to higher posts.

5. Before the High Court it was contended on behalf of the State of Gujarat that immediately before the "appointed day" the petitioners were governed by the 1939 Bombay Rules, of which Note to Rule 6-A provided the passing of the G. D. C. & A. as a qualification for promotion. On the ground that what was produced was a typed compilation consisting of some circular letters and rules of the Co-operative Department and that the learned advocate appearing for the Government had not been able to tell the Court whether the rules were gazetted or otherwise notified rules and whether they were made in any particular year and by what authority and under any particular provision of law and that it was not known when the 'note' to the rule was added, the High Court held that it would not be proper to rely upon Rule 6-A and that a note to a rule had in any case no legal effect.

6. In the course of arguments before this Court the relevant rules were sought to be produced. Based on the existence of those rules and on the decision of this Court in *Mohd. Shuiat Ali v. Union of India*, (AIR 1974 SC 1631) it was argued on behalf of the appellants that rules relating to promotion do not come within the scope of Section 81(6). The above decision of this Court was concerned with Section 115(7) of the States Reorganisation Act. There was in that case a circular of the Central Government dated May 11, 1957 to all State Governments stating, among other things, that so far as departmental promotion was concerned the decision of the Central Government was that "it would not be appropriate to provide any protection in the matter." On the basis of that circular it was pointed out by this Court that so far as departmental promotion was concerned the State Governments might, if they so desired, change the conditions of service and for this purpose they might assume the previous approval of the Central

Government as required by the proviso to Section 115 (7) and as the Central Government had given its approval to any alteration which the State Government might wish to make in the conditions of service relating to departmental promotion they did not need to be protected, and held that the Andhra Rules and Andhra Pradesh Rules regarding promotion did not contravene the proviso to Section 115 (7). In view of this decision the question whether there was any corresponding rule in the State of Bombay before the parties in this case were allotted to the State of Gujarat becomes academic. Whether there was or there was not any rule governing the parties while they were serving the Bombay State requiring that they should pass the G. D. C. & A. examination in order to qualify for promotion to higher posts the rule made by the Gujarat Government in 1962 should be held to be not hit by Section 81 (6) of the Bombay Re-organisation Act, 1960.

7. It was, however, argued on behalf of the petitioners that the circular of the Central Government which was under consideration by this Court in the decision above cited was dated 11-5-1957 and cannot therefore apply in relation to the provisions of the Bombay Reorganisation Act, 1960, which came into force subsequently. But there is a fallacy in this argument. Section 81 (6) reads:

"Nothing in this section shall be deemed to affect, after the appointed day the operation of the provision or the provisions of Chapter I of Part XIV of the Constitution in relation to the determination of the conditions of service of persons serving in connection with the affairs of the State of Maharashtra or Gujarat.

Provided that the conditions of service applicable immediately before the appointed day to the case of any person provisionally or finally allotted to the State of Maharashtra or Gujarat under this section shall not be varied to his disadvantage except with the previous approval of the Central Government."

8. The question, therefore, is what were the conditions of service applicable immediately before the appointed day to the parties in this case. They were the rules and orders applicable to them when they were servants of the State of Bombay before May 1, 1960. The conditions of service applicable to them included not merely the rules made under the proviso to Article 309 of the Constitution, it also included a liability to be subjected to any other rule that might be made under that proviso till May 1, 1960 by the State of Bombay. The States Reorganisation Act, 1956 was also applicable to them. It

would be remembered that under the States Reorganisation Act, 1956 the new State of Bombay included not merely the pre-reorganisation State of Bombay but also area of Kutch. Marathwada from the old Hyderabad State and the Vidharba region from the old Central Provinces and Berar. In respect of all Government servants who were allotted to the reorganised State of Bombay Section 115 (7) of the States Reorganisation Act applied. It was under the proviso to that section that the above mentioned circular of May 11, 1957 was issued by the Government of India. Under that circular it was open to the reorganised State of Bombay to make any rules for promotion of its servants which were not applicable to them before the formation of the reorganised State of Bombay. In other words the reorganised State of Bombay had the right to make rules regarding those Government servants including the parties in this case. The reorganised State of Bombay could have made rules making the G. D. C. & A. a necessary qualification for promotion even though there was no such rule earlier. Therefore the conditions of service of the servants of the reorganised State of Bombay before 1st of May, 1960 included a condition that they would be subject to any rule made by that State in respect of their promotion. The power granted to the reorganised State of Bombay should be deemed to accrue to the successor States, that is, the States of Maharashtra and Gujarat.

9. We may in this connection refer to Section 87 of the Bombay Reorganisation Act, 1960 which reads:

"87. Territorial extent of laws.— The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Bombay shall until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

Law is defined in that Act in Section 2 (d) as follows:

" "law" includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay."

10. The memorandum of Central Government dated 11th May, 1957 was an approval in terms of the proviso to sub-section (7) of Section 115 of the States Reorganisation Act. It is, therefore, an order or other instrument having the force of law for the purposes of the defini-

tion of 'law'. That circular had certainly the force of law in the whole of the State of Bombay and as S. 87 provides that that law would continue to be in force within the territories of the State of Bombay immediately before the appointed day which included the territories of the State of Maharashtra as well as the State of Gujarat the reference to the State Government in the circular would include references to the Governments of the State of Maharashtra and the State of Gujarat. It should, therefore, be held that even in terms of the circular of the Central Government dated 11th May, 1957 the Gujarat Government was competent to make the rules which they had made in 1962. The argument on behalf of the petitioners therefore that no approval could have been given in terms of Section 87 of the Bombay Reorganisation Act by a circular issued even in 1957 before that Act was passed has no force.

11. The result is that the order of the Government of Gujarat State of 1962 laying down the G. D. C. & A. examination as a necessary qualification for promotion should be held to be valid. The appeal is therefore allowed and the judgment of the Gujarat High Court set aside. We, however, make it clear that no recovery shall be made from the respondents. In the circumstances of this case there will be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2092

(From: Disciplinary Committee of Bar Council of India, New Delhi)*

A. N. RAY C. J., H. R. KHANNA, K. K. MATHEW, M. H. BEG, V. R. KRISHNA IYER, A. C. GUPTA, S. MURTAZA FAZL ALI JJ.

Bar Council of Maharashtra, Appellant v. M. V. Dabholkar etc. etc., Respondents.

Civil Appeals Nos. 1461 to 1468 of 1974, D/- 13-8-1975.

(A) Advocates Act (1961), Section 38 — "Person aggrieved" — State Bar Council is a person aggrieved to maintain an appeal under S. 38.

The State Bar Council is a person aggrieved to maintain an appeal under S. 38. (Paras 31, 33, 43)

*(D. C. Appeals Nos. 15 to 19, 21, 22 and 25 of 1973, D/- 14-4-1973—(D. C. of B. Council of India N. Delhi.))

IS/IS/D60/75/SSG

Per Majority (M. H. Beg, J. contra only on point of existence of lis between the Bar Council and the delinquent advocates):

The Bar Council is "a person aggrieved" for these reasons. First, the words "person aggrieved" in the Act are of wide import in the context of the purpose and provisions of the statute. In disciplinary proceedings before the disciplinary committee there is no lis and there are no parties. Therefore, the word "person" will embrace the Bar Council which represents the Bar of the State. Second, the Bar Council is "a person aggrieved" because it represents the collective conscience of the standards of professional conduct and etiquettes. The Bar Council acts as the protector of the purity and dignity of the profession. Third, the function of the Bar Council in entertaining complaints against advocates is when the Bar Council has reasonable belief that there is a prima facie case of misconduct that a disciplinary committee is entrusted with such inquiry. Once an inquiry starts, the Bar Council has no control over its decision. The Bar Council may entrust it to another disciplinary committee or the Bar Council may make a report to the Bar Council of India. This indicates that the Bar Council is all the time interested in the proceedings for the vindication of discipline, dignity and decorum of the profession. Fourth, a decision of a disciplinary committee can only be corrected by appeals as provided under the Act. When the Bar Council initiates proceedings by referring cases of misconduct to disciplinary committee, the Bar Council in the performance of its functions under the Act is interested in the task of seeing that the advocates maintain the proper standards and etiquette of the profession. Fifth, the Bar Council is vitally concerned with the decision in the context of the functions of the Bar Council. The Bar Council will have a grievance if the decision prejudices the maintenance of standards of professional conduct and ethics.

(Para 30)

Per M. H. Beg, J.:—

The State Bar Council, in its executive capacity, acts as the prosecu-

tor through its Executive Committee. There is no incongruity in its Disciplinary Committee, representing its judicial wing, functioning as an impartial Judge whose decisions are binding upon the State Bar Council. If a Bar Council, dissatisfied with a decision of its Disciplinary Committee, can appeal against it, it must therefore be held that it is a party to a "lis". (Paras 39, 41)

Per V. R. Krishna Iyer, J.:—

A case of professional misconduct is not a lis in the British sense nor a case and controversy in the American meaning. It is a public investigation about misconduct by one belonging to a public profession where every member of the Bar with a reputation to lose has a stake and every one concerned with the justice administration is interested. In a developing country this pattern of public oriented litigation better fulfils the rule of law if it is to run close to the rule of life. The Bar Council clearly comes within this category of organisations when a lawyer is involved. (Para 53)

(B) Advocates Act (1961), Sections 37, 38 — "Person aggrieved" — Interpretation — Restricted meaning — Permissibility — (Interpretation of Statutes).

The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The words "persons aggrieved" in Sections 37 and 38 are of wide import and should not

be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. (Para 27)

Cases Referred: Chronological Paras
AIR 1971 SC 385 = (1971) 1 SCR 863
21, 22, 52, 57
(1962) 369 U. S. 186 = 7 L ed 2d 663
55
1961 AC 617 = (1961) 2 WLR 845 57
AIR 1955 SC 223 = (1955) 1 SCR
1055 52
(1947) 2 All ER 395 = 111 J. P. 508
38
(1859) 7 H. L. C. 633 = 11 ER 252 38

Mr. V. S. Desai Sr. Advocate (Mr. Vimal Dave and Miss Kailash Mehta (Advocates of M/s. Mehta Dave & Co.) Advocates with him) for Appellant in all the Appeals. Mr. M. V. Dabholkar, Advocate (In person), (In C. A. No. 1461 of 1974); Mr. Z. F. Bootwala and Mrs. Urmila Sirur, Advocates (In C. A. Nos. 1462-64 of 1974); M/s. V. N. Ganpule and V. H. Dixit, Advocates (In person) (In C. A. No. 1465 of 1974); Mr. K. G. Mandalia Advocate (In person) (In C. A. No. 1466 of 1974); Mrs. E. Udayarathnam, and Mr. A. K. Doshi, Advocates (In person) (In C. A. No. 1467 of 1974) and Mr. D. K. Raisinghani, Advocate (In person) (In C. A. No. 1468 of 1974), for Respondents; M/s. D. K. Sinha and S. K. Sinha, Advocates, for Bar Council of Bihar State; Mr. D. V. Patel, Sr. Advocate (Mrs. K. Hingorani Advocate with him), for Bar Council of India.

Judgment of the Court was delivered by

A. N. RAY C. J. (for and on behalf of self, H. R. Khanna, K. K. Mathew, A. C. Gupta, and S. M. F. Ali JJ.):— These appeals were placed before this Bench for consideration of the question whether the Bar Council of a State is "a person aggrieved" to maintain an appeal under Section 38 of the Advocates Act, 1961 hereinafter called the Act.

2. The Bar Council of Maharashtra on 8 August, 1964 considered a complaint received from the High Court against the respondents and resolved that the complaint received from the High Court against the respondents be referred to the discipli-

nary committee. Another resolution was passed by the Bar Council of Maharashtra on the same day whereby Messrs Hotchand Advani, R. W. Adik and S. C. Chagla were elected as members of the disciplinary committee to enquire into the complaints.

3. The aforesaid disciplinary committee met on 19 March, 1965 and heard the Advocates for the Bar Council of the State of Maharashtra. After considering the papers placed before the committee, it directed the Registrar to issue notices under section 35 (2) of the Act to the "parties concerned including the Advocate-General". The committee also expressed the opinion that "there is a prima facie case of professional misconduct".

4. The Bar Council of Maharashtra on 18 May, 1965 issued notices under S. 35 of the Act to the respondents. The notice was described as a suo motu inquiry against the respondents. The notice proceeded with the recital that it came to the notice of the Bar Council of Maharashtra that the respondents stood at the entrance of the Court House at the Presidency Magistrate's Court, Esplanade, Fort Bombay and solicited work and generally behaved at that place in an undignified manner and the said acts amounted to professional and/or other misconduct and the Bar Council constituted disciplinary committee and the inquiry was entrusted to the committee consisting of Messrs H. C. Advani, R. W. Adik and S. C. Chagla.

5. The said disciplinary committee heard evidence upto 31 August, 1968. On 14 June, 1969, the Bar Council of Maharashtra passed a resolution requesting the aforesaid disciplinary committee to proceed with the inquiry which was pending before them prior to 31 March, 1969.

6. The disciplinary committee of the Bar Council of Maharashtra on 27 June, 1973 found the respondents guilty of conduct which seriously lowered the reputation of the Bar in the eyes of the public. The disciplinary committee directed that the respondents would stand suspended from practising as advocates for a period of three years. The suspension orders

were to be operative from 1 August, 1973.

7. The respondents preferred appeals before the Bar Council of India. In these appeals, the respondents impleaded the Bar Council of Maharashtra as respondents. The disciplinary committee of the Bar Council of India on 14 April, 1974 allowed the appeals and set aside the orders of the disciplinary committee of the Bar Council of Maharashtra. While setting aside the orders of the disciplinary committee of the Bar Council of Maharashtra, the disciplinary committee of the Bar Council of India stated as follows:—

"The Bar Council of Maharashtra has not appeared even though they started the proceedings suo motu and we do not pass any orders as to costs and we direct each party will bear their costs. However, we have gone through the evidence ourselves and also the same has been placed in detail by the appellants. All that we can say is that we expected the Bar Council of Maharashtra to be represented in the appeal because proceedings were started suo motu."

8. These statements of the disciplinary committee of the Bar Council of India indicate that the Bar Council of Maharashtra should have appeared before the disciplinary committee of the Bar Council of India.

9. The scheme of the Advocates Act in short is as follows:

There are State Bar Councils. There is Bar Council of India. Every Bar Council is a body corporate.

10. The functions of a State Bar Council are inter alia to entertain and determine cases of misconduct against advocates on its roll and to safeguard the rights, privileges and interests of advocates on its roll.

11. The functions of the Bar Council of India are inter alia to lay down standards of professional conduct and etiquette, to lay down the procedure to be followed by its disciplinary committee and the disciplinary committees of State Bar Councils, to safeguard the rights, privileges and interests of advocates and to exercise general supervision and control over State Bar Councils.

12. Disciplinary committees are constituted by each Bar Council. A Bar Council is required to constitute one or more disciplinary committees each of which shall consist of three persons of whom two shall be persons elected by the Council from amongst its members and the other shall be a person co-opted by the Council from amongst advocates who possess the qualifications specified in the proviso to Section 3 (2) of the Act and are not members of the Council, and the senior-most advocate amongst the members of a disciplinary committee shall be its Chairman.

13. When the Executive Committees of a State Bar Council and of the Bar Council of India and an Enrolment Committee of a State Bar Council and the legal education committee of the Bar Council of India are to consist of members elected by the Council from amongst its members, it is noticeable that the disciplinary committees of Bar Councils of State as well as of Bar Council of India shall consist of three persons of whom two shall be elected by the Council from amongst its members and the other shall be a person co-opted by the Council from advocates who are not otherwise members of the Council.

14. Chapter V of the Act relates to the Conduct of Advocates. Chapter V contains Sections 35 to 44. Section 35 states that where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct that inquiry to be made by another disciplinary committee of the State Bar Council. The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case and shall cause a notice to be given to the advocate concerned and to the Advocate-General of the State. The disciplinary committee of the State Bar Council may make any of the fol-

lowing orders namely. (a) dismiss the complaint, or where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed, (b) reprimand the advocate, (c) suspend the advocate for such period as it may deem fit, (d) remove the name of the advocate from the State roll of advocates.

15. Section 36 speaks of disciplinary powers of the Bar Council of India and provides that where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any advocate whose name is not entered on any State roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The disciplinary committee of the Bar Council of India may either of its own motion or on a report by any State Bar Council or on an application made to it by any person interested, withdraw for inquiry before itself any proceeding for disciplinary action against any advocate pending before the disciplinary committee of any State Bar Council and dispose of the same.

16. Section 37 speaks of appeal to the Bar Council of India. This section states that any person aggrieved by an order of the disciplinary committee of a State Bar Council or the Advocate-General of the State may, within sixty days of the date of communication of the order, prefer an appeal to the Bar Council of India.

17. Section 38 provides for appeal to the Supreme Court. Section 38 states that any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under Section 36 or Section 37 or the Attorney-General of India or the Advocate-General of the State, as the case may be, may prefer an appeal to the Supreme Court.

18. Section 49 of the Act provides that the Bar Council of India may make rules for discharging its functions under the Act and in particular such rules may prescribe inter alia the standards of professional conduct and etiquette to be observed by advocates. The Bar Council of India in exercise of the rule making power under Section 49 (c) of the

Act on 10 and 11 July, 1954 approved the rules of standards of professional conduct and etiquette. The standards of professional conduct and etiquette are described in five sections. The first section deals with duty of advocates to the Court. The second section speaks of duty of advocates to the clients. The third section consists of rules regarding duty of advocates to opponent. The fourth section prescribes duties of advocates to colleagues. The fifth section lays down restrictions on advocates on other employments.

19. The present appeals touch on Rule 36 of the Rules of the Bar Council of India. Rule 36 is in the fourth section under the heading "duty to colleagues." Rule 36 speaks that "an advocate shall not solicit work or advertise either directly or indirectly, whether by circular, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing newspaper comments or procuring his photograph to be published in connection with cases in which he has been engaged or concerned."

20. The question for consideration is the meaning of the words "any person aggrieved by an order made by the disciplinary committee of the Bar Council of India" occurring in Section 38 of the Act. It is noticeable that in Section 37, the Advocate-General of the State and in Section 38, the Attorney-General or the Advocate-General of the State, as the case may be, have been given specific rights of appeal. These rights were introduced into the Act by amendments made in the year 1974 by Amending Act 60 of 1973.

21. In *Adi Pherozshah Gandhi v. H. M. Seervai*, Advocate-General of Maharashtra, Bombay reported in (1971) 1 SCR 863 = (AIR 1971 SC 385) the question which fell for consideration was whether the appeal filed by the Advocate-General of Maharashtra before the Bar Council of India was competent. The majority view was that the Advocate-General of the State was not competent to file an appeal to the Bar Council of India. In the Maharashtra case (supra), the disciplinary committee

of the State Bar Council was satisfied that there was no reason to hold *Adi Pherozshah Gandhi* guilty of professional misconduct or other misconduct. The Advocate-General of Maharashtra filed an appeal before the Bar Council of India. The appellant objected to the locus standi of Advocate-General before the Bar Council of India. That objection was overruled and the appeal filed by the Advocate-General was accepted by the disciplinary committee of the Bar Council of India. The disciplinary committee of the Bar Council of India held the advocate, *Adi Pherozshah Gandhi* guilty of misconduct and suspended him from practice for one year. The advocate preferred an appeal under Section 38 of the Act to this Court. In view of majority decision, the appeal filed by *Adi Pherozshah Gandhi* was accepted by this Court on the ground that the Advocate-General of Maharashtra was incompetent to file an appeal. It is in this background that amendments have been introduced into Sections 37 and 38 of the Act conferring right of appeal on the Advocate-General of State and the Attorney General of India under Sections 37 and 38 respectively.

22. The respondents contended on the ruling of this Court in *Adi Pherozshah Gandhi's* case (AIR 1971 SC 385) (supra) that the Bar Council of the State is not a person aggrieved to maintain an appeal against a decision of its disciplinary committee for these reasons. First, the Bar Council of a State is not an aggrieved person because Bar Council has not suffered any legal grievance, and the decision of the Bar Council of India has not deprived the Bar Council of a State of anything. Second, the allegation that order of the disciplinary committee of the Bar Council of India is wrongfully made does not by itself give any grievance to the Bar Council of a State. The person must be aggrieved by the order and not by the consequences which ensue. Third, it is not the duty of the State Bar Council to attempt to set right any alleged error of the disciplinary committee of the Bar Council of India. The reason is that no such duty has been imposed or cast

by law on the Bar Council of a State. Fourth, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. Fifth, the Bar Council of a State is subordinate to Bar Council of India and is, therefore, not competent to appeal against any order of the superior body. Finally, an appeal could have been filed by the Advocate-General or the Attorney-General of India who have the right to appeal but they have chosen not to do so.

23. The scheme and the provisions of the Act indicate that the constitution of State Bar Councils and Bar Council of India is for one of the principal purposes to see that the standards of professional conduct and etiquette laid down by the Bar Council of India are observed and preserved. The Bar Councils therefore entertain cases of misconduct against advocates. The Bar Councils are to safeguard the rights, privileges and interests of advocates. The Bar Council is a body corporate. The disciplinary committees are constituted by the Bar Council. The Bar Council is not the same body as its disciplinary committee. One of the principal functions of the Bar Council in regard to standards of professional conduct and etiquette of advocates is to receive complaints against advocates and the Bar Council has reason to believe that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its disciplinary committee. The Bar Council of a State may also of its own motion if it has reason to believe that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its disciplinary committee. It is apparent that a State Bar Council not only receives a complaint but is required to apply its mind to find out whether there is any reason to believe that any advocate has been guilty of professional or other misconduct. The Bar Council of a State acts on that reasoned belief. The Bar Council has a very important part to play first, in the reception of complaints, second, in forming reasonable belief of guilt of professional or other

misconduct and finally in making reference of the case to its disciplinary committee. The initiation of the proceeding before the disciplinary committee is by the Bar Council of a State. A most significant feature is that no litigant and no member of the public can straightway commence disciplinary proceedings against an advocate. It is the Bar Council of a State which initiates the disciplinary proceedings.

24. In finding out the meaning of the words "person aggrieved by an order made by the disciplinary committee of the Bar Council of India", two features are to be kept in the fore-front. First, there is no lis in proceedings before the disciplinary committee. When the disciplinary committee exercises the power to reprimand the advocates, or suspend the advocate from practice or remove the name of the advocate, the committee does not decide a suit between the parties. The Bar Council in placing a matter before the disciplinary committee does not act as prosecutor in a criminal case. A complainant who prefers a complaint against an advocate is not like a plaintiff in a civil suit. The complaint is examined by the Bar Council in order to find out whether there is any reason to believe that any advocate has been guilty of misconduct. The Bar Council may act on its own initiative on information which has come to its notice in the course of its duties. Second, there is no party to the disciplinary proceedings. It is because the Bar Council, the Attorney-General, the Advocate-General, as the case may be, all act in protecting the interests of advocates, the interests of the public. In so acting there is no conflict between the advocate and any other person. The reason is that it is professional conduct, professional etiquette, professional ethics, professional morality, which are to be upheld, transgression of which results in reprimanding the advocate or suspending him from practice or removing his name from the roll.

25. With regard to the conduct of the advocates, the State Bar Council plays an important part, vis-

a-vis the disciplinary committee constituted by the State Bar Council. First, under Section 35 (1A) of the Act the State Bar Council may either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of the State Bar Council. This indicates the watch that the State Bar Council has to keep. Its task does not cease on placing a matter before the disciplinary committee. This provision shows on one hand the abiding interest of the State Bar Council in the matter and on the other the duty of guarding the professional ethics with which it is entrusted. Second, under Section 36 (2) of the Act, a State Bar Council may make a report to the Bar Council of India to withdraw before the disciplinary committee of the Bar Council of India any proceeding for disciplinary action against any advocate pending before the disciplinary committee of a State Bar Council. These provisions indicate that after the State Bar Council has placed the matter before its disciplinary committee, the Bar Council continues its check on the proceedings. These courses of action are procedural. These steps do not give the State Bar Council any power to deal with the decisions of the disciplinary committee. The reason why the State Bar Council is empowered under the Act to withdraw proceedings from one disciplinary committee and give it to another or to have the disciplinary proceedings withdrawn from the State for determination by the disciplinary committee of the Bar Council of India is that the State Bar Council is all the time interested in the task of preserving the profession against impurities in the standards of conduct. The Bar Council is the collective representative of the lawyers, the public, in regard to the observance of professional ethics by persons belonging to the noble profession.

26. The words "person aggrieved" are found in several statutes. The meaning of the words "person aggrieved" will have to be ascertained with reference to the pur-

pose and the provisions of the statute. Sometimes, it is said that the words "person aggrieved" correspond to the requirement of locus standi which arises in relation to judicial remedies.

27. Where a right of appeal to Courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved." Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates Act is comparable to the role of a guardian in professional ethics. The words "persons aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "person aggrieved" include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests." It has, therefore, to be found out whether the Bar Council has a grievance in respect of an order or decision affecting the professional conduct and etiquette.

28. The pre-eminent question is: what are the interests of the Bar Council? The interests of the Bar Council are the maintenance of standards of professional conduct and etiquette. The Bar Council has no per-

sonal or pecuniary interest. The Bar Council has the statutory duty and interest to see that the rules laid down by the Bar Council of India in relation to professional conduct and etiquette are upheld and not violated. The Bar Council acts as the sentinel of professional code of conduct and is vitally interested in the rights and privileges of the advocates as well as the purity and dignity of the profession.

29. The interest of the Bar Council is to uphold standards of professional conduct and etiquette in the profession, which is founded upon integrity and mutual trust. The Bar Council acts as the custodian of the high traditions of the noble profession. The grievance of the Bar Council is to be looked at purely from the point of view of standards of professional conduct and etiquette. If any decision of the disciplinary committee of the Bar Council of India is according to the State Bar Council such as will lower the standards and imperil the high traditions and values in the profession, the State Bar Council is an aggrieved person to safeguard the interests of the public, the interests of the profession and the interests of the Bar.

30. The Bar Council is "a person aggrieved" for these reasons. First, the words "person aggrieved" in the Act are of wide import in the context of the purpose and provisions of the statute. In disciplinary proceedings before the disciplinary committee there is no lis and there are no parties. Therefore, the word "person" will embrace the Bar Council which represents the Bar of the State. Second, the Bar Council is "a person aggrieved" because it represents the collective conscience of the standards of professional conduct and etiquette. The Bar Council acts as the protector of the purity and dignity of the profession. Third, the function of the Bar Council in entertaining complaints against advocates is when the Bar Council has reasonable belief that there is a prima facie case of misconduct that a disciplinary committee is entrusted with such inquiry. Once an inquiry starts the Bar Council has no control over its decision. The Bar Council may en-

trust it to another disciplinary committee or the Bar Council may make a report to the Bar Council of India. This indicates that the Bar Council is all the time interested in the proceedings for the vindication of discipline, dignity and decorum of the profession. Fourth, a decision of a disciplinary committee can only be corrected by appeals as provided under the Act. When the Bar Council initiates proceedings by referring cases of misconduct to disciplinary committee the Bar Council in the performance of its functions under the Act is interested in the task of seeing that the advocates maintain the proper standards and etiquette of the profession. Fifth, the Bar Council is vitally concerned with the decision in the context of the functions of the Bar Council. The Bar Council will have a grievance if the decision prejudices the maintenance of standards of professional conduct and ethics.

31. For these reasons we hold that the Bar Council is an aggrieved person to maintain an appeal under the Act.

32. The appeals will now be heard on merits by a Division Bench.

M. H. BEG, J.:— 33. I not only concur with the conclusion reached by My Lord the Chief Justice and the reasons given to support it, but I think that we can and should hold that there was actually a "lis" between the Bar Council and the allegedly delinquent Advocates who were hauled up before its Disciplinary Committee, on complaints sent by the Executive Committee of the State Council, for what were said to be acts of professional misconduct.

34. The learned Chief Justice has very clearly and succinctly set out the reasons why a State Bar Council is a "person aggrieved" entitled to appeal against orders in disciplinary proceedings against members of the Bar of the State. It represents the Bar of the State. It is the "keeper of the conscience" and the guardian of the interests of members of the Bar. It acts "as the protector of the purity and dignity of the profession." Its function in relation to disciplinary proceedings, is to

entertain complaints against Advocates, and, when there is a prima facie case of misconduct, to initiate proceedings by sending the complaint to its Disciplinary Committee. It has an interest in seeing that correct decisions are given upon matters involving allegations of misconduct against members of the Bar of the State. My learned brother Krishna Iyer has indicated the wide range and the social significance and dimensions of this interest.

35. A State Bar Council is composed primarily of members elected from amongst Advocates of a State. Its statutory functions are given in Section 6 of the Advocates Act, 1961 (hereinafter referred to as 'the Act'). Amongst these, we are especially concerned here with clauses (c) and (d) of Section 6 (1) of the Act, which read as follows:

"(c) to entertain and determine cases of misconduct against advocates on its roll;

(d) to safeguard the rights, privileges and interests of advocates on its roll;"

36. Under Section 9 of the Act, the State Bar Council constitutes its Disciplinary Committee consisting of "three persons of whom two shall be persons elected by the Council from amongst its members and the other shall be a person co-opted by the Council from amongst Advocates who possess the qualifications specified.....". Under Section 10 it elects an Executive Committee of five members and an Enrolment Committee of three members. Thus, the State Bar Council operates through its committees. Each Committee has distinct and separable functions. Each could, therefore, be said to have a "persona" and an identity of its own which is distinguishable from that of the Bar Council as a whole. Each Committee, no doubt, acts for the Bar Council, but its members are likely to be different although this is not necessarily so. In any case, when the State Bar Council has sent a case to its Disciplinary Committee, under Section 35 of the Act, that Committee proceeds as an independent and impartial authority which tries a complaint and either dismisses it or

directs proceedings to be filed, or, upon finding an advocate guilty, punishes him by either reprimanding him, suspending him from practice for a specified period, or orders removal of his name from its roll of advocates. Indeed, Section 42 (1) of the Act gives the Disciplinary Committee the powers of a Civil Court under the Civil Procedure Code; and, Section 42 (2) enacts that its proceedings shall be "deemed" to be judicial proceedings for the purposes mentioned there.

37. At the trial of a complaint, opportunities to be heard must be given to the Advocate General and to the Advocate who is tried by it. This has to be done because there are disputes and conflicting interests and points of view on which the Disciplinary Committee has to give its decisions. The Advocate General can appear either personally or through an Advocate representing him. He presumably represents public interest as well as the interests of the legal profession of which he is the formal head in the State. It is true that there is no provision in Section 35 of the Act for impleading the State Bar Council which, on its executive side, initiates the proceedings by sending the case to its Disciplinary Committee. But, if the Bar Council has separable interest, as a guardian of the rights and privileges of the members of the Bar, specifically mentioned by Section 6 (1) (d) of the Act, there is no reason why a right to represent this interest before its own Disciplinary Committee as well as before the Bar Council of India, on an appeal under Section 37 of the Act, or, on the further appeal to this Court under Section 38 of the Act, should be denied to it. Neither Section 37 nor Section 38 of the Act mention the State Bar Council as a separate entity. Nevertheless, if, as we are holding, it can have the locus standi and rights of a "person aggrieved", affected by the results of such proceedings. I see no reason why we should not say that it is in the position of a party to a "lis" or a dispute between itself and the allegedly delinquent Advocate towards the decision of which the proceedings are directed.

38. The term "lis" is not confined to litigation by means of a suit in a Court of law. In *Butler v. Mountgarret*, (1859) 7 HLC 633 at p. 641 it was held that a "suit is not necessary to constitute lis". It was pointed out there that "a family controversy capable of being litigated is a *lis mota*". In *B. Johnson & Co. (Builders) v. Minister of Health*, (1947) 2 All ER 395 at p. 399 Lord Greene, M. R. said "Lis implies the conception of an issue joined between two parties. The decision of a *lis*..... is the decision of that issue".

39. If the State Bar Council, acting through its Executive Committee, has found a *prima facie* case to be sent and tried by its Disciplinary Committee, it performs the functions of a prosecuting agency. It does so in the discharge of its duty to safeguard "the rights, privileges and interests" of Advocates as a whole on its roll which are affected by the misconduct of an Advocate. There are, therefore, triable issues between it and the individual Advocate accused of misconduct. It seems to me that we could and should, therefore, hold that the State Bar Council, in its executive capacity, acts as the prosecutor through its Executive Committee. There is no incongruity in its Disciplinary Committee, representing its judicial wing, functioning as an impartial Judge whose decisions are binding upon the State Bar Council. If we are holding that a Bar Council, dissatisfied with a decision of its Disciplinary Committee, can appeal against it, we have to, I think, as its logical corollary also hold that it is a party to a "lis". Our opinion that it is a "person aggrieved", within the meaning of that expression as used in Sections 37 and 38 of the Act necessarily implies that.

40. The point of view stated above rests upon the distinction between the two different capacities of the State Bar Council: an executive capacity, in which it acts as the prosecutor through its Executive Committee, and a quasi-judicial function, which it performs through its Disciplinary Committee. If we can make this distinction, as I think we can,

there is no merger between the prosecutor and the Judge here. If one may illustrate from another sphere, when the State itself acts through its executive agencies to prosecute and then through its judicial wing to decide a case, there is no breach of a rule of natural justice. The prosecutor and the Judge could not be said to have the same personality or approach just because both of them represent different aspects or functions of the same State.

41. For the reasons given above, I do not see any objection to a participation of a State Bar Council in its executive capacity, in a disciplinary proceedings, against an Advocate on its roll, either at the initial or the appellate stages. Before it can become a "person aggrieved" by an order against which it could appeal, there must have been a "lis" or a dispute to be decided which gives rise to the order complained of. To such a "lis" the State Bar Council, in its executive capacity must be deemed to be a party. Apparently, its interests are presumed to be sufficiently represented by the Advocate General. Hence, it was not considered necessary to provide for its separate representation by a notice to be given by its Disciplinary Committee as is provided for in the case of the Advocate General. But, there seems to me to be no legal obstacle in the way of its separate representation, if it so desires, even before its own Disciplinary Committee. It certainly has notice of every complaint whenever it sends it to its Disciplinary Committee. Its right to appeal, in any event, as a "person aggrieved", seems squarely covered by the provisions of Sections 37 and 38 of the Act. It may be mentioned here that the respondents themselves treated the Bar Council as a party interested in a "lis", so that it could become a "person aggrieved" by the setting aside of the orders against respondents, when they impleaded the State Bar Council as a respondent in their appeals to the Bar Council of India. Its statutory right to appeal to this Court under Section 38 is not affected by the mere fact that it did not put in appearance before the Bar Council of India.

V. R. KRISHNA IYER, J.:— 42. My concurrence in the opinion which has been handed down by the learned Chief Justice is ordinarily dissuasive of a separate long note, save when a fresh perspective is to be presented or new frontiers are to be drawn by doing so. Partially, my supplementary has this apology.

43. The two-day long arguments in this case have been devoted to a construction of two simple words in common use forming the expression 'person aggrieved'. Precedential erudition and traditional approaches notwithstanding, the key to the meaning of the expression in question lies in plain English plus the social feel of the statute and the public commitment of the legal profession, the regulation of which has been achieved by the Advocates Act, 1961 (for short, the Act) wherein the above words occur. Legal scholarship, to be fruitful, must focus on the life-style of the law without getting lost in mere logomachy.

44. The short question is as to whether the State Bar Council is a 'person aggrieved' within the meaning of Section 38 so that it has locus standi to appeal to this Court against a decision of the Disciplinary Tribunal of the Bar Council of India which, it claims, is embarrassingly erroneous and, if left unchallenged, may frustrate the high obligation of maintaining standards of probity and purity and canons of correct professional conduct among the members of the Bar on its rolls.

45. I skip the facts as they have been set out in the judgment of the learned Chief Justice, except to state that a number of advocates, who are ranged as respondents, had been found guilty by the Disciplinary Tribunal of the State Bar Council of unseemly soliciting but, on appeal, the disciplinary body of the National Bar Council, exonerated them on certain view of 'professional conduct, which disturbed the State Bar Council and even the All India Bar Council, with the result that the former came up to this Court in appeal and the latter actively supported this stand.

46. The hackneyed phrase, 'person aggrieved', is not merely of

frequent occurrence in statutes and in the writ jurisdiction but has come up for judicial consideration in Anglo-American and Indian courts in a variety of a situations and legislative settings. Notwithstanding the slippery semantics of such legalese, the Indian legislative draftsmen have continued to use them, out of linguistic allegiance to the British art, and Indian Judges have frequently sought interpretative light from English authorities of ancient vintage. These 'borrowed' drafting and interpretative exercises are sometimes inept when time and country change and the context and text of the statute vary. I stress this aspect since much of the time of the Courts in India is consumed by massive, and sometimes mechanical, reliance on exotic constructions and default in evolving legislative simplicity and avoiding interpretative complexity. At a time when our Courts are on trial for delayed disposals and mystifying processes, this desideratum becomes all the more urgent. Otherwise, why should decoding a single expression — 'person aggrieved' — take two days of learned length?

47. Even in England, so well-known a Parliamentary draftsman as Francis Bennion has recently pleaded in the Manchester Guardian against incomprehensible law forgetting 'that it is fundamentally important in a free society that the law should be readily ascertainable and reasonably clear, and that otherwise it is oppressive and deprives the citizen of one of his basic rights'. It is also needlessly expensive and wasteful. Reed Dickerson, the famous American Draftsman, said: 'It cost the Government and the public many millions of dollars annually'. The Renton Committee, in England, has reported on drafting reform but it is unfortunate that India is unaware of this problem and in a post-Independence statute like the Advocates Act legislators should still get entangled in these drafting mystiques and judges forced to play a linguistic game when the country has an illiterate laity as consumers of law and the rule of law is basic to our constitutional order.

48. Back to the issue. Is the State Bar Council a 'person aggrieved'? No narrow, pedantic, technical or centenarian construction can be blindly applied. On the other hand, a spacious construction, functionally informed by the social conscience and the salutary purpose of the enactment must illumine the judicial effort. So viewed, the ample import and breadth of meaning of the words 'person aggrieved' will embrace the State Bar Council, for reasons which I shall presently set out.

49. Each statute has a personality and a message. Judicial interpretation is not bloodless and sterile exercise in spinning subtle webs, sometimes cobwebs, out of words and phrases otherwise simple, but to unfold the scheme of the legislation insightfully, sense its social setting and read the plain intendment. This living approach can do justice to law. We are here concerned with a legislative outfit for a national Bar, organising and prescribing its statutory autonomy, elective structure, public functions, internal regulation and ultimate appeal to the Supreme Court where canons of good conduct have been allegedly breached by delinquent lawyers. This conspectus will show what a vibrant and responsible role the Bar Council has to play at the State and national levels and any interpretation which will detract from this supervisory status of the Bar Council will be incongruous with the founding creed of the institution. The paramount concern of the Bar Councils is the lawyer, the public and professional responsibility. Anything that hurts the health of this system is a social trauma, a legal grievance, a special injury, for them. After all, 'lawyer-power' lasts not through peak incomes of a few and security of statutory monopoly, but by the high comport and ethics of the many, screening and weeding deviants and delinquents.

50. Let us get a glimpse of the great expectations about the legal profession in society. Long ago, De Toqueville trenchantly remarked that the profession of law "is the only aristocratic element which can be amalgamated without

violence with natural elements of democracy I cannot believe that a Republic could subsist if the influence of lawyers in public business did not increase in proportion to the power of the people."

He rightly stressed that 'lawyers belong to the people by birth and interest, to the aristocracy by habit and taste'. Thus the profession is the connecting link between the community and the Administration, given an enlightened, goal-oriented group outgrowing its elitist mores. Indeed today lawyers are recruited also from the lower brackets. India has a huge number of law men who can be a force. What Prof. Brabanti observed about the Pakistan Bar has some, only some though, relevance to India, and I quote:

"The sheer size of the legal community strongly organised into bar associations and closely allied with equally strong courts has not only been a major source for the diffusion and regeneration of norms generally, but by weight of numbers has enabled the courts to remain strong and has prevented the rise of administrative lawlessness. There is a curious anomaly here. The legal community, while often antagonistic to government and constraining executive action, is nevertheless closely identified normatively and culturally with the bureaucratic elite. This identification curiously coupled with healthy antagonism actually enhances the strength of the legal community. It derives popular support from its ostensible opposition to Government, and at the same time elicits bureaucratic support in the community at large. It has a net-work of relationships in rural areas and the cities..... In short, the legal community is a force to be reckoned with. It has challenged the executive during and after martial law, it has defined efforts to restrict court jurisdiction, it has compelled justiciability of fundamental rights, it has forced abrogation of several restrictive enactments. Is this law as an impediment to political development? Is this misallocation of scarce resources in the system? Is this unproductive use of non-productive man-power? On the contrary, it

seems to us that this is the very genius of political development."

Michael Hager, after quoting Prof. Brabanti, comments (in his article in the American Bar Association Journal, January 1972, Vol. 58, on 'The Role of lawyers in Developing Countries'):

"The legal profession has a unique opportunity to effect change from within the political elite, to exert pressure from without and to win over the general public to development policies. And as Mihaly and Nelson observed with respect to legal education, 'law graduates usually fan out not only into legal practice but also into responsible positions in business, government and politics.'"

51. The Bar is not a private guild, like that of 'barbers, butchers and candlestick-makers' but, by bold contrast, a public institution committed to public justice and pro bono publico service. The grant of a monopoly licence to practice law is based on three assumptions: (1) There is a socially useful function for the lawyer to perform. (2) The lawyer is a professional person who will perform that function. and (3) His performance as a professional person is regulated by himself and more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice ('The Practice of law is a Public Utility'—'The Lawyer. The Public and Professional Responsibility' by F. Raymond Marks et al-Chicago American Bar Foundation, 1972, p. 288-289). A glance at the functions of the Bar Council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order. If pathological cases of member misbehaviour occur, the reputation and credibility of the Bar suffer a mayhem and who, but the Bar Council, is more concerned with and sensitive to this potential disrepute the few black sheep bring about? The official heads of the Bar i.e., the Attorney General and the Advocates-General too are distressed if a lawyer 'stoops to conquer' by resort to soli-

citing, touting and other corrupt practices.

52. I may now refer to A. P. Gandhi v. H. M. Seervai, (1971) 1 SCR 863 = (AIR 1971 SC 385) where divergent opinions were delivered but all concurred in treating the Bar Council as an 'aggrieved person'. The earlier decision in Bhataraju, (1955) 1 SCR 1055 at p. 1064 = (AIR 1955 SC 223 at p. 227) strikes a note in consonance with this view. No hesitancy inhibits me from hazarding the opinion that the social canvas must be spread wide when making out the profile of a statute like the Advocates Act for the good reason that the Bar has a share in being the sentinel on the qui vive when the legal dykes of right and justice are breached by authoritarianism or citizen-wrong doing. Nor do I conceal my half-horror at any professional tribunal glossing over 'snatching briefs' and 'dragging clients'—provided they are proved—as less than gross misconduct. If the salt lose their savour, wherewith shall they be salted? However, I hasten to make it plain, to avoid prejudice to the parties, that I totally desist from pronouncing on the merits of the evidence in this case.

53. One more point. A case of professional misconduct is not a lis in the British sense nor a case and controversy in the American meaning. It is a public investigation about misconduct by one belonging to a public profession where every member of the Bar with a reputation to lose has a stake and every one concerned with the justice administration is interested. Traditionally used to the adversary system, we search for individual persons aggrieved. But a new class of litigation—public interest litigation—where a section or whole of the community is involved (such as consumers' organisations or NAACP—National Association for Advancement of Coloured People—in America), emerges. In a developing country like ours, this pattern of public-oriented litigation better fulfils the rule of law if it is to run close to the rule of life. The Bar Council clearly comes within this category of organisations when a lawyer is involved.

54. I derive support for this philosophy of approach from academic and judicial opinion in England and America. A question arose whether a railroad company — BAR (Bangor and Aroostook Railroad) — could bring an action against the stockholders for having drained BAR improperly. Although an academic critic took the view that the District Court was incorrect in its view that the BAR was the 'sole beneficiary', he went on to state that the public's interest in the financial health of BAR provided a separate interest in bringing the action. The learned author wrote:

"It would seem to be incontestable that the public has a very real interest in railroads. Railroads have been found vital to a healthy national economy; any such factor must, a priori, be deemed a potent component of the public welfare. As such, it is evident that a financially healthy railroad is of concern not only to its stockholders, but to the public as well..... Finding that the management of a railroad has obligations running to the public as well as fiduciary duties owing to the corporation's stockholders, the Court concluded that, of these two responsibilities, the public interest is paramount. "It must be remembered," the Court cautioned, "that railways are public corporations organized for public purposes..... They all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders."

(Review by James F. Simon of Bangor & Aroostook R. R. v. Bangor Punta Operations, Inc (Bangor & Aroostook), 482 F. 2d 865 (1st Cir. 1973), cert. granted, 94 S. Ct. 863 (1974) Columbia Law Review Vol. 74 No. 3, April 1974 — p. 528 at p. 531-532)

55. Similarly, the American Supreme Court relaxed from the restrictive attitude towards 'standing' in public actions in *Baker v. Carr* (1962) 369 U. S. 186: vide *Maryland Law Review*, Vol. XXXIII 1973 p. 506:

"In *Baker*, voters challenged the failure of the Tennessee legislature to reapportion itself since 1901; the plaintiffs lived in counties which had

become under-represented under the old law. The Supreme Court held that these voters had the requisite standing to challenge the inaction of the legislature. The Court expanded the notion of direct injury to include mere 'debasement' of a vote, rather than the total deprivation which had previously been required."

56. American jurisprudence has recognised, for instance, the expanding importance of consumer protection in the economic system and permitted consumer organisations to initiate or intervene in actions although by the narrow rule of 'locus standi', such a course could not have been justified (see p. 807 — *New York University Law Review*, Vol. 46 1971). In fact, citizen organisations have recently been campaigning for using legal actions for protection of community interest, broadening the scope of 'standing' in legal proceedings (see p. 403 — *Boston University Law Review*, Vol. 51, 1971).

57. In the well-known case of *Attorney-General of the Gambia v. Pierra Sarr N. Jie*, 1961 AC 617, Lord Denning observed about the Attorney-General's standing thus:

".....The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action."

Ray, J. (as he then was) crystallised this ratio in *A. P. Gandhi*, (AIR 1971 SC 385) thus:

"The Judicial Committee construed the words 'person aggrieved' to include the Attorney-General of Gambia as representing the public interest."

"The profession touches the public on the one hand and the courts on the other. On no other basis could the presence of the Advocate-General be explained." (p. 928)

58. Although not strictly confined to 'standing' with reference to suits, jurists have thrown some light on this subject. Professor S. A. de Smith has observed:

"All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest — the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him."

(Quoted in 'Standing and Justiciability' by V. S. Deshpande — Journal of the Indian Law Institute — April-June 1971 — Vol. 13, No. 2, p. 174)

Professor H. W. R. Wade has observed:

"In other words, certiorari is not confined by a narrow conception of locus standi. It contains an element of the actio popularis. This is because it looks beyond the personal rights of the applicant; it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers." (Standing and Justiciability — ibid, p. 175)

The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system. In this very case, to grant an exclusionary windfall on the respondents is to cripple the Bar Council in its search for justice and insistence on standards.

59. I have been long on a short point, but brevity, where there is something to speak, is not the soul of wit but a sign of something different.

Order accordingly.

AIR 1975 SUPREME COURT 2106

(From: Madhya Pradesh)*

A. N. RAY, C. J., K. K. MATHEW, V. R. KRISHNA IYER AND S. MURTAZA FAZL ALI, JJ.

The Commissioner of Income-tax, Nagpur, Appellant v. M/s. Suttlej Cotton Mills Supply Agency Ltd., Respondent.

Civil Appeal No. 1877 of 1970, D/- 25-7-1975.

(A) Income-tax Act (1922), Ss. 10 and 66 — Adventure in the nature of trade — Finding of Tribunal that certain profit was trading profit — Interference with finding by High Court in reference. Misc. Civil Case No. 221 of 1962, D/- 10-1-1968, (Madh Pra), Reversed.

The assessee a limited company applied for certain shares of another Company. Both the Companies were controlled by the same group viz. Birlas. The assessee which had already purchased 1000 ordinary shares subscribed for 3,49,000 shares of the new issue and paid Rs. 8,72,500/- as application money on the 25th and 27th February, 1951, and paid Rupees 26,17,500/- as final call money on 10-8-1951. These purchases were authorised by a resolution of the assessee dated 7-2-1951. The assessee sold a part of its stock viz., 1,58,200 shares at a profit of Rs. 2,13,150/-. For the assessment year 1956-57 (accounting year ending on 31-3-1956), the Income Tax Officer sought to assess the amount on the basis that it was profit accruing to the assessee from an adventure in the nature of business. The assessee contended that the amount represented capital gain as the shares were purchased by way of investment and that the same could not be taxed as revenue receipt. The Tribunal held that the amount of Rs. 2,13,150/- was a business profit. The High Court in reference interfered with the order of the Tribunal.

Held, that the finding that the profit was a business or trading profit was primarily a finding of fact

*(Misc. Civil Case No. 221 of 1962, D/- 10-1-1968—Madh. Pra.)

though in reaching that finding the Tribunal had to apply the correct test laid down by law. The Tribunal had considered the evidence on record and applied the correct test and there was no scope for interference by the High Court with the finding of the Tribunal. Case law discussed. Misc. Civil Case No. 221 of 1962, D/- 10-1-1968 (Madh Pra), Reversed. (Para 25)

The jurisdiction of the High Court in these matters is only advisory and conclusion of facts are conclusions on which the High Court is to exercise the advisory jurisdiction. (Para 23)

Cases Referred: Chronological Paras

1972 Tax LR 1115 = 83 ITR 439 (SC)	25
AIR 1966 SC 1256 = 60 ITR 65	12
AIR 1965 SC 1898 = 57 ITR 21	14
(1961) 43 ITR 297 (Mad)	13
(1961) 39 Tax Cas 636 = 105 S. J.	609
	13
AIR 1959 SC 359 = 35 ITR 594	11, 16
AIR 1959 SC 1252 = 37 ITR 242	14
AIR 1959 Ker 298 = 39 ITR 234	13
(1957) 31 ITR 92 (Bom)	13
(1954) 34 Tax Cas 389 = 1953 T. R.	11
	10
AIR 1953 Mad 166 = 22 ITR 379	13
(1951) 20 ITR 176 (Cal)	13
(1942) 24 Tax Cas 498 = 1942 SC	493 (Scot.)
	15
AIR 1939 Rang 337 = 7 ITR 470	13
(1930) 15 Tax Cas 333	14, 16
(1924) 9 Tax Cas 141 = 158 LT Jo	391
	8
(1889) 5 Tax Cas 159 (Scot)	8

Mr. V. S. Desai, Sr. Advocate, (M/s. E. B. Ahuja and S. P. Nayar, Advocates with him), for Appellant; Mr. M. C. Chagla & Mr. B. Sen, Sr. Advocates, (Mr. A. K. Chitale, Mrs. A. K. Verma and M/s. Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates with them), for Respondent.

Judgment of the Court was delivered by

MATHEW, J.:— This is an appeal from the judgment of the High Court of Madhya Pradesh in a reference made at the instance of the assessee M/s. Sutelj Cotton Mills Supply Agency Ltd. (hereinafter referred to as the 'assessee') by the Income Tax Appellate Tribunal (here-

inafter referred to as the 'Tribunal') under Section 66 (1) of the Indian Income Tax Act. The question referred was:

"Whether the inference of the Tribunal that the profit of Rupees 2,13,150/- arising from the sale of 1,58,200 shares of the Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd., is assessable as business profit is correct?"

2. When the reference came up for hearing before the High Court, the High Court found that although the Tribunal was of the view that the question referred was a mixed question of law and fact, it had not stated all the facts and circumstances on which it based its conclusion that the profit of Rs. 2,13,150/- was a business profit and so the Court called for a supplementary statement of the case and a supplementary statement of the case was submitted to the Court by the Tribunal.

3. The material facts in the statement of the case were as follows. The assessee is a public limited company and it is controlled by the Birlas. The assessee applied for certain shares of the Gwalior Rayon Silk Manufacturing (Weaving) Company Limited (hereinafter referred to as the "Rayon Company"), also a company controlled by the Birlas. This company was floated on 25-8-1947 with a paid up capital of Rupees 5 lakhs made up of 50,000 ordinary shares of Rs. 10/- each. In the year ending 31-12-1951, the Rayon Company issued certain new shares for paid up capital of Rs. 1,17,25,000/- made up as follows:

		Rs.
7,60,000	Ordinary shares of Rs. 10/- each fully paid up.	76,00,000
1,50,000	Ordinary shares of Rs. 10 each with paid up at Rs. 2/3- each.	3,75,000
1,50,000	6 per cent. preference shares of Rs. 100/- each paid up at Rs. 25 each (redeemable at par at the company option after a specified date by giving one year's notice).	37,50,000

4. The assessee which was interested in the Rayon Company and which had already purchased 1,000 ordinary shares, subscribed for 3,49,000 shares of the new issue and paid Rs. 8,72,500/- as application money on the 25th and 27th February, 1951, and paid Rs. 26,17,500/- as final call money on 10-8-1951. These purchases were authorised by a resolution of the assessee dated 7-2-1951. The assessee sold a part of its stock viz., 1,58,200 shares at a profit of Rs. 2,13,150/-.

5. For the assessment year 1956-57 (accounting year ending on 31-3-1956), the Income Tax Officer sought to assess the amount on the basis that it was profit accruing to the assessee from an adventure in the nature of business. The assessee contended that the amount represented capital gain as the shares were purchased by way of investment and that the same cannot be taxed as revenue receipt. The Income Tax Officer rejected the contention. The assessee filed an appeal before the Appellate Assistant Commissioner. He confirmed the order. The assessee then went up in appeal before the Appellate Tribunal.

6. The Tribunal came to the conclusion, after considering all the circumstances, that the transaction was in the nature of a business adventure and that profits were liable to be taxed. The reasons which induced the Tribunal to come to this conclusion were: The assessee was authorised by clauses 12, 13, 28 and 29 of paragraph 3 of its Memorandum of Association to buy and sell shares; there were specific resolutions of the Company authorising a director of the assessee to purchase and sell these shares; the assessee had included the profit of Rs. 2,13,150/- in the profit and loss account without taking it to any reserve account or specifically set it apart for any other purpose; the assessee had purchased the shares from borrowed funds and not with money readily available to it; the assessee did not make the sales on account of any pressing necessity to meet existing liabilities but had in fact kept a part of the sale-proceeds

as liquid cash in the United Commercial Bank Ltd.; the assessee had, in the past, dealt in shares as business transaction and had claimed for the assessment year 1951-52 Rs. 1,29,214/- as loss on account of its dealing in shares of M/s. Titagarh Paper Mills Ltd., it also claimed Rs. 6,30,000/- as loss on account of devaluation of the shares of M/s. Pilani Investment Corporation though that was not allowed. There had recently grown a business practice of investing large sums of money in shares in new ventures with an eye on their appreciation for obtaining by sale substantial profits in future.

7. The High Court, in its judgment, said that there was no provision in clauses 10, 12, 13, 28 and 29 of paragraph 3 of Memorandum of Association of the assessee which authorised the carrying on of the business of purchasing and selling shares, although some of these clauses did authorise the assessee to acquire and sell shares in other similar companies; that the inclusion of the profit of Rs. 2,13,150/- in the profit and loss account without taking it into any reserve specifically was not conclusive of the question whether it was a capital asset or a revenue receipt; that the true nature and character of the moneys received was to be determined not by the manner in which the assessee treated it but by its inherent character, and, that it was wholly immaterial as to how the assessee treated the amount in question; and that there was no evidence that the shares were purchased out of borrowed funds as the assessee had a fixed deposit of Rupees 31,75,000/- in the United Commercial Bank Ltd. and a deposit of Rupees 8,76,008-2-0 in the current account of the Bank. The High Court was of the view that the finding of the Tribunal that the sale of shares in 1955 was made not on account of any pressing necessity to meet existing liabilities was based on materials placed before the Tribunal. The Court, however, said: "It may be that, at that time, the liabilities of the assessee company existed, but it is quite another matter to say that it was obliged to sell the shares

in order to meet those liabilities." The High Court was also of the view that the conclusion of the Tribunal that the assessee had claimed Rupees 1,29,214/- as loss on account of dealing in shares of M/s. Titagarh Paper Mills Ltd. for the assessment year 1951-52 and that the claim was allowed by the Income-tax Officer must be accepted as correct, but said that this solitary transaction cannot be taken as conclusive of the fact that the sale of shares in question here was an adventure in the nature of trade. The main reason which impelled the High Court to hold that the transaction was not an adventure in the nature of trade was that the dominant intention of the assessee in acquiring the shares was to boost the shares of a sister concern viz., the Rayon Company, and thus render it assistance for setting it up as a going concern and when that was accomplished, the assessee started selling the investment which had in the meantime enhanced in value.

8. The question which the Tribunal had to consider in the appeal and which was referred to the High Court was a mixed question of law and fact, namely, whether the profit from sale of the shares in question was a revenue or a capital receipt. The distinction between capital accretion and income has been explained by Rowlatt, J. in *Thew v. South West Africa Co. Ltd.*, (1924) 9 Tax Cas 141. The learned judge said that for the purpose of ascertaining whether profits made upon a sale of an article are taxable profits, the question to be asked is: "Is the article acquired for the purpose of trade?" If it is, the profit arising from its sale must be brought into revenue account and that the profit is chargeable as capital gains if the sale is of a capital asset, and as business profit if the sale is in the course of business or the transaction constitutes an adventure in the nature of trade. The line between capital sales and sales producing income has been drawn by Lord Justice Clerk in *Californian Copper Syndicate v. Harris*, (1889) 5 Tax Cas 159 (Scot) in a passage which has become classical:

"It is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at the enhanced price is not profit..... assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on, or carrying out, of a business..... What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being — Is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit-making?"

9. In the absence of any evidence of trading activity in cases of purchase and resale of shares, it has been held that profit arising from the resale is an accretion to the capital. If a transaction is in the assessee's ordinary line of business there can be no difficulty in holding that it is in the nature of trade. But the difficulty arises where the transaction is outside the assessee's line of business and then, it must depend upon the facts and circumstances of each case whether the transaction is in the nature of a trade.

10. It is not necessary to constitute trade that there should be a series of transactions, both of purchase and of sale. A single transaction of purchase and sale outside the assessee's line of business may constitute an adventure in the nature of trade. Neither repetition nor continuity of similar transactions is necessary to constitute a transaction an adventure in the nature of trade. If there is repetition and continuity, the assessee would be carrying on a business and the question whether the activity is an adventure in the nature of trade can hardly arise.

A transaction may be regarded as isolated although a similar transaction may have taken place a fairly long time before (see *I. R. C. v. Reinhold*, (1954) 34 Tax Cas 389, 392).

11. The principles underlying the distinction between a capital sale and an adventure in the nature of trade were examined by this Court in *Venkataswami Naidu & Co. v. C. I. T.*, (1959) 35 ITR 594 = (AIR 1959 SC 359) where this Court said that the character of a transaction cannot be determined solely on the application of any abstract rule, principle or test but must depend upon all the facts and circumstances of the case. Ultimately, it is a matter of first impression with Court whether a particular transaction is in the nature of trade or not. It has been said that a single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of the trade; but mere purchase/sale of shares—if that is all that is involved in the plunge—may fall short of anything in the nature of trade. Whether it is in the nature of trade will depend on the facts and circumstances.

12. Where the purchase of any article or of any capital investment, for instance, shares, is made without the intention to resell at a profit, a resale under changed circumstances would only be a realisation of capital and would not stamp the transaction with a business character (see *C. I. T. v. P. K. N. Co. Ltd.* 60 ITR 65 = (AIR 1966 SC 1256)).

13. Where a purchase is made with the intention of resale, it depends upon the conduct of the assessee and the circumstances of the case whether the venture is on capital account or in the nature of trade. A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale (see *Jenkinson v. Freedland* (1961) 39 Tax Cas 636; *Radha Devi Jalan v. C. I. T.* (1951) 20 ITR 176 (Cal); *India Nut Co. Ltd. v. C. I. T.* (1960); 39 ITR 234 = (AIR 1959 Ker 298); *M/s. Sooniram Poddar v. C. I. T.* (1939) 7 ITR 470 (478-479) = (AIR 1939 Rang 337; at p. 338); *Ajax Products Ltd. v.*

C. I. T. (1961) 43 ITR 297 (310) (Mad) *Gustad Irani v. C. I. T.* (1957) 31 TR 92 (Bom); and *Mrs. Alexander v. C. I. T.* (1952) 22 ITR 379, 402 = (AIR 1952 Mad 166, 170)

14. A capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment (see *Leeming v. Jones*, (1930) 15 Tax Cas 333 and also the decisions of this Court in *Saroj Kumar Mazumdar v. C. I. T.* (1959) 37 ITR 242 (250-251) = (AIR 1959 SC 1252, 1258-1259) and *Janki Ram Bhadur Ram v. C. I. T.* (1965) 57 ITR 21 = (AIR 1965 SC 1898).

15. In *I. R. C. v. Fraser*, (1942) 24 Tax Cas 498 (502) (Scot) Lord Norman said:

"The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity for sale does not occur. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit....."

16. An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. Lord Dunedin said in *Leeming v. Jones*, (1930) 15 Tax Cas 333 at p. 360:

"The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or a concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever."

This Court laid down in *Venkataswami Naidu & Co. v. C. I. T.*, (1959)

35 ITR 594 (610; 622) = (AIR 1959 SC 359 at p. 367; 374) that the dominant or even sole intention to resale is a relevant factor and raises a strong presumption, but by itself is not conclusive proof, of an adventure in the nature of trade.

17. The intention to resell would, in conjunction with the conduct of the assessee and other circumstances, point to the business character of the transaction.

18. In the light of the principles above referred to, it is necessary to examine whether the Tribunal had approached the question from the right perspective, viz., whether on the basis of its finding on questions of fact, the inference that the transaction was an adventure in the nature of trade was justified.

19. The Tribunal relied on the following circumstances for coming to the conclusion. The assessee has been dealing in shares from 1951 to 1953. For the assessment year 1951-52, the assessee claimed a sum of Rs. 1,29,214/- which was shown in the profit and loss account and the balance sheet of the company for the year ending 31-3-1951 as a loss in the dealing of shares of M/s. Titagarh Paper Mills Ltd. This claim was allowed by the Income Tax Officer. According to the Tribunal, this would show that the assessee had been buying and selling shares even though as an isolated adventure in the nature of business. The High Court has not upset this finding, but has only said that this is an isolated transaction. That apart, in the same year, sum of Rs. 6,30,000/- was debited to the profit and loss account on devaluation of the shares of M/s. Pilani Investment Corporation. Such a debit was permissible only on the footing that the shares constituted the stock in trade of the assessee. It is no doubt true that the Department did not allow this claim. But that was on the basis that the claim that the shares have fallen in value was not proved to the satisfaction of the Income Tax Officer, and not on the basis that the shares were not held as stock in trade as the High Court wrongly thought. The Tribunal also referred to the resolutions passed by

the assessee authorising one of its directors to purchase and sell the shares in the Rayon Company. The finding of the High Court that the clauses of the Memorandum of Association viz., clauses 10, 12, 13, 28 and 29 do not authorize the company to acquire and sell shares as business has no relevance in view of the aforesaid resolution of the assessee and of the fact that it had been dealing in shares in a commercial spirit as is evident from its claim for loss in dealings in the shares of M/s. Titagarh Paper Mills Ltd. and devaluation of shares of M/s. Pilani Investment Corporation on the basis that they had fallen in value.

20. Secondly, the Tribunal said that from 1947 to 1966, no dividend had been declared by the Rayon Company and that the money which went into the purchase of these shares was borrowed by the assessee. In other words, the view of the Tribunal was, it was with borrowed funds that the assessee purchased the shares. It is no doubt true that there was no evidence to show that the money was specifically borrowed for the purpose of buying shares. But there was evidence before the Tribunal for its finding that the liabilities of the assessee exceeded its assets. The finding, therefore, that the shares were purchased with borrowed funds on which the assessee was paying interest, was a finding supported by evidence. The reasoning of the Tribunal that it is most improbable that the assessee would be investing borrowed money on which interest would have to be paid in shares which yielded no dividend, was correct. We cannot say that this was not a relevant circumstance for the Tribunal to take into consideration for coming to the conclusion that the transaction was an adventure in the nature of business. Looking into all the circumstances, the Tribunal negatived the case of the assessee that it had invested its funds with a view to earn dividend.

21. The case of the assessee throughout was that the purchase of the shares was by way of investment and the sale was forced by necessity because the creditors were pressing for repayment of the loan. The

Tribunal found that the shares were not sold to liquidate the debts of the assessee as the balance sheet as on 31-3-1956 showed that the proceeds were kept as liquid cash in the United Commercial Bank Ltd.

22. As already stated, the main reason why the High Court came to a different conclusion, is stated as follows in the judgment:

".....Undoubtedly, there are some elements which are contra-indicative of investment but there are other considerations which detract from their value as elements indicating an adventure in the nature of trade, the main being, that the assessee company, which is controlled by the Birlas, purchased the shares with a view to assisting a sister company controlled by the same persons, and not to embark upon a venture in the nature of trade."

23. At no time had the assessee a case that the shares were purchased with a view to help a sister company controlled by the Birlas. No such case was set up by the assessee either before the Income Tax Officer or the Appellate Assistant Commissioner; nor was it urged before the Appellate Tribunal. Nowhere in the statement of case or the supplementary statement of case prepared by the Tribunal and filed in the High Court was there any finding on the question. The whole conclusion of the High Court is based on unwarranted assumption of facts which must have been taken from the argument of the assessee before the High Court. The danger of failing to recognize that the jurisdiction of the High Court in these matters is only advisory and that conclusion of facts are conclusions on which the High Court is to exercise the advisory jurisdiction is illustrated by this case.

24. Mr. Chagla for the respondent contended that the only question to be asked and answered is: What was the dominant intention of the assessee when it purchased the shares? If the dominant intention was to carry on an adventure in the nature of business, the profit can be taxed; otherwise not. In other words, the question is whether the assessee purchased the shares

in a commercial spirit with a view to make profit by trading in them. The Tribunal found, after taking into account all the relevant circumstances that the dominant intention of the assessee was to make profit by resale of the shares and not to make an investment.

25. The finding that loss or profit is a trading loss or profit is primarily a finding of fact, though in reaching that finding the Tribunal has to apply the correct test laid down by law. When we see that the Tribunal has considered the evidence on record and applied the correct test, there is no scope for interference with the finding of the Tribunal (see *C. I. T. v. Ashoka Marketing Co.*, 83 ITR 439 = (1972 Tax LR 1115) (SC).

26. We do not think that the High Court was right in interfering with the judgment of the Tribunal. In the result we reverse the judgment of the High Court and allow the appeal with costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2112

(From; Punjab)*

H. R. KHANNA, V. R. KRISHNA
IYER, A. C. GUPTA AND
S. MURTAZA FAZL ALI JJ.

Lila Ram (In C. A. No. 35 of 1968),
Birla Cotton Spg. & Wvg. Mills (In
C. A. No. 989 of 1968) Ap-
pellants v. The Union of India
and others (In C. A. No. 35
of 1968); Delhi Administration (In C.
A. No. 989 of 1968) Respondents.

Civil Appeals Nos. 35 and 989 of
1968, D/- 19-8-1975.

(A) Constitution of India, Art.
133 — New plea.

In appeal to the Supreme Court from the judgment dismissing a writ petition the appellant cannot be allowed to agitate for the first time a question which was not raised before the High Court. (Para 4)

*(Civil Writ Nos. 76-D of 1961 and
604-D of 1962, D/- 8-5-1964 Punj;
at Delhi.)

IS/IS/D50/75/VBB

(B) Land Acquisition Act (1894), S. 4— Public purpose— Notification for the acquisition of land for the execution of the Interim General Plan for the Greater Delhi— Not vague— Notification is valid.

Where a notification under S. 4. in respect of land measuring about 3000 acres, stated that it was required "for the execution of the Interim General Plan for the Greater Delhi," and no objection had been taken before the authorities concerned that the public purpose was not specific;

Held that the public purpose mentioned in the notification was specific in the circumstances and did not suffer from any vagueness. It is significant that the land covered by the notification is not a small plot but a huge area covering thousands of acres. In such cases it is difficult to insist upon greater precision for specifying the public purpose because it is quite possible that various plots covered by the notification may have to be utilised for different purposes set out in the Interim General Plan. AIR 1973 SC 1150 Expl.; AIR 1974 SC 2077; M. P. Nos. 332 & 333 of 1971, D/-13-4-1975 (SC). Rel. on. (Para 4)

As the object of the Interim General Plan was to prevent haphazard and unplanned development of Delhi and thereby to ensure planned development of Delhi, the execution of the Interim General Plan must be held to be a 'public purpose' within section 4 of the Act. (Para 5)

The fact that the effect of the notification was to freeze the land of the appellant would not in any way affect the validity of the notification. (Para 6)

So also, the fact that the lands of some others which were also earlier proposed to be acquired under the notification were subsequently ordered not to be acquired would not militate against the validity of the acquisition of the land of the appellant. (Para 7)

It is for the appropriate Government to take the decision on the objections to the acquisition of the land filed under Section 5-A. There is, therefore, no inherent infirmity in the decision of the Government in accepting some of the objections and rejecting others. (Para 7)

Cases Referred: Chronological Paras
(1975) M. P. Nos. 332 and 333 of 1971
D/- 13-4-1975 (SC) 4
AIR 1974 SC 2077 = 1974 U. J. (SC) 765 4
AIR 1973 SC 1150 = (1973) 1 SCR 973 4

Mr. B. R. L. Iyengar, Sr. Advocate, (Mr. K. P. Gupta, Advocate with him) In C. A. No. 35 of 1968 and Mr. Hardayal Hardy Sr. Advocate, (Mr. P. C. Bhartari, Advocate for M/s J. B. Dadachanji & Co., Advocate, with him) In C. A. No. 989 of 1968 for Appellants; Mr. L. N. Sinha, Solicitor General of India (M/s. S. N. Prasad & S. P. Nayar Advocates with him) in C. A. Nos. 35 and 989 of 1968 for Respondents.

Judgment of the Court was delivered by

KHANNA:— This judgment would dispose of civil appeals Nos. 35 and 989 of 1968 which have been filed on certificate against the common judgment of the Punjab High Court whereby petitions under Article 226 of the Constitution filed by the appellants and others challenging the validity of the land acquisition proceedings were dismissed.

2. We may now set out the facts giving rise to appeal No. 35. On September 3, 1957 the Chief Commissioner of Delhi issued a notification under S. 4 of the Land Acquisition Act (hereinafter referred to as the Act) in respect of the land measuring about 3,000 acres mentioned in the schedule attached to the notification. The material part of the notification reads as under.

"Whereas it appears to the Chief Commissioner of Delhi that land is likely to be required to be taken at the public expense for a public purpose namely for the execution of the Interim General Plan for the Greater Delhi, it is hereby notified that the land described in the Schedule below is likely to be required for the above purpose."

The notification was published in the Delhi Gazette on September 12, 1957. Large tracts of land belonging to the appellant and situated in villages Carhi Jaharia Maria and Zamurdumpur were covered by the above notification. Declaration dated February 15, 1961 under section 6 of

the Act in respect of the land of the appellant and some other lands covered by the above notification was published on February 23, 1961. On or about February 24, 1961 the appellant filed petition under Article 226 of the Constitution challenging the validity of the notification under section 4 of the Act on various grounds, to which reference would be made hereafter. The Union of India, the Delhi Development Authority and the Chief Commissioner were impleaded as respondents in the petition and affidavit was filed on their behalf by Shri K. L. Rathee, Housing Commissioner, Delhi Administration in opposition to the petition.

3. It was argued on behalf of the appellant in the High Court that the acquisition of the land was not for a public purpose, that the so-called public purpose was merely a colourable device for freezing huge areas of land and that there could not be successive declarations under section 6 of the Act in respect of the lands covered by one notification under section 4 of the Act. A Division Bench of the High Court consisting of Falschow C. J. and Mehar Singh J. (as he then was) repelled the various contentions advanced on behalf of the appellants and in the result dismissed the writ petitions.

4. Mr. Iyengar on behalf of the appellant has at the outset contended before us that the so-called public purpose, namely, "for the execution of the Interim General Plan for the Greater Delhi" is vague and as such the notification is liable to be quashed. Reliance in this context has been placed by the learned counsel upon the case of *Munshi Singh v. Union of India*, (1973) 1 SCR 973 = (AIR 1973 SC 1150). In this connection we find that the judgment of the High Court shows that the appellant did not challenge the notification in question or the acquisition proceedings on the ground that the public purpose mentioned in the notification was vague. As such, the appellant, in our opinion, cannot be allowed to agitate this question for the first time in appeal. Apart from that, we are of the view that the public purpose mentioned in the notification, namely, for the execution of the Interim General Plan

for the Greater Delhi is specific and does not suffer from any vagueness. It is significant that the land covered by the notification is not a small plot but a huge area covering thousands of acres. In such cases it is difficult to insist upon greater precision for specifying the public purpose because it is quite possible that various plots covered by the notification may have to be utilised for different purposes set out in the Interim General Plan. No objection was also taken by the appellant before the authorities concerned that the public purpose mentioned in the notification was not specific enough and as such he was not able to file effective objections against the proposed acquisition. In the case of *Munshi Singh* (supra) the complaint of the appellant was that he was unable to object effectively under Section 5A of the Act to the proposed acquisition. The appellant in that case in that context referred to the fact that a scheme of planned development was not made available to him in spite of his application. As against that, as already mentioned, no objection was taken by the appellant that because of alleged vagueness of the public purpose he was not able to file any effective objection under S. 5A of the Act. The case of *Munshi Singh*, it may also be pointed out, was considered by the Constitution Bench of this Court in the case of *Aflatoon v. Lt. Governor of Delhi* AIR 1974 SC 2077 and it was observed that in the case of acquisition of a large area of land comprising several plots belonging to different persons, the specification of the purpose can only be with reference to the acquisition of the whole area. Unlike in the case of acquisition of a small area, it might practically be difficult to specify the particular public purpose for which each and every item of land comprised in the area is needed. This Court in that case upheld the validity of the notification for the acquisition of land for "the planned development of Delhi". In a subsequent unreported case *Ratni Devi v. Chief Commr.*, M. P. Nos. 332 and 333 of 1971 decided on 13-4-1975 (SC) this Court reiterated after referring to *Aflatoon's* case that acquisition

of land for the planned development of Delhi was for a public purpose.

5. There is also no force in the submission made on behalf of the appellant that the execution of the Interim General Plan is not a public purpose. The affidavit of Shri Rathee shows that consequent upon the increase in the population of Delhi after the partition of the country the Central Government decided that a single planning and development authority should be set up to deal with the land and housing problems in Delhi. As the constitution of such a body would have taken some time and as none of the existing authorities had the necessary power to check, control or regulate building activities which were rapidly creating slum conditions in the city, the Delhi (Control of Building Operations) Ordinance 1955 was promulgated on October 22, 1955. The Delhi Development (Provisional) Authority was constituted under the provisions of the Ordinance to prevent unplanned and haphazard development and constructions. The ordinance was later on superseded by the Delhi (Control of Building Operations) Act, 1955. Simultaneously the Town Planning Organisation was set up in November 1955 to draw up a Master Plan for Delhi. In September 1956 this organisation submitted an Interim General Plan which was considered by the Central Cabinet in October 1956 and was approved subject to such variations, as might be found necessary on further examinations. It will thus be seen that the Interim General Plan was prepared and published by the Government after approval by the Cabinet as a policy decision for development of Delhi as an interim measure, till a Master Plan could be made ready. We have already referred to the case of Aflatoon wherein this Court laid down that the planned development of Delhi was a public purpose for the purpose of Section 4 of the Act. As the object of the Interim General Plan was to prevent haphazard and unplanned development of Delhi and thereby to ensure planned development of Delhi, the execution of the Interim General Plan must be held to be a public purpose for the purpose of Section 4 of the Act.

6. Equally devoid of force is the submission that the proceedings for the acquisition of land are liable to be struck down on the ground that the notification under S. 4 of the Act was issued for the collateral purpose of freezing the land of the appellant. As already stated above, the public purpose mentioned in the notification under Section 4 of the Act was the execution of the Interim General Plan for the Greater Delhi. It is true that the effect of the notification under Section 4 of the Act was to freeze the land, but that fact would not in any way affect the validity of the notification. The object of a notification under Section 4 is to give public notice that it is proposed to acquire the land mentioned in the notification and that any one who deals in that land subsequent to the notification would do so at his own risk. According to Section 23 of the Act, in determining the amount of compensation to be awarded for land acquired under the Act, the Court shall take into consideration, besides other factors, the market-value of the land at the date of the publication of the notification under Section 4. It is further provided in Section 24 of the Act that the Court shall not take into consideration any outlay or improvements on, or disposal of, the land acquired, commenced, made or affected without the sanction of the Collector after the date of the publication of the notification under Section 4. It is, therefore, obvious that the consequence of the "freezing of the land" about which complaint has been made by the appellant is inherent in the nature of things once a notification under Section 4 is issued.

7. Reference has also been made by Mr. Iyengar to the fact that the lands of some others which were also earlier proposed to be acquired under the notification were subsequently ordered not to be acquired. This fact too, in our opinion, would not militate against the validity of the acquisition of the land of the appellant. According to Section 5A of the Act, any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed

for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be. The objector is then given opportunity of being heard and thereafter a report is submitted to the appropriate Government by the Collector containing his recommendations on the objections. It is for the appropriate Government thereafter to take the decision on the objections. There is, therefore, no inherent infirmity in the decision of the Government in accepting some of the objections and rejecting others. The question as to what factors weighed with the authorities concerned in deciding not to acquire the land of others need not be gone into in these proceedings because that would not in any way affect the validity of the acquisition of the land of the appellant.

8. Civil Appeal No. 989 of 1968 has been filed by the Birla Cotton Sp. and Wv. Mills Ltd. in connection with the acquisition of its land measuring 9 bighas 1 biswas situated in village Ada Chini. Notification under Section 4 of the Act in respect of the appellant's land was issued on November 13, 1959. Declaration under Section 6 of the Act was issued on May 14, 1962. Various grounds were urged before the High Court on behalf of the appellant challenging the validity of the acquisition of its land. We are not, however, concerned with them all as Mr. Hardy on behalf of the appellant in this appeal has advanced only one contention. According to the learned counsel, no adequate opportunity was given to the appellant of being heard after the appellant had filed objections under Section 5A of the Act to the acquisition of the land. Clause (2) of S. 5A reads as under:

"(2) Every objection under subsection (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader and shall after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has

been notified under Section 4, subsection (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government shall be final."

After notification under Section 4 of the Act was issued on November 13, 1959 the appellant company filed objections on December 12, 1959. Intimation was thereupon given to the appellant that the objections were fixed for hearing in the office of the Collector on May 9, 1961. According to the case of the respondents, no one representing the appellant company appeared on the date of hearing. The High Court apparently accepted this stand and in this context observed that no affidavit of the person who was alleged to have been present on behalf of the appellant on May 9, 1961 had been filed. In any case, the learned Judges had no doubt that the objections submitted by the appellant were considered along with the objections of other interested persons before the decision was taken to go ahead with acquisition proceedings.

9. At the hearing of the appeal Mr. Hardy has referred to judgment dated May 15, 1972 of the Delhi High Court in a case filed by the appellant company against the respondents relating to the acquisition of some other land of the appellant. In that case a number of affidavits were filed and on consideration of those affidavits as well as the fact that the respondents had not been able to produce the relevant file before the High Court, the High Court inferred that a representative of the appellant had actually appeared before the Collector on May 9, 1961 when objections relating to the acquisition of the other land were taken up. The finding of the Delhi High Court in the other case cannot, in our opinion, be of much avail to the appellant because we are unable to rely upon that finding for coming to the conclusion that a representative of the appellant actually appeared before the Collector in support of the objections relating to the acquisition of the land in dis-

pute in the present case. The present case has to be decided upon the material brought on the record in this case. As already observed above, no affidavit of the person who was alleged to have appeared on behalf of the appellant before the Collector in the proceedings with which we are concerned was filed. There is also nothing to rule out the possibility of a person deputed to attend the hearings of two different cases fixed for the same date in a court appearing in only one of them and not being present when the second case is called. The relevant file was sent for at the instance of the appellant company and was produced before us. It contains the written representation of the appellant. We find no indication therein that a representative of the appellant was actually present before the Collector on May 9, 1961. The report of the Collector shows that he considered objections of a number of other parties who were present before him and sent his recommendations about the lands of those objections. As regards the lands upon which nothing had been built, the recommendation was that the objections of the objectors be ignored. The appellant's land belonged to the last mentioned category. We are, therefore, of the view that there is no force in the contention that opportunity was not afforded to the appellant of being heard before the Collector made his report to the appropriate Government with his recommendations on the objections under clause (2) of Section 5A of the Act.

10. As a result of the above, both the appeals fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1975 SUPREME COURT 2117

(From: Allahabad)*

N. L. UNTWALIA AND S. MURTAZA FAZL ALI, JJ.

Bhabhi, Appellant v. Sheo Govind and others, Respondents.

Civil Appeal No. 63 of 1975.
D/- 21-4-1975.

*(Ele. Petn. No. 1 of 1974, D/- 20-9-1974—All.)

(A) Representation of the People Act (1951), Sections 100 (1) (d), 101, 102, 92 — Conduct of Election Rules, 1961, R. 63 — Sample inspection of ballot papers — Circumstances under which order can be passed.

Before the Court can order inspection of ballot papers, in an election petition the following conditions are imperative.

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper. AIR 1964 SC 1249; AIR 1966 SC 773; AIR 1970 SC 276; AIR 1973 SC 215; AIR 1972 SC 1251; AIR 1975 SC 693; AIR 1975 SC 283; AIR 1975 SC 403 and AIR 1975 SC 502 Ref.

(Para 15)

Cases referred: Chronological Paras

AIR 1975 SC 283 = (1975) 1 SCJ	289
	12
AIR 1975 SC 376	13
AIR 1975 SC 403	13
AIR 1975 SC 502 = (1975) 1 SCC	260
	14
AIR 1975 SC 693	11
AIR 1973 SC 215 = (1973) 2 SCR	920
	4, 10
AIR 1972 SC 1251 = (1972) 2 SCR	177
	8, 9
AIR 1970 SC 276 = (1970) 1 SCR	852
	4, 7
AIR 1966 SC 773 = (1967) 1 SCJ	762
	4, 6, 7
AIR 1964 SC 1249 = (1964) 6 SCR	238
	4, 5, 7

M/s. J. P. Goyal, Pranab Chatterjee and G. S. Chatterjee, Advocates, for Appellant; M/s. R. K. Garg, S. C. Agrawala and V. J. Francis, Advocates of M/s. Ramamurthi & Co., for Respondent No. 1.

Judgment of the Court was delivered by

FAZL ALI, J.:— By virtue of an order dated December 20, 1974 Banerji, J., of the Allahabad High Court who was designated as the Election Judge passed an order granting the application of the respondent No. 1 for a sample inspection of the ballot papers. The order directed that a sample inspection of 20 bundles of 50 ballot papers each of the votes counted in favour of the appellant may be taken out and examined along with the 5 bundles of the rejected ballot papers. It is against this order that the appellant has filed the present appeal by special leave and has assailed the order of the learned Single Judge on the ground that the learned Judge has exercised his discretion illegally and improperly in allowing the sample inspection of the ballot papers without there being sufficient proof of the allegations made by the respondent in his petition for setting aside the election of the appellant.

2. The facts giving rise to the present appeal may be briefly summarised as follows:

3. The appellant was elected to the U. P. Legislative Assembly from 218, Mubarakpur Constituency in the District of Azamgarh, U. P.

The last date of nomination for election to the said assembly was January 24, 1974. The date of scrutiny was January 25, 1974 and that of withdrawal January 28, 1974. The poll was held on February 26, 1974 and the counting of votes done on February 27, 1974. The result of the election was declared on February 28, 1974. The respondent filed an election petition before the Election Judge of the Allahabad High Court some time in March 1974. The appellant secured 19,728 votes while the respondent No. 1 had secured 19,634 votes and thus the appellant defeated respondent No. 1 by a margin of 94 votes and was duly elected to the U. P. Legislative Assembly. In the petition filed by the respondent before the Allahabad High Court the respondent in paragraph-3 of the said petition made a large number of allegations regarding the improper reception and rejection of votes and regarding wrong arithmetical counting of votes and acceptance of votes which were void. The material facts with respect to the allegations were set out in paragraph-9 of the petition which broadly are as follows.

(1) That the election staff engaged in the work of counting was suffering from serious physical strain as they had to work without any rest on that day as a result of which there were a number of arithmetical mistakes in the counting of votes.

(2) That the staff had become drowsy and was actually dozing and could not efficiently discharge its function of counting the votes properly.

As regards the facts relating to improper rejection of valid ballot papers it is said that a large number of ballot papers in which valid votes had been marked for the petitioner (respondent No. 1) were declared invalid despite oral protests made by the counting agents of the respondent. Similarly a large number of ballot papers had distinct marks of stamp in the column of the petitioner near the symbol of cow and calf and yet they were improperly rejected by the counting staff on the ground that there were no distinct marks. The respondent further alleged that

there were 70 such ballot papers which were wrongly rejected. It was also pleaded that a number of ballot papers which had a valid vote for the petitioner were illegally rejected on the ground that there were some accidental marks made in the column of some other candidate which was not a mark of the stamp or a voting mark and the number of such ballot papers rejected was 50. Finally it was said that a number of ballot papers which carried valid votes for the petitioner were illegally rejected on the ground that there was no seal mark or there was no signature of the Returning Officer on those ballot papers although it was far from the truth. Such were said to be the obvious mistakes in the rejection of the ballot papers and the counting of votes which formed the sheet-anchor of the case of the respondent in challenging the election of the appellant. The appellant in his written statement denied all the allegations made in the petition.

4. While the election petition was being heard by the High Court an application was filed by the respondent No. 1 praying that a sample inspection of the ballot papers may be allowed. In support of this application some witnesses, counting agents of the respondent and other persons were examined and some affidavits were filed. The appellant also produced some evidence. The learned Judge has mentioned in his order that this sort of evidence was led before him but he has not at all given any finding on the credibility of the evidence. The learned Judge further noticed very prominently that in respect of the allegations made that the counting of votes was wrong and the rejection of the ballot papers was improper, yet the respondent filed no application for recounting of votes as provided by Rule 63 of the Conduct of Election Rules 1961. The learned Judge also noticed that the respondent had not given serial number of a single ballot paper which is said to have been improperly accepted or improperly rejected. The Judge, however, allowed the application because he thought that the ends of justice re-

quired it. In this connection the learned Judge observed as follows:

"But before I advert to consider the election petition, the affidavit and the oral evidence to decide whether there should be an order for the general inspection of the used ballot papers, I think it will be in the interests of justice to order a sample inspection of ballot papers counted in favour of respondent No. 1 as also a sample inspection of the rejected ballot papers in this case."

These observations clearly show that the learned Judge made no attempt at all to give any finding whether he was *prima facie* satisfied regarding the credibility of the evidence or materials adduced before him but ordered a sample inspection in order to test the validity of the allegations made by the respondent. It seems to us that in passing this order the learned Judge, while noticing some of the leading cases of this Court on the point which he has cited in his judgment, viz., *Ram Sewak Yadav v. Hussain Kamil Kidwai*, (1964) 6 SCR 238 = (AIR 1964 SC 1249); *Dr. Jagjit Singh v. Giani Kartar Singh*, AIR 1966 SC 773; *Jitendra Bahadur Singh v. Krishna Behari*, (1970) 1 SCR 852 = (AIR 1970 SC 276) and *Sumitra Devi v. Shri Sheo Shanker Prasad Yadav*, (1973) 2 SCR 920 = (AIR 1973 SC 215) has made no attempt to apply the principles laid down in those cases to the facts of the present case.

5. Before, however, dealing with the order passed by the learned Judge it may be necessary to refer to a number of authorities of this Court on the circumstances under which an inspection of the ballot papers, or for that matter a sample inspection, can be allowed. In the case of *Ram Sewak Yadav*, (AIR 1964 SC 1249) (*supra*) the matter was considered at great length and this Court pointed out that an order for inspection could not be granted as a matter of routine but only under special circumstances and observed as follows:

"An order for inspection may not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting

an order for inspection provided two conditions are fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

6. Two years later in *Dr. Jagjit Singh's case*, (AIR 1966 SC 773) this Court observed on the facts of that case that the discretion to allow inspection of ballot papers should not be used in such a way so as to make a roving or fishing inquiry in order to discover materials for declaring the election void. In this connection, this Court made the following observations:

"The true legal position in this matter is no longer in doubt. Section 92 of the Act which defines the powers of the Tribunal, in terms, confers on it, by Cl. (a), the powers which are vested in a Court under the Code of Civil Procedure when trying a suit, *inter alia*, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes..... An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the im-

portance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void."

7. In *Jitendra Bahadur Singh's case*, (AIR 1970 SC 276) (*supra*) the order of the Election Judge granting inspection of the ballot papers was reversed by this Court because the Court thought that the learned Judge had not followed the essential conditions laid down before granting the prayer for inspection of the ballot papers. In that case the Court held that the allegations were vague and indefinite, no material fact was pleaded and further that the petitioner was present at the time of counting and yet he did not take any objection regarding the illegal rejection of the votes. In this connection Hegde, J., speaking for the Court laid down the following principles:

(1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case; and

(2) the Tribunal must be *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.

The cases of *Ram Sewak Yadav*, (AIR 1964 SC 1249) and *Dr. Jagjit Singh*, (AIR 1966 SC 773) mentioned *supra* were referred to and relied upon by Hegde, J., in his judgment.

8. Another case which appears to be in point and which was the sheet-anchor of the argument of the learned counsel for the respondent is the case of *Shashi Bhushan v. Prof. Balraj Madhok*, (1972) 2 SCR 177 = (AIR 1972 SC 1251). It is true that a sample inspection was allowed in that case. But, in our opinion, it was so done because of the special facts of that case. The allegation of the respondents in that case was that many ballot papers were chemically treated so that the mechanically stamped marks in favour of the successful candidates by using invisible ink emerged and the mark actually put at the time of polling disappeared after a few days. This was undoubtedly an allegation of a very serious nature, which, if true, would have shaken the entire confidence of the people in the electoral process and would have seriously impaired our democratic system. In these circumstances this Court held that it was not only necessary but in public interest that the allegation should be thoroughly examined so as to maintain confidence of the people. In this connection, Hegde, J., while delivering the judgment of the Court, observed as follows:

"It is true that merely because someone makes bold and comes out with a desperate allegation that by itself should not be a ground to attach value to the allegation made. But at the same time serious allegations cannot be dismissed summarily merely because they do not look probable. Prudence requires a cautious approach in these matters. In all these matters, the court's aim should be to render complete justice between the parties. Further, if the allegations made raise issues of public importance, greater care and circumspection is necessary.

These cases have peculiar features of their own. No such case had come up for decision earlier. Hence decided cases can give little assistance to us. In a matter like allowing inspection of ballot papers, no rigid rules have been laid down, nor can be laid down. Much depends on the facts of each case. The primary aim of the courts is to render complete justice between the par-

ties. Subject to that overriding consideration, courts have laid down the circumstances that should weigh in granting or refusing inspection.

.....The ratio of that decision is that the inspection of ballot papers should be allowed only when the court thinks that it is necessary in the interests of justice to do so. In that case this Court did not lay down any hard and fast rule as to when an inspection of the ballot papers can be allowed."

9. In the instant case, however, the allegations are of a different kind. They relate only to the mistakes in counting and improper rejection of votes. They are not of a sweeping pattern as in the case aforesaid.

In these circumstances, therefore, the ratio laid down in *Shashi Bhushan's* case, (AIR 1972 SC 1251) cannot be pressed into service for the purpose of supporting the order of the learned Judge.

10. In the case of *Sumitra Devi*, (AIR 1973 SC 215) (supra), Mathew, J., after reviewing the previous authorities of this Court, held as follows:

"In the case at hand, the allegations in the election petition were vague and the petition did not contain an adequate statement of the material facts. The evidence adduced by the appellant to prove the allegations was found unreliable. No definite particulars were also given in the application for inspection as to the illegalities alleged to have been committed in the counting of the ballot papers. A recount will not be granted as a matter of right but only on the basis of evidence of good grounds for believing that there has been a mistake in the counting. It has to be decided in each case whether a *prima facie* ground has been made out for ordering an inspection"

11. In *Baldev Singh v. Te'a Singh*, Civil Appeal No. 233 of 1973 decided on 24-1-1975 = (AIR 1975 SC 693), Krishna Iyer, J., remarked as follows:

"Coming to the facts of this case, we have already indicated that no good grounds for a Court order for inspection and recount, particularly

after the Sherpur experiment, exist. Although we are free to admit that an imaginative Returning Officer might have quietened the qualms and silenced the scepticism of the appellant by a test check or partial recount, proceeding to a full recount if serious errors were found, we are inclined to agree with the High Court, there being no reason to reverse its elaborately discussed conclusions, and the relief of recount was rightly rejected."

12. In *Beliram Bhalaik v. Jai Behari Lal Kachi*, AIR 1975 SC 283 Sarkaria, J., speaking for the Court, observed as follows:

"Since an order for a recount touches upon the secrecy of the ballot, it should not be made lightly or as a matter of course. Although no cast iron rule of universal application can be or has been laid down, yet, from a beadroll of the decisions of this Court, two broad guidelines are discernible: that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (i) all the material facts on which the allegations of irregularity, or illegality in counting are founded, are pleaded adequately in the election petition, and (ii) the Court/Tribunal trying the petition is *prima facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

13. In *Suresh Prasad Yadav v. Jai Prakash Mishra*, AIR 1975 SC 376, while summarising the principles laid down by this Court from time to time in granting prayer for inspection of ballot papers, the Court adumbrated the circumstances in which a prayer for inspection of ballot papers could be considered and observed as follows:

"Before dealing with these contentions, we may recall, what this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of course. The reason is twofold. Firstly such an order affects the secrecy of the ballot which under the law is

not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against trickery, mistakes and fraud in counting, that it can be called almost fool-proof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court, may be indicated thus:

The Court would be justified in ordering a recount of the ballot papers, only where:

"(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are *prima facie* established, affording a good ground for believing that there has been a mistake in counting; and

(3) The Court trying the petition is *prima facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

These principles were reiterated in *Chanda Singh v. Ch. Shiv Ram Varma*, AIR 1975 SC 403 where speaking for this Court, Krishna Iyer, J., observed thus:

"On all hands, it is now agreed that the importance of the secrecy of the ballot must not be lost sight of, material facts to back the prayer for inspection must be *bona fide*, clear and cogent and must be supported by good evidence. We would only like to stress that in the whole process, the secrecy is sacrosanct and inviolable except where strong *prima facie* circumstances to suspect the purity, propriety and legality in the counting is made out by definite factual averments, credible probative material and good faith in the very prayer. We may even say that no winning candidate should be afraid of recount and, conditions as they are a sceptical attitude expecting the unexpected may be correct, informed of course by the broad legal guidelines already set out."

14. Lastly in *Manphul Singh v. Surinder Singh*, AIR 1975 SC 502,

the Court upheld the order of the High Court allowing inspection of ballot papers because the High Court had given a finding that the evidence of the witnesses was sufficient to prove the allegation of impersonation in that case. The Court further held that the High Court did not act arbitrarily in granting the prayer for inspection.

15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be *prima facie* satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the *prima facie* satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise

of the discretion would undoubtedly be proper.

16. In the instant case we find that the learned Judge while passing the order of sample inspection made no attempt to apply the principles mentioned above to the facts of the present case. What is more important is that the Court actually noticed some of the important decisions of this Court which we have discussed and yet it did not try to test the principles laid down on the touchstone of the allegations and the material facts pleaded by the respondent. Another error into which the learned Judge had fallen was that he did not realise that by allowing sample inspection he had provided an opportunity to the respondent to indulge in a roving inquiry in order to fish out materials to justify his plea in order to declare the election to be void — a course which has been expressly prohibited by this Court because it sets at naught the electoral process and causes a sense of instability and uncertainty amongst the duly elected candidates. Thirdly, while the learned Judge has observed that the Court must be *prima facie* satisfied regarding the truth of the materials, but it did not choose to record its satisfaction on the application of the respondent at all and has readily accepted the suggestion of the respondent for sample inspection on the ground that it was necessary for the ends of justice. Such an approach, in our opinion, is legally erroneous. While indicating in his order that both the parties had produced some affidavits before him in support of their pleas, the learned Judge has not at all tried to appreciate or consider the evidence in order to find out whether it was worthy of credence. In the absence of any such finding it was not open to the learned Judge to have passed an order for sample inspection just for the asking of the respondent.

17. Finally there were intrinsic circumstances in this case which went to show that unless the respondent was able to place cogent materials this was not a case for allowing sample inspection at all. In

the first place although the counting agents of the respondent were present at the time when the votes were counted no application for a recount was made under Rule 63 of the Conduct of Election Rules, 1961. The nature of the allegations made by the respondent in his petition as alluded to above was such as could have been easily verified at the spot by the Returning Officer, if his attention was drawn to those facts by an application made under Rule 63 of the Conduct of Election Rules, 1961. Secondly the learned Judge overlooked that the respondent had not given the material particulars of the facts on the basis of which he wanted an order for sample inspection of ballot papers. No serial number of the ballot paper was mentioned in the petition nor were any particulars of the bundles containing the ballot papers which were alleged to have been wrongly rejected given by the respondent. Even the segment in which the irregularity had occurred was not mentioned in the petition. We, however, refrain from making any further observation as to what would be the effect of non-disclosure of these particulars because we intend to remit the case to the learned Judge for rehearing the matter and deciding the application for inspection. What appears to have weighed with the Judge is the solitary circumstance that the appellant had succeeded by a narrow margin and that was a sufficient ground for ordering sample inspection. We are, however, unable to agree with this broad statement of the law by the learned Judge because if a person is duly elected even by a narrow margin of votes there is no presumption that there has been illegality or irregularity in the election. This is a fact which has to be proved by a person who challenges the election of the duly elected candidate. After all in a large democracy such as our's where we have a multi-party system, where the number of voters is huge and diverse, where the voting is free and fair and where in quite a few cases the contest is close and neck to neck, a marginal victory by a successful candidate over his rival can some

times be treated as a tremendous triumph so as to give a feeling of satisfaction to the victorious candidate. The Court cannot lightly brush aside the success of the duly elected candidate on an election petition based on vague and indefinite allegations or frivolous and flimsy grounds.

18. The learned counsel for the respondent submitted, however, that in view of the amended provisions of the Representation of the People Act and the rules made thereunder the question of maintenance of secrecy has now become obsolete, because under the present system which was in vogue at the time when the election of the appellant was held it is difficult to find out as to which voter voted for the candidate. It is, however, conceded by the learned counsel for the respondent that if the counter-foils which are sealed and kept separately are made to tally with the ballot papers, then it can be ascertained with some amount of precision as to which voter voted for whom. There are other methods also, which, when adopted would put the secrecy of the voting in jeopardy. In these circumstances, therefore, the question of maintenance of secrecy does not become obsolete as argued by Mr. Garg appearing for the respondent. We have adverted to a long course of decisions of this Court where it has been insisted on the maintenance of the secrecy of the ballot and the new methodology adopted by the Act has not made any material change in this concept.

19. Lastly it was submitted by the counsel for the respondent that the learned Judge had to satisfy himself whether or not a case had been made out for allowing sample inspection and if he had exercised his discretion one way or the other, this Court should not lightly interfere with that discretion. This argument, however, is wholly untenable for the reasons we have given in holding that the order of the learned Judge is not in accordance with the law. The learned Judge has not at all applied the principles laid down by this Court in the cases referred to above. It is

manifest that the Court has the undoubted power to grant prayer for inspection, but this discretion has to be exercised according to the sound and sacrosanct principles laid down by this Court. In the instant case, the discretion has been exercised by the learned Judge in an arbitrary manner without the application of the mind to the material facts and circumstances as discussed above.

20. For the reasons given above, we allow this appeal, set aside the order of the learned Single Judge of the Allahabad High Court dated December 20, 1974 and remand this case to the learned Election Judge for disposing of the application of the respondent for inspection of the ballot papers in accordance with law and in the light of the observations made above. The appellant will be entitled to his costs in this Court.

Appeal allowed.

AIR 1975 SUPREME COURT 2125

(From: 5th Labour Court—Bombay)*

M. H. BEG, Y. V. CHANDRACHUD and A. C. GUPTA, JJ.

Mulchandani Electrical and Radio Industries Ltd., Appellant v. The Workmen, Respondent.

Civil Appeal No. 1574 (NL) of 1973, D/- 24-1-1975.

(A) Constitution of India, Articles 32 and 226 — Domestic enquiry — Cross-examination of witnesses.

The Enquiry Officer in a domestic enquiry can put questions to the witnesses for clarification wherever necessary and if he allows the witnesses to be cross-examined thereafter, the enquiry proceeding cannot be impeached as unfair. (1970) 1 Lab LJ 26 (SC) Foll. (Para 5)

(B) Industrial Employment (Standing Orders) Act (1946), S. 13A and Sch., Item 9 — Misconduct of worker — Disciplinary action against worker — Misconduct what amounts to — Interpretation of Standing

*(Award made on 9-8-1973 by Fifth Labour Court—Bombay.)

Orders. (Industrial Disputes Act (1947), Schedule 2 Items 1 and 2) — (Industrial Dispute — Misconduct — What amounts to) — (Industrial Dispute — Standing Orders — Interpretation of.)

The relevant Standing Order of a factory ran as follows:—

"24. The following acts and omissions on the part of a workman shall amount to misconduct:—

(1) Commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment:

x x x x".

Assault by operator on charge-man of same factory would be an act subversive of discipline. The fact that the assault was committed outside the factory (in a suburban train while the chageman assaulted was going home) would not take it out of the above standing order. The words "within the premises or precincts of the establishment" refer not to the place where the act which is subversive of discipline or good behaviour is committed but where the consequence of such an act manifests itself. In other words, an act, wherever committed, if it has the effect of subverting discipline or good behaviour within the premises or precincts of the establishment, will amount to misconduct under Standing Order 24 (1). (Para 6)

Cases Referred: Chronological Paras (1970) 1 Lab LJ 26 = 1969 UJ (SC) 494 5

The Judgment of the Court was delivered by

GUPTA, J.:— This appeal by special leave is directed against the Award made on August 9, 1973 by the Fifth Labour Court at Bombay deciding some of the issues arising for consideration in the reference before it.

2. The appellant company owns a factory at Thana near Bombay. Among the Workmen of the Company are "Operators" who work under the supervision of "Charge-hands". On December 30, 1970 one Ashok Bhambani who was an Operator employed in the Company's aforesaid factory is alleged to have threatened a Charge-hand, Ramesh

Thadani, with assault because Ramesh Thadani had reported against another operator who was consequently removed from service. According to the Management, Ashok Bhambani followed up this threat by assaulting Ramesh Thadani at about 5.30 P.M. that very day in the train between Thana and Mulund when Ramesh Thadani was on his way home after the day's work. Next day i.e. December 31, 1970 several Junior Assistants and Charge-hands employed in the factory submitted to the Factory Manager a memorandum signed by them protesting against the assault on Ramesh Thadani. A charge-sheet was served on Ashok Bhambani asking him to explain in writing why disciplinary action should not be taken against him for threatening and assaulting Ramesh Thadani which, it was stated, constituted a grave misconduct. After Ashok Bhambani had submitted his explanation, there was an enquiry into the charges against him, conducted by Shri D. S. Chandnani, Personnel Officer of the Company. The Enquiry Officer having considered the evidence adduced at the enquiry found that the charges of threat and assault against Ashok Bhambani had been established. Ultimately, on February 9, 1971 Ashok Bhambani was dismissed from service. The employees' Union having raised a demand for his reinstatement in service with full back wages and continuity of service, the dispute was referred for adjudication to the Labour Court, Bombay.

3. At the request of the parties, the Labour Court heard as a preliminary issue the question whether the domestic enquiry was unfair, improper and unjust and against the principles of natural justice. It appears that along with this issue the Court also dealt with another question, namely, whether or not Ashok Bhambani was guilty of misconduct as alleged by the Company. Both the parties made their submissions also on this point before the Labour Court. In this Court the findings recorded by the Labour Court on both the questions were assailed by the appellant and supported by the respondent and no objection was taken by either side that the Labour

Court while deciding the preliminary issue should not have gone on to record a finding on the other question as well. The propriety of the Award containing the findings of the Labour Court on these two points is in question in this appeal.

4. On the preliminary issue the Labour Court held that the enquiry had not been conducted in a fair and proper manner, and on the question of misconduct, found that the alleged assault did not amount to misconduct under the Standing Orders of the Company.

5. The finding that the enquiry had not been fair is based on the following facts. One Anant Bana, a Charge-hand, who had signed the memorandum dated December 31, 1970 stated before the Enquiry Officer that he had not signed any such memorandum. No one represented the Management at the Enquiry. It appears that the Enquiry Officer made a note that Mr. Bana had "turned hostile" and proceeded to put certain questions to the witness to resolve the apparent conflict between his statement at the enquiry and what the Memorandum dated December 31, 1970 purported to show. In answer to the questions put by the Enquiry Officer Mr. Bana admitted that he had signed the memorandum and that the words "I was present at the time of the incident" appearing against his signature were by his own hand, and further that he presented the memorandum along with others to the Factory Manager. This witness was cross-examined at length on behalf of the Union after the Enquiry Officer had put questions to him. In respect of another witness, Shri Mohan Shahani, also a Charge-hand, the Enquiry Officer made a similar note that he had turned hostile and put a number of questions to him. This witness also had signed the memorandum dated December 31, 1970 in which he stated that he was with Ramesh Thadani at the time of assault and had seen the "whole thing". Before the Enquiry Officer, however, he stated that he had not in fact seen the assault on Ramesh Thadani but he "felt that the assault on the Charge-hand was

a criminal offence" and therefore had signed the memorandum. In answer to one of the questions put to him by the Enquiry Officer, the witness admitted his signature on the memorandum and also that against his signature he had himself written that he had seen the incident himself. This witness also was cross-examined on behalf of the Union after he had replied to the questions put to him by the Enquiry Officer. The Labour Court held that the Enquiry Officer "had no business to treat the Company's witnesses Shri Anant Bana and Shri Mohan Shahani as hostile witnesses on his own" and "to ask questions for proving the misconduct alleged against the delinquent employee". Ashok Bhambani deposing before the Labour Court said that his only grievance against the enquiry was that the Enquiry Officer had "cross-examined" the witnesses of the Management. As stated already no one was present on behalf of the Management at the enquiry. The memorandum dated December 31, 1970 was in apparent conflict with what Shri Anand Bana and Shri Mohan Shahani had stated before the Enquiry Officer. It was reasonable and also necessary to look for some explanation for the contradictory statements. If, therefore, the Enquiry Officer had put certain questions to these two witnesses by way of clarification, it could not be said that he had done something that was not fair or proper. The witnesses were allowed to be cross-examined on behalf of the Union after they had answered the questions asked by the Enquiry Officer. In our opinion the note made by the Enquiry Officer stating that the witnesses had turned hostile meant only that they had stated before him something that was inconsistent with what appeared in the memorandum signed by them. We do not think that the enquiry was vitiated because the Enquiry Officer put some questions to the said witnesses by way of clarification in the circumstances stated above. This Court in *Workmen in Buckingham and Carnatic Mills Madras v. Buckingham and Carnatic Mills Madras*, (1970) 1 Lab LJ 26 (SC) held that the Enquiry Officer in a

domestic enquiry can put questions to the witnesses for clarification wherever necessary and if he allows the witnesses to be cross-examined thereafter, the enquiry proceeding cannot be impeached as unfair. We are therefore unable to accept that the enquiry in this case had not been conducted in a fair and proper manner.

6. On the question of misconduct the relevant Standing Order is Standing Order 24 (1) which is in these terms:

"24. The following acts and omissions on the part of a workman shall amount to misconduct:—

x x x x

(1) Commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment;

x x x x

It was not disputed before us that the allegation of assault, if proved, would be an act subversive of discipline; what was contended on behalf of the respondent was that the alleged assault having taken place in the train between Thana and Mulund which was obviously outside the premises or precincts of the establishment, was not covered by Standing Order 24 (1). The Labour Court also found that the alleged assault did not amount to misconduct under Standing Order 24 (1) which, it was held, was restricted to acts and omissions inside the premises of the establishment. In our opinion, on a plain reading of the clause, the words "within the premises or precincts of the establishment" refer not to the place where the act which is subversive of discipline or good behaviour is committed but where the consequence of such an act manifests itself. In other words, an act wherever committed, if it has the one effect of subverting discipline or good behaviour within the premises or precincts of the establishment, will amount to misconduct under Standing Order 24 (1). We are unable to agree that Standing Order 24 (1) leaves out of its scope an act committed outside though it may result in subversion of discipline or good behaviour within the premises or pre-

cincts of the establishment in question. Such a construction in our view would be quite unreasonable.

7. For the reasons stated above the appeal is allowed, the findings recorded by the Labour Court on the questions referred to above are set aside. The Labour Court will now proceed to dispose of the reference in accordance with law. In the circumstances of the case we make no order as to costs.

Appeal allowed.

AIR 1975^o SUPREME COURT 2128

(From: (1974) 15 Gui LR 560)

A. N. RAY, C. J., K. K. MATHEW AND
Y. V. CHANDRACHUD, JJ.

Bapubhai Mohanbhai, Appellant v.
Mahila Sahakari Udyog Mandir, Respondent.

Civil Appeals Nos. 574-575 of 1974.
D/- 26-8-1975.

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) (as applicable to Gujarat), Ss. 13 (1) (g) and 25 — Reasonableness of landlord's requirement — Has to be judged in the light of Section 25. (1974) 15 Gui LR 560. Reversed.

In view of the wording of the non obstante clause of Section 13 (1), the provisions of that section must have priority over the rest of the Act, except for what is contained in Section 15. But conceding to Section 13 (1) its rightful precedence and granting that it stands supreme except for Section 15, according to its own terms the Court has to be satisfied that the requirement of the landlord is reasonable. A requirement which runs in the teeth of Section 25 and which, if established, may throw the landlord open to the risk of a prosecution cannot be called reasonable. (Para 7)

Whether the requirement of the landlord is reasonable or not is to be judged from all the facts and circumstances of the case and a highly relevant circumstance bearing on the reasonableness of the landlord's requirement is that the purpose for which the possession is sought is a purpose for which the premises cannot be used save on pain of penal consequences. Courts ought not to construe a statute in a manner which will encourage the breach of any of its provisions and, most certainly, a decree ought not to be passed which, if honoured, will attract penal consequences. (1974) 15 Gui LR 560.

IS/IS/D201/75/CWM

Reversed; Civil Revn. Appln. No. 2172 of 1957, D/- 3-9-1959 (Bom); AIR 1972 Bom 354 and Civil Revn. Appln. No. 896 of 1963, D/- 7-3-1967 (Gui). Approved.

(Para 7)

Cases Referred: Chronological Paras

AIR 1972 Bom 354 = 74 Bom LR 186 9
(1967) Civil Revn. Appln. No. 896 of 1963.

D/- 7-3-1967 (Gui) 9

(1959) Civil Revn. Appln. No. 2172 of 1957, D/- 3-9-1959 (Bom) 9

Mr. P. H. Parekh and Miss Manju Jaitley, Advocates, for Appellant; Mr. I. N. Shroff, Advocate, for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellants in these two appeals are monthly tenants of the respondent, the Mahila Sahakari Udyog Mandir. The respondent filed suits against the appellants for possession of the premises let out to them, on the ground of arrears of rent and on the ground that the premises were reasonably and bona fide required by the respondent for its own purposes. On both counts the trial Court held against the respondent and dismissed the suits. The decree of the trial Court was confirmed in appeal by the learned Assistant Judge, Surat but the High Court of Gujarat allowed the respondent's revision application and decreed the suits. On March 11, 1974 the High Court granted to the appellants a certificate to appeal to this Court under the amended Article 133 (1) of the Constitution.

2. The Bombay Rents, Hotel and Lodging House Rates Control Act, LVII of 1947, is in force in Gujarat with certain modifications. Section 12 (1) of the Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. Section 13 of the Act sets out the various grounds on which a landlord may recover possession of the premises let out to the tenant. Sub-section (1), clause (g) of that section provides:

"13 (1) Notwithstanding anything contained in this Act but subject to the provisions of Section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied—

X	X	X	X	X
X	X	X	X	X

(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of

a public charitable trust that the premises are required for occupation for the purposes of the trust."

Section 15 (1) provides that notwithstanding anything contained in any law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of the Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. Section 15 (2) legalises sub-leases, assignments and transfers effected in favour of persons as have entered into possession and have continued in possession on the date of the commencement of the Ordinance of 1959.

3. The trial Court and the First Appellate Court found that the respondent required the premises for the purpose of its business but they dismissed the suits on the ground that in view of the provisions of Section 25 of the Act, the requirement could not be said to be reasonable and bona fide. The High Court accepted the finding of the Courts below that the premises were required by the respondent for the purpose of its business but it differed from them on the question of the applicability of Section 25. The High Court has taken the view that Section 13 (1) (g) is not subject to Section 25 and therefore the question whether the requirement of the landlord is reasonable and bona fide has to be decided apart from the provisions of Section 25. The correctness of this view is challenged by the tenants in these appeals.

4. The scheme of the Act is that ordinarily, the landlord shall not be entitled to evict a tenant so long as the latter pays or is ready and willing to pay the Standard rent and permitted increases and so long as he observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. This rule is enunciated in Section 12 (1). Section 13 of the Act is in the nature of an exception to Section 12. It enumerates the grounds on which, notwithstanding the injunction contained in Section 12, a landlord may obtain possession of the premises let out to the tenant. Under Section 13 (1) (g), the landlord can obtain possession only if he satisfies the Court that the premises are required by him "reasonably and bona fide." If the issue as regards the reasonableness of the landlord's requirement is to be decided without reference to the provision contained in Section 25, the respondent would be entitled to succeed because all the three Courts have found that the respondent requires the premises genuinely for occupation by itself for the purpose of its business and that the requirement, apart from Section 25, is rea-

sonable and bona fide. The short question for consideration in these appeals is whether the reasonableness of the landlord's requirement can be judged in the light of the provision contained in Section 25 or whether, as held by the High Court, Section 25 is to be kept out of way in judging that question.

5. By Section 25, a landlord cannot use nor can he permit to be used for a non-residential purpose any premises which on the date when the Act came into force were used for a residential purpose. Under sub-section (2) of Sec. 25, a landlord who contravenes the provisions of sub-section (1) is punishable with imprisonment for a term which may extend to three months or with fine or with both. In the instant case, the premises were admittedly used for a residential purpose on February 13, 1948 being the date on which the Act came into operation. It is plain from the language of Section 25 (1), that the respondent cannot convert the user of the premises from a residential to a non-residential purpose. If it did so, it would be liable to be prosecuted and punished under S. 25 (2).

6. The respondent sought possession of the premises let out to the appellants and three other tenants on the ground that it wanted one room for its office, two rooms for running a fair-price grain-shop, two rooms for conducting a provision stores, two rooms for preparing pickles, cleaning spices and for keeping the finished products for sale, two rooms for establishing a godown and some more space for conducting a tailoring and sewing class. The respondent succeeded in proving its requirement but its very success in establishing that it required the premises for a non-residential purpose is its failure to establish the ingredients of Section 13 (1) (g) of the Act. Under that provision, it is not sufficient for a landlord to establish that the premises are required by him but it has to be shown further that the requirement is reasonable and bona fide. The requirement of the respondent in the instant case cannot ever be called reasonable, if the very statute under which it seeks relief contains an injunction that it shall not use residential premises for a non-residential purpose. Not only does the statute contain an injunction against the user of residential premises for a non-residential purpose, but it makes it penal for a landlord to use for a non-residential purpose any premises which were used for a residential purpose on the date when the Act came into force. In the light of S. 25 (1), granting a decree to the respondent for possession of the residential premises on the ground that it requires those premises for a non-residential purpose is to pave the way for its prosecution and punish-

ment under Section 25 (2). In fact, such a decree would be self-defeating because, whereas the decree shall have been passed on the ground that the respondent requires the premises for a non-residential purpose, it will not be able to use those premises for the purpose for which the decree was granted, save on pain of prosecution.

7. Learned counsel for the respondent places great reliance on the non-obstante clause of Section 13 (1) and argues that the legislature having considered the question whether Section 13 should be made subject to any other law or to any other provision of the Act, came to the conclusion that it should be made subject to the provisions of Section 15 only and therefore it would be wrong to subject the provisions contained in Section 13 (1) to Section 25. The High Court also approached the problem before it by saying that the material question for consideration was whether Section 13 (1) can be made subject to Section 25. This question was answered by High Court by saying that since the legislature did not subject the right conferred on the landlord by Section 13 (1) to any other provision save the one contained in Section 15, Section 25 cannot be permitted to override Section 13 (1). This approach, in our opinion, is misconceived. The true question for consideration is not whether as between Section 13 (1) and Section 25 (1) one overrides the other and indeed, in view of the wording of the non-obstante clause of Section 13 (1), the provisions of that section must have priority over the rest of the Act, except for what is contained in Section 15. But conceding to Section 13 (1) its rightful precedence and granting that it stands supreme except for Section 15, according to its own terms the Court has to be satisfied that the requirement of the landlord is reasonable. A requirement which runs in the teeth of Section 25 and which, if established, may throw the landlord open to the risk of a prosecution cannot be called reasonable. Therefore, if the respondent shall have failed, it is not because Section 25 overrides Section 13 (1) but because of its failure to prove the reasonableness of its requirement. Whether the requirement of the landlord is reasonable or not is to be judged from all the facts and circumstances of the case and a highly relevant circumstance bearing on the reasonableness of the landlord's requirement is that the purpose for which the possession is sought is a purpose for which the premises cannot be used save on pain of penal consequences. Courts ought not to construe a statute in a manner which will encourage the breach of any of its provisions and, most certainly, a decree ought not to be passed which, if honour-

ed, will attract penal consequences. To pass a decree in favour of the respondent on the grounds accepted by the High Court is to invite the respondent to commit a breach of the statutory injunction contained in S. 25 (1).

8. In short, therefore, though the evidence led by the respondent is sufficient to prove that it requires the suit premises for the purpose of its business, no decree for possession can be passed in its favour as its requirement cannot be said to be reasonable. The requirement runs across a statutory prohibition and is therefore not reasonable.

9. The view taken by the Bombay High Court in Civil Revn. Appln. No. 2172 of 1957 decided on 3-9-1959 and in Laxmi Co-operative Bank Ltd. v. Mohan Govind Diwanji, 74 Bom LR 186 = (AIR 1972 Bom 354), as also the view taken by a learned single Judge of the Gujarat High Court in Civil Revn. Appln. No. 896 of 1963 decided on 7-3-1967 (Guj), is in our opinion correct. The learned Judges of the Gujarat High Court were in error in the instant case in departing from that view.

10. For these reasons we allow the appeals, set aside the judgment of the High Court and direct that the suits filed by the respondent against the appellants shall stand dismissed. Respondent shall pay to the appellants the costs of these appeals. One set of hearing fee only.

Appeals allowed.

AIR 1975 SUPREME COURT 2130

(From: Madhya Pradesh)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

Roshan Lal and another, Appellants v. Madan Lal and others, Respondents.

Civil Appeal No. 2473 of 1972,
D/- 18-9-1975.

(A) M. P. Accommodation Control Act (41 of 1961), Section 12 (1) — Construction — Order 23, Rule 3 C. P. C. applicable to eviction suits governed by special statutes — Decree on basis of compromise — Duty of Court — AIR 1972 Madh Pra 106, Overruled. (Civil P. C. (1908), O. 23, R. 3).

Reading Section 12 as a whole and remembering the beneficial ob-

*(Misc. Second Appeal No. 33 of 1972,
D/- 30-10-1972—(Madh Pra).)

IS/JS/D551/75/CWM

ject of the Act for the protection of a tenant based upon public policy it must be held as a matter of construction that no decree for the eviction of a tenant from any accommodation can be passed except on one or more of the grounds mentioned in Section 12 (1). AIR 1972 Madh Pra 106, Overruled. (Para 4)

In order to get a decree or order for eviction against a tenant whose tenancy is governed by any Rent Restriction or Eviction Control Act the suitor must make out a case for eviction in accordance with the provisions of the Act. When the suit is contested the issue goes to trial. The Court passes a decree for eviction only if it is satisfied on evidence that a ground for passing such a decree in accordance with the requirement of the Statute has been established. Even when the trial proceeds ex parte, this is so. Case law discussed. (Para 5)

If, however, parties choose to enter into a compromise due to any reason such as to avoid the risk of protracted litigating expenses, it is open to them to do so. The Court can pass a decree on the basis of the compromise. In such a situation the only thing to be seen is whether the compromise is in violation of the requirement of the law. The compromise must indicate either on its face or in the background of other materials in the case that the tenant expressly or impliedly is agreeing to suffer a decree for eviction because the landlord, in the circumstances, is entitled to have such a decree under the law. (Para 5)

The provisions of Order 23 Rule 3 of the Code of Civil Procedure apply to eviction suits governed by the special statutes. If the agreement or compromise for the eviction of the tenant is found, in the facts of a particular case, to be in violation of a particular Rent Restriction or Control Act, the Court would refuse to record the compromise as it will not be a lawful agreement. If on the other hand, the Court is satisfied on consideration of the terms of the compromise and, if necessary, by considering them in the context of the pleadings and other materials in the case, that the agreement is lawful, as in any other suit, so in an eviction suit, the

Court is bound to record the compromise and pass a decree in accordance therewith. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 SC 471 = (1974) 2 SCR 544
3, 4
AIR 1973 SC 1311 = (1973) 3 SCR 691
3
AIR 1972 Madh Pra 106 = 1972 MPLJ 216
1, 4
(1971) 12 Guj LR 1012...
4
AIR 1970 SC 794 = 1970 Ren CR 375
3
AIR 1970 SC 838 = (1969) 2 SCR 1048
2
(1969) 2 SCR 432 = (1970) 2 SCJ 153
2
AIR 1960 Punj 514 = 62 Pun LR 888
3

Mr. S. N. Andley Sr. Advocate, (M/s. N. B. Mangal and Rameshwar Nath Advocates of M/s. Rajender Narain & Co. Advocates with him), for Appellants; Mr. G. B. Pai Sr. Advocate, (M/s. S. K. Bagga, Mrs. S. Bagga Advocates and R. K. Mehta, V. C. Parashar Advocates with him), for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— This appeal by special leave has been filed by the tenant-defendants. The plaintiff-respondents, the landlords, filed a suit against the appellants in the Court of Second Civil Judge, Class II, Gwalior for a decree for eviction from the suit premises and for certain other reliefs. The appellants' eviction was sought on statement of facts mentioned in paragraph 3 of the plaint which squarely fell within clause (f) of subsection (1) of Section 12 of the Madhya Pradesh Accommodation Control Act, 1961 (hereinafter referred to as 'the Act'). The appellants filed a written statement and in paragraph 3, they denied the respondents' assertion in plaint, paragraph 3. It appears that the suit which was filed in the year 1966 proceeded to trial in October, 1967 and some evidence was adduced. But eventually, the parties entered into a compromise, filed a petition to that effect in the Trial Court which passed a decree for eviction and other reliefs in January, 1968 in accordance with the terms of the compromise. Pursuant

to the said compromise decree the appellants were to vacate the shop — the suit premises — by 31-12-1970. On their failure to do so, execution was levied by the respondents. The appellants objected to the execution on the ground that the compromise decree was void and inexecutable as being against the provisions of the Act. The execution court accepted the appellants' objection to the execution of the decree and dismissed the execution case. A miscellaneous appeal filed by the respondents was dismissed by the Third Additional District Judge, Gwalior. They preferred a second miscellaneous appeal before the Madhya Pradesh High Court. A learned single Judge following the Bench decision of that Court in *Smt. Chandan Bai v. Surjan*, AIR 1972 Madh Pra 106 came to the conclusion that the decree was not a nullity and was executable. Hence this appeal by the tenant-judgment-debtors.

2. The point which falls for determination in this appeal is not *res-integra* and has been the subject-matter of consideration in several decisions of this Court. In *Bahadur Singh v. Muni Subrat Dass*, (1969) 2 SCR 432 a decree for eviction based on an award without anything more was found to be a nullity as it was held to have been passed against the prohibitory mandate of Section 13 (1) of the Delhi and Ajmer Rent Control Act, 1952. Following the said decision the compromise decree was also held to be a nullity in the case of *Kaushalya Devi v. K. L. Bansal*, (1969) 2 SCR 1048 = (AIR 1970 SC 838). The earlier two decisions were followed again in *Ferozi Lal Jain v. Man Mal*, AIR 1970 SC 794. In all these three cases the decrees were found to have violated Section 13 (1) of the Delhi Act of 1952.

3. The law was reviewed exhaustively by this Court in *K. K. Chari v. R. M. Seshadri* (1973) 3 SCR 691 = (AIR 1973 SC 1311). *Vaidialingam, J.* delivering the judgment on his behalf as also on behalf of *Dua, J.* pointed out that under the terms of the compromise under consideration in that case the defendant had withdrawn all his defence to the application filed by the landlord and sub-

mitted to a decree for eviction unconditionally. The three earlier cases of this Court were distinguished and it was said at page 704 "The true position appears to be that an order of eviction based on consent of the parties is not necessarily void". And finally it was held "it is no doubt true that before making an order for possession the Court is under a duty to satisfy itself as to the truth of the landlord's claim, if there is a dispute between the landlord and tenant. But if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry". One of us (*Alagiriswami, J.*) while agreeing with *Vaidialingam, J.* added a few words of his own. In the separate judgment it has been pointed out that the view taken by *Grover, J.* of the Punjab High Court in *Vas Dev v. Milkhi Ram*, AIR 1960 Punj 514 was exactly the position in *K. K. Chari's* case. *Sarkaria, J.* delivering the judgment on behalf of the Court in *Nagindas Ramdas v. Dalpatram Ichharama alias Brijram*, (1974) 2 SCR 544 = (AIR 1974 SC 471) took pains to go into the matter elaborately once more and said at p. 552 (of SCR) = (at pp. 476-477 of AIR),

"From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be *prima facie* satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape, of an express or implied admission made in the compromise agreement, itself".

On facts the case of *Nagindas Ramdas* was found to fall in line with that of *K. K. Chari*. Distinguishing

the earlier cases, Chari's case was followed.

4. Before we state the principles of law governing such a case we would like to point out that the language of Section 12 of the Act is somewhat different from many similar State Statutes. Section 12 (1) says:

"Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:"

Thereafter grounds (a) to (p) have been enumerated. On a superficial reading of the provision aforesaid it would appear that the inhibition related to the filing of the suit only. No suit can be filed for eviction of a tenant except on one or more of the grounds enumerated in Section 12 (1). In sub-sections (2) to (11) of Section 12 certain conditions have been engrafted to show under what circumstances an order for the eviction of tenant cannot be passed in relation to some of the grounds enumerated in sub-section (1). Reading the section as a whole and remembering the beneficial object of the Act for the protection of a tenant based upon public policy, we do not find much difficulty in bringing the section at par with other similar State Statutes and holding as a matter of construction that no decree for the eviction of a tenant from any accommodation can be passed except on one or more of the grounds mentioned in S. 12 (1). A Bench of the Madhya Pradesh High Court in Smt. Chandan Bai's case (AIR 1972 Madh Pra 106) (supra) seems to have taken too literal a view of the section when in paragraph 5 of the judgment it says "There is nothing in Section 12 of the Act or any other provision which prevents the tenant in vacating the accommodation in spite of the fact that none of the grounds mentioned in Section 12 exists. Similarly, there is nothing in the Act which may prevent the tenant in agreeing to vacate the accommodation in future." It says further in paragraph 10 "Merely enumeration of grounds on which relief can be claimed does not either

expressly or impliedly exclude the operation of Order 23, Rule 3, because grounds for claiming relief are always limited whether the relief be claimed under the general law or a statute". A similar argument advanced in the case of Nagindas Ramdas, (AIR 1974 SC 471) (supra) with reference to the relevant provisions of Bombay Rent Act, 1947 was repelled at page 550 (of SCR) = (at p. 475 of AIR) and the view taken by a Bench of the Gujarat High Court in the case of Shah Rasiklal Chunnilal v. Sindhi Shyamal Mulchand, (1971) 12 Guj L.R. 1012 "that in spite of the fact that there is no express provision in the Bombay Rent Act prohibiting contracting out, such a prohibition would have to be read by implication consistently with the public policy underlying this welfare measure" was approved.

5. In order to get a decree or order for eviction against a tenant whose tenancy is governed by any Rent Restriction or Eviction Control Act the suitor must make out a case for eviction in accordance with the provisions of the Act. When the suit is contested the issue goes to trial. The Court passes a decree for eviction only if it is satisfied on evidence that a ground for passing such a decree in accordance with the requirement of the Statute has been established. Even when the trial proceeds ex parte, this is so. If, however, parties choose to enter into a compromise due to any reason such as to avoid the risk of protracted litigating expenses, it is open to them to do so. The Court can pass a decree on the basis of the compromise. In such a situation the only thing to be seen is whether the compromise is in violation of the requirement of the law. In other words, parties cannot be permitted to have a tenant's eviction merely by agreement without anything more. The compromise must indicate either on its face or in the background of other materials in the case that the tenant expressly or impliedly is agreeing to suffer a decree for eviction because the landlord, in the circumstances, is entitled to have such a decree under the law.

6. It is too late in the day to contend that the provisions of Order

23, Rule 3 of the Code of Civil Procedure cannot apply to eviction suits governed by the special statutes. Undoubtedly, a compromise of such suit is permissible under the said provision of law. The protection of the tenant is inherent in the language of Order 23, Rule 3 when it says "Where it is proved to the satisfaction of the Court that a suit has been adjusted by any lawful agreement or compromise.....the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." If the agreement or compromise for the eviction of the tenant is found, on the facts of a particular case, to be in violation of a particular Rent Restriction or Control Act, the Court would refuse to record the compromise as it will not be a lawful agreement. If on the other hand, the Court is satisfied on consideration of the terms of the compromise and, if necessary, by considering them in the context of the pleadings and other materials in the case, that the agreement is lawful, as in any other suit, so in an eviction suit, the Court is bound to record the compromise and pass a decree in accordance therewith. Passing a decree for eviction on adjudication of the requisite facts or on their admission in a compromise, either express or implied, is not different.

7. We now proceed to consider the facts of the case on hand. The ground for eviction from the accommodation let for non-residential purposes mentioned in clause (f) of Section 12 (1) of the Act is that the accommodation "is required bona fide by the landlord for the purpose of continuing or starting his business.....and that the landlord.....has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned". In paragraph 3 of the plaint the respondents' necessity was pleaded both in the positive and the negative aspects of clause (f). Both were denied in paragraph 3 of the written statement of the appellants. Paragraph 1 of the compromise petition says: "That due to the neces-

sity of the plaintiffs for their own business—opening grocery shop, decree for ejection may be granted to them against the defendants." In this case it is not necessary to refer to any piece of evidence adduced at the inconclusive trial. The meaning of paragraph 1 of the compromise petition is clear and definite especially in the background of the pleadings of the parties and in our opinion it squarely makes out a case of eviction within the meaning of Section 12 (1) (f) of the Act on admission of the appellants. We reject the argument of Mr. Andley, learned counsel for the appellants, that paragraph 1 of the compromise petition was an admission in respect of only the first part, namely, the positive aspect of clause (f) and not of the second part, namely, that the landlord has no other reasonably suitable non-residential accommodation. The admission, by necessary implication, was in respect of both.

8. In the order recording the compromise the Court said:

"On a perusal of the joint compromise it was found that the same is legal and is within the purview of the plaint. Therefore, plaint verification is accepted and the case is decreed in accordance with the conditions of the compromise as under:

1. That the defendants shall vacate the shop in dispute by 31-12-1970."

The order so recorded in our judgment was in full compliance with the requirement of Order 23, Rule 3 of the Code of Civil Procedure. The Court found that the compromise was legal, that is to say, lawful and was in accordance with the plaint. The averment in the plaint was, therefore, accepted and the suit was decreed. It is regrettable that though the appellants got about three years' time to vacate the shop in dispute from the date of the compromise decree, they were ill-advised to fight the litigation further and thus cause delay in the vacating of the shop by another five years. We have no doubt in our mind that on the facts and in the circumstances of this case the compromise decree was clearly valid and executable. We uphold the deci-

sion of the High Court but on a slightly different basis.

9. For the reasons stated above, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1975 SUPREME COURT 2135

(From: Kerala)*

H. R. KHANNA, M. H. BEG, A. C. GUPTA JJ.

In Civil Appeals Nos. 1489-1499, 1159 and 1160 of 1970:—

Isha Beevi and others, Appellants v. Tax Recovery Officer and others, Respondents.

In Civil Appeals Nos. 653 and 654 of 1971.

T. K. Usman Musaliar, etc. Appellants v. The Tax Recovery Officer, Quilon and others, Respondents.

Civil Appeals Nos. 1489-1499, 1159 and 1160 of 1970 and 653 and 654 of 1971, D/- 5-9-1975.

(A) Income-tax Act (1961), Ss. 221, 222, 2 (44) — Additional Collector or Collector competent to discharge duties of 'Peshkar' as Recovery Officer — Travancore Income-tax Act (1121 ME), Section 66 (3) — Finance Act (1950), Section 13 — General Clauses Act (1897), S. 8.

The duties of Peshkar who was competent to act as a Recovery Officer under the Travancore Income-tax Act (1121 ME) have by virtue of operation of Section 13 of Finance Act, Section 8 (1) of the General Clauses Act and S. 226 read with Sec. 2 (44) of the Income-tax Act 1961, automatically devolve upon the Collector or an Additional Collector or upon such officer as may be empowered by the State Government by a Special or general notification in official

*(1) Writ Appeals Nos. 492-495, 497-500 and 502-505 of 1969 reported in (1970) 2 I. T. J. 260—(Ker).

(2) Writ Appeals Nos. 142 and 166 of 1970, D/- 25-8-1970 and 22-9-1970—(Ker).

gazette "to effect recovery of land revenue or other public demand" under any law relating to land revenue or other public demand. (Para 8)

(B) Constitution of India, Article 226 — Prohibition — Issue of conditions essential — Existence of alternative remedy — Total absence of alternative remedy — Total absence of jurisdiction in the authority ought to be shown — Citing wrong provisions of law not sufficient if power exists otherwise.

The existence of an alternate remedy is not generally a bar to the issuance of a writ of prohibition. But in order to substantiate a right to obtain a writ of prohibition from a High Court or the Supreme Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section of provision of law is cited in a notice or order if the power to proceed is actually there under another provision.

(Para 5)

Cases Referred: Chronological Paras
(1969) 74 ITR 513 = (1970) 2 ITJ 673
(Guj) 3
AIR 1964 SC 1473 = 52 ITR 538 3
AIR 1961 SC 200 = 41 ITR 12 3

Mr. D. V. Patel, Sr. Advocate (M/s. M. Ramchandran and A. S. Nambiyar Advocates with him), for Appellants; Mr. B. Sen, Sr. Advocate, (M/s. B. S. Ahuja and S. P. Nayar Advocates with him), for Respondents.

Judgment of the Court was delivered by

BEG, J.:— These are fifteen Civil Appeals arising out of petitions for writs of certiorari, prohibition, and mandamus against certain tax recovery proceedings instituted against the heirs and legal representatives of Thangal Kunj Musaliar of Kerala who died on 19-2-1966. It appears that there were arrears of Income Tax due under the Travancore Income Tax Act (of 1121 ME) (hereinafter referred to as 'the Travancore Act') and other enactments on income from the cashew nut export business. By an order passed on 10-6-1968, the Additional Personal Assistant of the District Collector Quilon, functioning as the Tax Recovery

Officer, attached a number of immovable properties mentioned in a schedule to the order. He purported to act under Rule 48 in the second schedule to the Indian Income Tax Act of 1961, (hereinafter referred to as 'the 1961 Act'). He prohibited the appellants from transferring or otherwise dealing with properties in their possession on the basis of 22 certificates covering a total amount of Rupees 50,42,970.34 np. Some of the certificates were issued under Section 46, sub-section (2) of the Indian Income Tax Act of 1922 (hereinafter referred to as 'the 1922 Act') and others under Section 221 of the 1961 Act. The appellants, claiming to be in possession of immovable properties gifted in 1947, 1953, 1954 and 1956 by T. K. Musaliar objected to the attachment of their properties on the ground that the income tax dues against the deceased could not be recovered by attachment or sale of properties belonging to the appellants. The appellants question the jurisdiction of the Tax Recovery Officer to proceed with the recovery against their properties. The appellants also contended that taxes having become due under the Travancore Act and the 1922 Act from the deceased, recovery proceedings by their attachment under the 1961 Act were not legally competent. Furthermore, they objected that all out of 22 certificates having been issued after the death of T. K. Musaliar, expressly stating that the deceased was the assessee, were *prima facie* invalid because neither S. 66, sub-section (3) of the Travancore Act, nor S. 221 of 1961 Act warranted the issue of certificates against an assessee after his death. They submitted that as the amounts covered by the certificates issued after the death of T. K. Musaliar were tacked on to the amounts covered by the other certificate the whole attachment was vitiated. Questions of title to the properties, said to have been gifted by the deceased long ago, were also raised.

2. At this stage, it may be mentioned that there had been an agreement recorded in a settlement dated 10-7-1957 the terms of which were binding upon the deceased and T. K. Musaliar & Sons Ltd. This re-

lated to assessments under the Travancore Income Tax Act and the Indian Income Tax Act of 1922. By clause 4 of this settlement it was agreed that the Appellate Authority before which an appeal in respect of these assessments were pending could enhance or reduce the assessments in accordance with this settlement. It was also agreed that the Writ Petitions in connection with assessments for certain years will be withdrawn and that penal interest under Section 18A of the 1922 Act will be paid, but no other penalties will be leviable in respect of the assessment years covered by this settlement. On 25-9-1957, an order signed by a Deputy Secretary to the Government of India was passed under Section 9, sub-section (2) of the Travancore Taxation in Income (Investigation Commission) Act 1124 showing that the Government accepted the terms and conditions of the settlement recorded by the Commissioner of Income Tax and directing that demand notices in accordance with the terms of the settlement be served on T. K. Musaliar for a sum of Rs. 9,15,458 and that such other proceedings under the Travancore Income-tax Act or "under any other law", as may be required, should be taken in order to enforce the payment of the amount demanded. Thus, for the amounts sought to be recovered in pursuance of the settlement, the machinery to realise under Section 297 (2) (i) of the 1961 Act is available according to the Department.

3. The learned Judge of the Kerala High Court before whom the Writ Petitions came up overruled all the objections of the appellants. He held that, although the attachment order purports to have been passed under Rule 48 of the 2nd Schedule, the Recovery Officer had authority to proceed under the Travancore Act to recover dues under that Act by recourse to the provisions of Travancore-Cochin Revenue Recovery Act 7 of 1951. He relied upon the well established proposition that where the power to proceed is actually there, the mere reference to a wrong section for authority to act, will not vitiate the action taken. (See

L. Hazari Mal Kuthiala v. Income Tax Officer, 41 ITR 12 = (AIR 1961 SC 200); Income Tax Officer, Kolar Circle v. Seghu Buchiah Setty, 52 ITR 538 = (AIR 1964 SC 1473) and P. M. Bharucha & Co. v. G. S. Venkatesan, (1969) 74 ITR 513 (Guj). The learned Judge also took the view that the Income-tax dues covered by the abovementioned settlement were realized by virtue of an order made under S. 3 of the Opium and Revenue Laws (Extension of Application Act No. 33 of 1950), and, the last mentioned enactment having authorised the Income Tax authorities to apply the provisions not merely of the Travencore Act but of "any other law" the recovery proceedings for those years, even under the provisions of the 1961 Act, were unassailable. The learned Judge also thought that, as the appellants had not objected to the validity of the 11 certificates issued after the death of the deceased, when notices were served upon them under rule 85 of the second Schedule to the 1961 Act, they were debarred from taking up such an objection in their Writ Petitions. As regards the title claimed to properties alleged to have been wrongly attached, the learned Judge pointed out that the appellants had not only already resorted to alternative remedies by way of suits but had not yet availed themselves of their remedy by preferring objections under Rule 11 of the second Schedule to the 1961 Act, where such objections could also be decided.

4. A Division Bench of the Kerala High Court, consisting of P. T. Raman Nayar, C. J. and K. K. Mathew, J., agreed with the views expressed by the learned single Judge on the questions mentioned above except as regards the 11 certificates which were issued after the death of the assessee. It allowed the objections of the appellants to the extent that it held that the claims sought to be enforced under the attachment order of 10-6-1968 (Ex. P. I) will not include the arrears of Income Tax mentioned in the 11 certificates issued after the death of T. K. Musaliar. The appellants have, after grant of certificates of fitness of the cases for appeals to

this Court, repeated before us the submissions mentioned above.

5. We may point out that the reliefs claimed in the Writ Petitions were Writs of Certiorari, and Mandamus and Prohibition. It is clear to us, after perusal of those so called "orders" sought to be quashed that they were only notices of commencement of recovery proceedings by attachment of certain properties. Final orders could only be passed after the appellants have had their opportunities to object under Rule 11 of the 2nd schedule of the 1961 Act because the notices purport to be only preliminary notices under Rule 48 of the 2nd Schedule to the 1961 Act. These proceedings could only be quashed even at this stage, if they were entirely without jurisdiction. Otherwise, a prayer for quashing proceedings would, obviously, be premature. No occasion for the issue of a writ of Mandamus can arise unless the applicants show non-compliance with some mandatory provision and seek to get that provision enforced because some obligation towards them is not carried out by the authority alleged to be flouting the law. The grievance of the appellants, however, is that the tax recovery officer had no jurisdiction whatsoever to start tax recovery proceedings against them. They have, therefore, asked for writs of prohibition. The existence of an alternative remedy is not generally a bar to the issuance of such a writ or order. But, in order to substantiate a right to obtain a writ of prohibition from a High Court or from this Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against. It is not enough if a wrong section of provision of law is cited in a notice or order if the power to proceed is actually there under another provision.

6. One of the identically similar notices to which objection was taken by the appellants may be reproduced here. It runs as follows:

"Form No. ITCP 16.

(See Rule 48 of the Second Schedule to the Income Tax Act, 1961).

ORDER of Attachment of Im-
movable property. Office of the Tax
Recovery Officer,

Collector, Quilon.

Dated 10th May, 1958.

To

Smt. Iysha Beevi on behalf of
Minors 1. Umaiba Beevi 2 My-
moon Beevi, 3 Mariam Beevi and
4. Safia Beevi, Kantanchaalil
Veedu, Kannimelcherry, Kilokkol-
loor, Quilon.

Where as you the legal representa-
tives of late Shri A. Thangal Kunju
Musaliar, have failed to pay Rupees
50,42,970.34 payable by late Shri A.
Thangal Kunju Musaliar, Cashew Ex-
porter, Quilon, in respect of certifi-
cates mentioned in the attached state-
ment, forwarded by the Income Tax
Officers, Special Investigation/Circle,
Trivandrum and Income Tax Officer,
Quilon, and the interest payable
under S. 220 (2) of the Income Tax
Act, 1961, for the period commencing
immediately after the said date.

It is ordered that you, said Isha
Beevi be and you are hereby prohi-
bited and restrained until the further
order of the undersigned, from trans-
ferring or charging the properties as
per attached list in any way and that
all persons be and that they are here-
by prohibited from taking any bene-
fit under such transfer or charge.

Given under my hand and seal
at Quilon on this 10th day of May,
1968.

Sd/-

Tax Recovery Officer, and
Addl. Personal Assistant to Col-
lector Quilon."

7. As regards the authority of
the Additional Personal Assistant to
the Collector, Quilon, as the tax Re-
covery Officer, no objection appears
to have been taken anywhere relat-
ing to his appointment in accordance
with the law as the Tax Recovery
Officer. The Division Bench of the
High Court had held that recovery of
the dues for the years 1119 to 1125
ME could not take place under the
1922 Act and, therefore, no proceed-
ings for their recovery could be taken
under the provisions of the 1961
Act. Nevertheless, as proceedings
could be taken under the Travancore
Income Tax Act, it was argued be-

fore it that the "Peshkar" alone
would have been competent to initiate
recovery proceedings under Section 66
(3) of the Travancore Act. The cor-
responding officer, according to the
appellants, was the Collector and,
therefore, the certificates could only
be forwarded, it was submitted, to
the Collector of the District who
alone could have initiated the pro-
ceedings. The Division Bench over-
ruled this contention on the ground
that the proviso to Section 13 (1) of
the Indian Finance Act, 1950 made it
clear that the authority constituted
under the provisions of the Act of
1922, empowered to proceed, must be
determined by resorting to the provi-
sions of Section 8 (1) of the General
Clauses Act, which reads as follows:

"Where this Act, or any Central
Act or Regulation made after the
commencement of this Act, appeals
and re-enacts, with or without modifi-
cations, any provisions or a former
enactment then references in any
other enactment or in any instrument
to the provision so repealed shall, un-
less a different intention appears be
construed as references to the provi-
sion so re-enacted."

The 1922 Act was repealed by the
1961 Act. Hence, it held that Section
2 (44) of the 1961 Act, read with Sec-
tion 221 of that Act, were sufficient
to enable the Additional Personal As-
sistant to the Collector to proceed as
a Tax Recovery Officer.

8. Section 13, sub-section (1)
of the Finance Act, 1950 laid down:

"13 (1) If immediately before
the last day of April 1950, there is in
force in any Part B State other than
Jammu and Kashmir or in Manipur
Tripura or Vindhya Pradesh or in
the merged territory of Cooh-Bihar
any law relating to income-tax or
super-tax or tax on profits of busi-
ness, that law shall cease to have
effect except for the purposes of the
levy, assessment and collection of in-
come-tax and super-tax in respect of
any period not included in the previ-
ous year for the purposes of assess-
ment under the Indian Income-Tax
Act, 1922 (XI of 1922) for the year
ending on the 31st day of March, 1951,
or for any subsequent year, or as the
case may be, the levy assessment and
collection of the tax on profits of

business for any chargeable accounting period ending on or before the 31st day of March, 1949:

Provided that any reference in any such law to an officer, authority, tribunal or Court shall be construed as a reference to the corresponding officer, authority, tribunal or Court appointed or constituted under the said Act, and if any question arises as to who such corresponding officer, authority, tribunal or Court is, the decision of the Central Government thereon shall be final."

Section 46 of 1922 Act had also laid down:

"46 (2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue".

Section 2 sub-section (44) of the Act of 1961 provides:

"2 (44) 'Tax Recovery Officer' means—

(i) A Collector or an additional Collector;

(ii) any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official Gazette to exercise the powers of a Tax Recovery Officer.

(iii) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer".

And, Section 222 (1) of the 1961 Act lays down:

"222 (1) When an assessee is in default or is deemed to be in default in making payment of tax, the Income-tax Officer may forward to the

Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee, and the Tax Recovery Officer on receipt of such certificate shall proceed to recover from such assessee the amount specified therein by one or more of the modes mentioned below, in accordance with the rules laid down in the Second Schedule:

(a) Attachment and sale of the assessee's movable property;

(b) Attachment and sale of the assessee's immovable property.

(c) arrest of the assessee and his detention in prison,

(d) appointing a receiver for the management of the assessee's movable and immovable properties."

Hence, even if the "Peshkar" was the competent officer under the Travancore Income Tax Act, the duties of the Peshkar as the Recovery Officer, would, by operation of the abovementioned provisions of law, automatically devolve upon the Collector or an Additional Collector or upon such officer as may be empowered by the State Government by a special or General notification in the Official Gazette "to effect recovery of land revenue or other public demand" under any law relating to land revenue or other public demand. The appellants, not having raised the question at any earlier stage that the Additional Personal Assistant to the Collector was not an officer so authorised, cannot do so in appeal to this Court. However, we leave it open to them to take such an objection, which really raises a question of fact as to whether the required notification was or was not made, before the Tax Recovery Officer himself. If such an objection had been taken there or even in the High Court, the relevant notification may have been produced. We are unable to see any flaw in the reasoning adopted by the High Court.

9. Another objection as to jurisdiction relates to the lumping together of demands which were legal as well as those, which could not, according to the assessee, be covered by provisions of law. The High Court had held that 11 out of 22 certificates, which had been issued after the death of T. K. Musaliar, were not

legal. To that extent the demands against property attached could be said to be not covered by required certificates. Nevertheless, neither had any property been sold nor any action taken against the person of any of the appellants. The authorities relied upon by the appellants related only to either sales of properties for recovering amounts which were larger than those which were legally recoverable or arrest of the judgment-debtor in execution of dues. The cases before us are those of attachment only. If any part of the property is illegally or unjustifiably attached, it does not really affect the jurisdiction of the Tax Recovery Officer to proceed to deal with an objection under Rule 11. The High Court has held that the appellants can file all their objections under Rule 11 in Schedule 2 of the 1961 Act.

10. It has also been stated on behalf of the Department that it has no objection to the application of the procedure laid down in the Travancore Act for recovery of such dues against the appellants as are realisable from the assets of the deceased. In view of this concession, it is necessary for us to deal with the question whether there was any additional burden or disadvantage imposed upon the appellants by the procedure in the 1961 Act. In view of this concession, the Tax Recovery Officer will only use the procedure in the Travancore Act so far as it is possible to apply it.

11. For the reasons given above, these appeals are hereby dismissed, but, in the circumstances of these cases, the parties will bear their own costs in this Court.

Appeals dismissed.

AIR 1975 SUPREME COURT 2140

(From: (1975) 1 All LR 391 (FB))

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

Nanhoo Mal and others, Appellants v. Hira Mal and others, Respondents.

Civil Appeal No. 732 of 1975,
D/- 16-9-1975.

IS/JS/D554/75/GMJ

(A) U. P. Municipalities Act (2 of 1916), Section 43-B — Election to office of President of Municipal Board — Can be challenged only by election petition presented according to provisions of Act — Writ jurisdiction of High Court is excluded — (1975) 1 All LR 391 (FB), Reversed. (Constitution of India Art. 226).

The election to the office of the President of the Municipal Board could be challenged only according to the procedure prescribed by the U. P. Municipalities Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. An election petition is to be presented after the election is over and there is no remedy provided at any intermediate stage. The election itself can be questioned only on one or more of the three grounds mentioned in sub-section (2) of Section 43B. The only ground in the present case on the basis of which the election of the President was questioned in writ jurisdiction of High Court was that there was a non-compliance with the provisions of R. 6 made under the Act. The jurisdiction to decide the validity of the election of a President is an exclusive one conferred on the District Judge. In the circumstances there was no room for the High Court exercising its powers under Article 226 in order to set aside the election. In setting aside the election the High Court plainly erred because it did not consider whether the result of the election had been materially affected by non-compliance with the rule in question. In any case that is a matter within the exclusive jurisdiction of the District Judge. AIR 1952 SC 64 and AIR 1928 Mad 1271 and (1859) 6 C. B. (NS) 336, Rel. on. (1975) 1 All LR 391 (FB), Reversed. (Paras 3 & 5)

Cases Referred: Chronological Paras

AIR 1952 SC 64 = (1952) 3 SCR 218
3, 4, 5

AIR 1928 Mad 1271 = 56 Mad LJ
162 4

(1859) 6 CB (NS) 336 = 141 ER 486
4

M/s. R. K. Garg and S. C. Agarwala, V. J. Francis and T. M. Ansari, Advocates of M/s. Ramamurti and

Co., for Appellants; Mr. M. C. Bhandare, Sr. Advocate (Mr. R. Nagaratnam and Mrs. S. Bhandare, Advocates of M/s. Bhandare Parekh & Co., Advocates with him), for Respondents.

The judgment of the Court was delivered by

ALAGIRISWAMI, J.:— To fill up a casual vacancy in the office of the President of the Municipal Board, Soron in the district of Etah in Uttar Pradesh, the District Magistrate issued notices to the members of the Board informing them that nomination papers should be filed in his office by 26th of September 1974 and if necessary the election will take place on 1st October, 1974. The 1st respondent thereupon filed a petition under Article 226 of the Constitution challenging the validity of the procedure adopted by the District Magistrate for holding the election and prayed for an order to the District Magistrate not to hold the election on 1st October, 1974. The election programme had been notified in the U. P. Gazette dated 21-9-74 but it was published in the Gazette dated 24-9-74.

2. The objection to the procedure for election was based on the allegation that it did not conform to the provisions of Rule 6 of the U. P. Municipalities (Conduct of Election of Presidents and Election Petitions) Order, 1964, which reads as follows:

"6. Appointment of date for nomination, etc.—

(1) As soon as may be after the election of members of a board is completed at a general election within the meaning of Section 43 of the Act or a casual vacancy occurs in the office of President of a board, the District Magistrate shall, by notification in the official Gazette, appoint for the election to the office of President of the Board:

(a) the date for making nominations which shall be a date at least four days after the date of notification; and

(b) the date for scrutiny of nominations which shall be the date next following the date fixed under clause (a); and

(c) the last date for withdrawal of candidatures which shall be the third day after the date fixed for scrutiny of nominations; and

(d) the date on which and the hours during which a poll shall, if necessary, be taken:

Provided that the date for taking the poll shall be a date not more than five days after the last date fixed under clause (c).

(2) On the issue of notification under sub-para (1), the Returning Officer shall give public notice of the election in Hindi in Form I by affixing a copy of the notice at his office and another copy at the office of the Board and in such other manner, if any, as he may think fit and shall also cause to be despatched by post under certificate of posting a copy of the notice to the last known address of each member."

Though there was a prayer in the writ petition for an order to the District Magistrate not to hold the election on 1-10-74, the learned Judges who admitted the writ petition directed that the election would be subject to ultimate decision in the writ petition. Consequently the election took place on the 1st of October and the 1st appellant was declared elected. Thereafter the 1st respondent filed an application for impleading the 1st appellant and the Municipal Board as parties and also claimed a further relief for quashing the election proceedings that took place on the 1st of October, 1974. The learned Judges allowed the petition and set aside the entire election proceedings relating to the election of the 1st appellant as the President of the Municipal Board.

3. We are of the opinion that the whole approach of the learned Judges of the High Court to this problem was mistaken. After the decision of this Court in *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency*, (1952) 3 SCR 218 = (AIR 1952 SC 64) there is hardly any room for Courts to entertain applications under Article 226 of the Constitution in matters relating to elections. Before dealing with this question we may set out Section 43-B of the U. P. Municipalities Act, which is the provision of law dealing with

cases where the election of the President is questioned:

"43-B. Judicial Officer to decide the question of validity of election to the office of President.—

(1) No election of the President shall be called in question except by an election petition presented in accordance with the provisions of this Act.

(2) An election petition may be presented by any member entitled to vote at the election or by a candidate who has been defeated at the election on one or more of the following grounds, that is to say—

(a) that the returned candidate has committed any corrupt practice within the meaning of Section 28;

(b) that the nomination of any candidate has been wrongly rejected, or the nomination of the successful candidate or any other candidate who has not withdrawn his candidature has been wrongly included;

(c) that the result of the election has been materially affected by —

(i) the improper rejection or refusal of a vote, or

(ii) any non-compliance with the provisions of this Act or of any rules or orders made under this Act.

(3) An election petition shall be presented to the District Judge, or in a district where there is no headquarters of the District Judge, to the Civil Judge, within whose jurisdiction the Municipality to which the election petition relates is situate:

.....
Thus the only way by which the election of a President can be called in question is by means of an election petition presented in accordance with the provisions of this Act. The election itself can be questioned only on one of the three grounds mentioned above. The only ground in the present case on the basis of which the election of the appellant was questioned is that there was a non-compliance with the provisions of Rule 6, already referred to. Under the Act the non-compliance with any rule or order made under the Act or any provision of the Act does not ipso facto result in the election being set aside. That result can be set aside only if the Election Tribunal comes to the

conclusion that the result of the election has been materially affected by such non-compliance. The jurisdiction to decide the validity of the election of a President is an exclusive one conferred on the District Judge. In the circumstances there was no room for the High Court exercising its powers under Article 226 in order to set aside the election. In setting aside the election the High Court plainly erred because it did not consider whether the result of the election had been materially affected by non-compliance with the rule in question. In any case that is a matter within the exclusive jurisdiction of the District Judge.

4. As early as 1928 in its decision in *Desi Chettiar v. Chinnasami Chettiar*, (AIR 1928 Mad 1271) the Madras High Court observed:

"It is clear that there is another side of the question to be considered, namely, the inconvenience to the public administration of having elections and the business of Local Boards held up while individuals prosecute their individual grievances. We understand the election for the elective seats in this Union has been held up since 31st May because of this petition, the result being that the electors have been unable since then to have any representation on the Board, and the Board is functioning, if indeed it is functioning, with a mere nominated fraction of its total strength; and this state of affairs the petitioner proposes to have continued until his own personal grievance is satisfied."

These observations were quoted with approval by this Court in *Ponnu-swami's case* (AIR 1952 SC 64) (*supra*). In that decision this Court arrived at the following conclusions:

"(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress".

In absence of any express provisions in the Act to the contrary these principles are applicable equally to cases of elections to local bodies also. This Court also pointed out that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. It referred to the decision in *Wolverhampton New Water Works Co. v. Hawkesford*, ((1859) 6 C.B. (N. S.) 336) where it had been held:

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the

second class. The form given by the statute must be adopted and adhered to".

and after referring to the provisions of the Representation of the People Act pointed out that it will be a fair inference that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage. This Court also held that the word 'election' connotes the entire procedure to be gone through to return a candidate whenever we talk of elections in a democratic country.

5. It follows that the right to vote or stand for election to the office of the President of the Municipal Board is a creature of the statute, that is, the U. P. Municipalities Act and it must be subject to the limitations imposed by it. Therefore, the election to the office of the President could be challenged only according to the procedure prescribed by that Act and that is by means of an election petition presented in accordance with the provisions of the Act and in no other way. The Act provides only for one remedy, that remedy being an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. These conclusions follow from the decision of this Court in *Ponnuswami's case* (AIR 1952 SC 64) (supra) in its application to the facts of this case. But the conclusions above stated were arrived at without taking the provisions of Article 329 into account. The provisions of Article 329 are relevant only to the extent that even the remedy under Article 226 of the Constitution is barred as a result of the provisions. But once the legal effect above set forth of the provision of law which we are concerned with is taken into account there is no room for the High Courts to interfere in exercise of their powers under Article 226 of the Constitution. Whether there can be any extraordinary circumstances in which the High Courts could exercise their power under Article 226 in relation to elections it is not now neces-

sary to consider. All the considerations applied in coming to the conclusion that elections to the legislatures should not be delayed or protracted by the interference of Courts at any intermediate stage before the results of the election are over apply with equal force to elections to local bodies.

6. The appeal is, therefore, allowed and the judgment of the High Court set aside. There will, however, be no order as to costs.

Appeal allowed.

AIR 1975 SUPREME COURT 2144

(From: Allahabad)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

Sh. Navneet Ram Batra, Appellant v. State of Uttar Pradesh and others, Respondents.

Civil Appeal No. 1154 of 1972,
D/- 17-9-1975.

**(A) Land Acquisition Act, (1894),
Sections 17-5A — Notification dispensing with enquiry under Section 5-A — By whom it can be impugned.**

The appellant who is owner of waste or arable land to which Sections 17 (1) and 17 (4) are applicable and therefore enquiry under Section 5-A could properly be dispensed with, cannot object to the same notification because it also relates to another land to which Ss. 17 (1) and 17 (4) are not applicable when the owner of that land has not chosen to challenge it. AIR 1965 SC 1763, Distinguished. (Para 2)

Section 5A should be understood in the background of provisions of Section 4 (1). The latter parts of Section 5A would apply to a case where lands in any locality are notified under Section 4 (1). When a locality in the sense of a village or group of villages is notified for acquisition, any person interested in any land in that locality would be entitled to be heard under Section 5A. But

*(Special Appeal No. 324 of 1962,
D/- 18-12-1969—All.)

where land proposed to be acquired is specifically mentioned in the notification, it is only the person interested in that land who is entitled to be heard under S. 5A. (Para 4)

Cases Referred: Chronological Paras
AIR 1965 SC 1763 = ILR (1965) 2
All 564 3

M/s. Yogeshwar Prasad, S. K. Bagga, Mrs. S. Bagga and Miss Rani Arora, Advocates of M/s. Bagga Advocate, for Appellant; Mr. G. N. Dikshit, Sr. Advocate (Mr. O. P. Rana, Advocate with him), for Respondents.

The Judgement of the Court was delivered by:

ALAGIRISWAMI, J.:— The appellant is a tenant of plot No. 428 in mauza Dehra Khas, pargana Central Doon, district Dehradun. This land along with some other pieces of land was notified under Section 4 (1) of the Land Acquisition Act on February 8, 1962 for acquisition for the purpose of setting up an industrial estate at Dehradun. By the same notification, under Section 17 (4) of the Act it was directed that the provisions of Section 5A shall not apply on the ground that the provisions of Section 17 (1) were applicable to the facts of the case. He filed a writ petition out of which this appeal arises for the issue of a writ of certiorari for quashing the notification dated 8th February, 1962. He made various allegations which it is not necessary to go into for the purpose of this appeal. A learned single Judge of the Allahabad High Court dismissed the petition and an appeal filed by him was dismissed by a Division Bench of the same High Court.

2. The only point argued before us was that there was a pucca construction on plot No. 436 which was also notified for acquisition under the impugned notification and consequently the provisions of S. 17 (4) would not be applicable to that land as it was not arable or waste land which could be acquired by dispensing with the enquiry under Section 5A and as such the whole notification is bad and should be quashed. Admittedly the appellant's land is a waste and arable land and thus falls under Section 17 (1). There was

to visit the spot, prepare a map on scale of the plaintiffs' houses, the land in suit, show if there existed any constructions on it and mark the place where the plaintiffs alleged his demolished constructions existed. The commissioner was also directed to serve the defendants 1 and 2 with the order and notice of injunction and to submit his report by 3rd February, 1964.

7. Rule 18 of Order 26, Civil Procedure Code provides that where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders and that where all or any of the parties do not so appear, the Commissioner may proceed in their absence. Rule 9 of Order 26 makes provision for local investigation it provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Sub-clause (2) of Rule 10 of Order 26 provides that the report of the Commissioner and the evidence taken by him but not the evidence without the report shall be evidence in the suit and shall form part of the record but the court or with the permission of the court any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred in his report, or as to his report, or as to the manner in which he has made the investigation. Under R. 7 of O. 39, Civil Procedure Code the Court may on the application of any party to a suit and on such terms it thinks fit make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. Rule 8 of Order 39, Civil Procedure Code provides that an application by the plaintiff for an order under Rule 6 or Rule 7 may be made after notice to the defendants at any time after institution of the suit. Thus there are two provisions for making local investigation. Under Rule 9 of Order 26 local investigation may be ordered to be made by a commission where the court deems it to be requisite or proper for the purposes of elucidating any matter in dispute. Under Rule 7 of the Order 39 the court may on the motion of any party to the suit make an order or inspection of any property which is the subject-matter of such suit or to which any question may arise therein. In the instant case, an application was moved by the plaintiffs for inspection of the sahan in dispute and the houses of the plaintiffs

and the defendants and to prepare a site plan relating thereto. On this application the trial court passed the order appointing a commissioner to visit the spot, prepare a map on scale of the plaintiffs' house and the land in suit and to show if there existed any constructions over it, and also to mark the place where the plaintiffs alleged their demolished constructions existed. This order is obviously covered by Rule 7 of Order 39 and not by Rule 8 or Rule 9 of Order 26, Civil Procedure Code. A combined reading of Rule 7 and Rule 8 of Order XXXIX, Civil Procedure Code would make it clear that it is not obligatory on the part of the Court to issue notice to the defendants before making an order under Rule 7. This is borne out from the expression 'may' used in Rule 8. It is well settled that in construing a power the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person* for securing which the power was given. And, as was held in Province of Bombay v. Khushaldas, AIR 1950 SC 222 enabling words are always potential and never in themselves significant of any obligation. The word 'may' used in Rule 8 of Order 39 is only an enabling word and is in itself not significant of any obligation. In appointing a commissioner for making inspection of any property which is the subject-matter of the suit or as to which any question may arise in the suit the court has to bear in mind the urgency of the situation and the necessity for passing the interim order to protect the rights of the parties or to secure the interests of justice. In such matters the court has to exercise its discretion whether to appoint a commission ex parte without notice to the opposite party with regard to any of the matters mentioned in rule 7 of Order 39. If the Court exercises its discretion, to issue a commission for inspection of any property which is the subject-matter of the suit or as to which any question may arise therein, without giving notice to the opposite party the order would not be illegal. That being so, the order passed by the trial Court issuing commission for the purposes referred to above was not illegal.

8. The submission on behalf of the appellants with regard to the report of the commissioner was that the commissioner had exceeded his authority by giving his opinion about the age of the house of the defendants and their chabutra. The commissioner was appointed on the application of the plaintiffs. The plaintiffs had not asked in their application 6-C for a report about the age of the constructions made by the defendants. The trial Court had also not directed the commissioner to

submit his report with regard to the age of the constructions made by the defendants. The commissioner had, therefore, no authority to give his opinion about the age of the defendants' constructions. The appellants were, therefore, justified in contending that the commissioner had exceeded his power and authority while opining about the age of the constructions of the defendants. The appellate court below while reversing the findings received by the trial court relied on the report of the commissioner. It observed:—

"According to commissioner, defendants' houses and chabutra were of recent construction, while plaintiffs' houses were admittedly very old. If defendants had no houses at this place till recently, it was highly unlikely for the defendants to be tying their cattle and otherwise using his land when they were living far away from it."

Thus, the opinion of the Commissioner with regard to the age of the defendants' houses and chabutra weighed with the appellate court below in coming to the conclusion that the land in dispute was the sahan of the plaintiffs. The Commissioner had in his report opined that the houses of the defendants were 'of recent construction' and the chabutra of the defendants was 'quite new'. This opinion was accepted and relied upon by the appellate court below. The commissioner was, however, not called upon to give this opinion. A report with regard to the age of a building cannot straightway be accepted nor can it be a conclusive proof of the age of the building. It is merely one of the pieces of evidence amongst other evidence led by the parties. That apart, the commissioner gave no reasons in support of his aforesaid opinion. He was also not examined in the case as a witness to support his aforesaid opinion with regard to the age of the constructions of the defendants. It was, therefore, not open to the appellate court below to rely on that part of the opinion of the commissioner. The basic questions, in view of the respective contentions of the parties with regard to the land in dispute, the plaintiffs contending that it was their sahan land and the defendants claiming the same to be their sahan land, thus are whether the houses of the defendants were in existence on 1st July, 1952, and if so what portion of the disputed land is appurtenant to their houses and what portion of the said land is appurtenant to the plaintiffs' houses and whether the plaintiffs or the defendants have been in possession of the land in dispute or any portion thereof. The appellate court below has not approached the case in its correct perspective and has erred in relying on the aforesaid opinion of the commissioner.

9. The learned Counsel for the appellants further urged that the courts below had erred in relying on paper No. 33A1. The submission was that the Court should have compared the thumb impression appearing on the said paper with the other thumb impression of Murli on the record. In my view, this contention has no force. Murli had denied his thumb impression on paper No. 33A1. There was no convincing evidence on the record to establish that paper No. 33A1 bore the thumb mark of Murli. The court cannot assume the role of an expert and compare the disputed thumb impression with the other thumb impression of Murli on the record. The court below was, therefore, justified in not placing reliance on the said document.

10. In view of the pleadings of the parties it was necessary for the trial court to frame the following issue in the case:—

"Whether the defendants' houses in question marked by letters DSTB and ABXY as well as the chabutra BSTW were in existence on 1st July, 1952? if so, what portion of the disputed land is appurtenant to the said houses of the defendants and what portion of the said land is appurtenant to the plaintiffs' houses?"

A re-trial of the suit is, therefore, necessary.

11. In the result the appeal is allowed, the decree passed by the appellate court below is set aside, the decree passed by the trial court is also set aside, the suit is remanded to the trial court with the direction to re-admit the suit to its original number, frame the aforesaid issue and re-try the suit giving an opportunity to the parties to the suit to adduce further evidence, if any, and decide the suit on the basis of the evidence already recorded and the evidence which the parties may further produce. The parties shall bear their own costs in this Court.

Appeal allowed

AIR 1975 ALLAHABAD 402

S. MALIK, J.

Sri Masood, Petitioner v. Bikram Singh, Respondent.

Election Petn. No. 8 of 1974, D/- 3-2-1975.

(A) Representation of the People Act (1951), Section 33 (4), Proviso and Section 100 (1) (c) — Word "misnomer" in Proviso — Meaning of — Printing of candidate Madood's name as Masood in electoral roll held was misnomer — Nomination paper filed by Madood held was valid.

ES/FS/B626/75/GNB

The word "misnomer" in Section 33 (4) Proviso means giving an incorrect or wrong name to a person even in a legal document and where the election candidate whose name was Madood filed his nomination paper describing himself as Madood and the deposit also had been made in the name of Madood but in the electoral roll he was recorded as Masood it was held that the details of the description of the members of the candidate's family in the electoral roll together with other material showed that the candidate's name was wrongly printed as Masood in the electoral roll and the nomination paper filed by the candidate was valid.

(Paras 11, 12)

(B) Representation of the People Act (1951), Section 33 (4) Proviso and Section 100 (1) (c) — Candidate filing nomination paper — His name wrongly recorded in electoral roll — No steps taken to get mistake corrected — Omission does not absolve Returning Officer of duty to apply Proviso and admit nomination paper.

(Para 13)

N. N. Mukerjee and Satya Moha, for Petitioner; Gopi Nath Kunzru, K. N. Tripathi and D. P. S. Chouhan, for Respondent.

ORDER:— This election petition has been filed under Section 81 of the Representation of the People Act, 1951, (hereinafter referred to as the Act) by the candidate set up by Congress (Organisation) Party during the last General Elections held in February, 1974 and the only ground taken is that the election of the Bhartiya Kranti Dal candidate, respondent Vikaram Singh to the Uttar Pradesh Legislative Assembly from 383 Agota Assembly Constituency in district Bulandshahr be set aside because the nomination paper of the petitioner was improperly rejected within the meaning of Section 100 (1) (c) of the Act.

2. The relevant facts are that the petitioner was one of the eight candidates for 383 Agota Assembly Constituency. The notification for holding the General Elections was issued on the 17th of January, 1974. The dates fixed for filing of nomination papers were from 19th of January to 24th of January, 1974, and the date for scrutiny of nomination papers was the 25th of January, 1974, 26th of February, 1974 was the polling date and votes polled were counted on 28-2-1974 fixed for the purpose. The result was also declared on the same day. The petitioner filed two nomination papers on the proper form on 23-1-1974 (vide Ex. P-14 and certified copy Ex. R-1). Both these nomination papers were filed by the petitioner as Madood Ali, son of Tariqat Ali, post office Gutholi, village Lohgara, district Bulandshahr. In both it was also mentioned that his name was printed at Serial No.

76 in part 140 in the electoral roll of the Constituency. Subsequently, on 24-1-1974 he filed the third nomination paper (Ex. P-15) and in this his name was given as Masood alias Madood Ali and the rest of the details were the same. It is not in dispute that the necessary security money was duly deposited in the name of Madood Ali.

3. On the 25th of January, 1974 i.e., on the date of scrutiny the objection application (Ex. P-17) was filed by one of the candidates, namely, Jagbir Singh Sirohi, set up by Congress (R). A perusal of the objection application filed before the Returning Officer will show that the objection raised was that the actual name of the petitioner is "Madood" and not "Masood", and that the petitioner filed the third nomination paper in the name of Masood alias Madood Ali because his actual name viz., Madood has not been printed in the electoral roll and as his actual name is not to be found in the electoral roll, he is not duly qualified to stand as a candidate. It was also mentioned in that objection-application that Madood actually is the elder brother of the petitioner. Against this objection-application the petitioner filed his replies which is Ex. P-19 on the record and it was supported by a counter-affidavit (Ex. P-6). In his reply it has been alleged that the name of the petitioner is to be found at Serial No. 76 of the electoral roll and that the sum of Rs. 250/- deposited on 23-1-1974 was also deposited by him. It was further averred that the third nomination paper filed in the name of Masood alias Madood Ali was also filed nominating him as a candidate. The petitioner took the plea that he has two names — one Masood and the other Madood. The order by which the Returning Officer rejected the petitioner's nomination papers is Ex. P-7 and a perusal of the same will show that even before him during arguments it was contended that the name of the petitioner is Madood and that due to a printing error his name was printed as Masood at Serial No. 76. Besides these facts, it was also given out that from a comparison of the electoral roll of 1971 which was also filed before the Returning Officer before scrutiny was done, with the electoral roll of 1973, it will appear that all the names of the family members of the petitioner were correctly printed in the electoral roll of 1971 from Serial No. 72, to Serial No. 81, that in the electoral roll of 1973 at the identical serial numbers the same persons were shown and but for some mistakes in printing the names, all the other details are the same and that at Serial No. 76 instead of Madood, Masood was wrongly printed. It was also pleaded in the alternative that in any case, as Madood also is known as Masood, at least his third

nomination paper should be accepted. The Returning Officer, as is apparent from Ex. P-7, did not consider whether the proviso to Section 33 (4) of the Act was applicable to the facts of this case. The only question he considered was whether the name of the petitioner actually finds place in the electoral roll of 1973. He came to the conclusion that at Serial No. 76 instead of the name of the petitioner, the name of his brother Masood was printed and his name not being in the electoral roll of 1973 he was not duly qualified to be a candidate and on that ground rejected his nomination papers.

4. Keeping in view the pleadings of the parties the following issues were framed:—

Issues:—

1 (a) Whether the petitioner is enrolled as a voter in the electoral roll of the constituency at Serial No. 76, part 140 and his name by misnomer and/or owing to printing mistake has been written as "Masood" and not "Madood"?

1 (b) Whether the petitioner is sometimes called as "Masood" and not "Madood"?

2. Whether the nomination paper of the petitioner was improperly rejected? If so, what is its effect?

3. Whether the security money has not been deposited in accordance with the Rules of Court? If so, what is its effect?

4. Whether the election petition is liable to be rejected for non-compliance with the provisions of Section 81 of the Representation of the People Act, 1951?

5. Whether in the array of respondents the name of respondent is wrongly written as Vikaram Singh instead of "Vikram Singh"? If so, its effect?

6. To what relief, if any, is the petitioner entitled?

5. Neither Issue No. 5 nor Issue No. 4 was pressed. Moreover, nothing was brought to the notice of the Court due to which it could be said that the petition was not filed in accordance with the provisions of Section 81 of the Act.

6. A perusal of the rest of the issues will show that the only question involved in the case is whether the person enrolled at Serial No. 76 of Part 140 of the electoral roll is the same person as Madood, the petitioner and in view of the proviso to Section 33 (4) of the Act it was a misnomer and, therefore, the Returning Officer should have accepted at least the nomination papers filed in the name of Madood on 23-1-1974. Of course, the question as to whether the petitioner also is known as Masood or has a name of Masood, was agitated by both the parties and evidence was adduced re-

garding the same. Under the circumstances, all these issues may be taken up together.

7. The question as to whether the petitioner is also known as Masood may be taken up first. As P. W. 1 the petitioner examined his father Tariqat Ali. He stated that he has two sons, Masood Ali and Madood Ali alias Masood Ali and that Masood Ali is two years older than the petitioner whose name is Madood Ali alias Masood Ali. He proved other facts and a perusal of his cross-examination will show that it has not been controverted that the petitioner's family, of which his father is the head reside in village Lohgara in house No. 145 and that all the persons recorded from Serial Nos. 72 to 81, in both the electoral rolls i.e., of 1971 and 1973 are members of his family. It has also been proved and as a matter of fact, it was not challenged by the respondent that there was no other person named Masood or Madood besides the petitioner and his elder brother whose father's name is Tariqat and which at places has been wrongly printed as Kariqat in the electoral roll of 1973 and that the difference in age between the two brothers is of two years. It has also come in evidence that in 1971 Masood Ali was 28 years old and Madood Ali was 26 years old. As a matter of fact, one of the respondent's witnesses, R. W. 2 Biniyad Ali also admitted these facts. It is thus apparent that at serial No. 76, but for the name Masood all the other details fit in with the description of the petitioner or in other words, Madood and this fact is not in dispute. In this connection, reference may be made to the High School Certificate and the other certificate of the petitioner got proved by the respondent. Tariqat, no doubt, stated that as there is considerable resemblance between his two sons, the petitioner often by mistake is also referred to as Masood by outsiders. But it is difficult to believe that two brothers could have been given the same name. Moreover, the statement of the father that the petitioner due to mistaken identity at times is called Masood, clearly proves that Masood is not a name of the petitioner and that his real name is Madood though he may at times be called Masood by mistake. The statements made by the witnesses of the respondent on this point also prove the same. Though the respondent's witnesses did not admit that the petitioner at times is called Masood by mistake, Buniyad Ali, a relation of the petitioner admitted in his cross-examination that the two brothers Madood and Masood resemble one another.

8. It is apparent that the third nomination paper was filed by the petitioner when he discovered that his name

"Madood" had been wrongly printed as "Masood" in the electoral roll at Serial No. 76 of 1973 so that his nomination papers may not be rejected because the name "Madood" did not appear in the electoral roll of 1973. But it could not be argued, even if it appears that the petitioner wrongly alleged that he was also known as Masood, that the proviso to sub-section (4) of Section 33 of the Act would not apply and because the Returning Officer was satisfied that the petitioner's name was not Masood, he was justified in rejecting all the nomination papers.

9. The proviso to sub-section (4) of Section 33 of the Act may be quoted:

"Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate mentioned in the electoral roll shall affect the full operation of the electoral roll with respect to such person in any case where the description in regard to the name of the person.....is such as to be commonly understood; and the Returning Officer shall permit any such misnomer or inaccurate description or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description or printing error in the electoral roll shall be overlooked."

It is not in dispute that the proviso quoted is mandatory and, therefore, it has to be considered whether in view of these provisions the Returning Officer could be said to have rightly rejected the petitioner's nomination papers filed on 23-1-1974.

10. The meaning of the word "Misnomer" as given in the Oxford Dictionary and also in the New Standard Dictionary, 1952 Edition of the English Language is:—

"the giving of a wrong name to a person in a legal document; a name wrongly or mistakenly applied; a misnaming."

Similarly, in Aiyar's Law Lexicon Dictionary "Misnomer" has been described as:

"the using one name for another; a misnaming; mistake in a name; the giving an incorrect name to a person in a pleading, deed, will or other document."

11. Therefore, from what has been quoted, it is apparent that "misnomer" really means giving an incorrect or wrong name to a person even in a legal document. It may be considered whether the name "Masood" mentioned at Serial No. 76 in Ex. P-13 really is a wrong name describing the petitioner whose name, it is not in dispute, is Madood. It may be repeated that it is nobody's case and even the Returning Officer did not think it

probable that in fact, there was another person in village Lohgara whose description might fit in with the description given at Serial No. 76. The finding of the Returning Officer, on the other hand, was that the name of the elder brother of the petitioner was repeated and he was recorded as a voter both at Serial No. 75 and at Serial No. 76. To quote the actual words of the Returning Officer,

"At S. No. 75 Masood has been shown as son of Karikat and at S. No. 76 Masood has been shown as the son of Tarikat. Even if persons registered at S. Nos. 75 and 76 are taken to be the sons of the same father i.e., Tarikat, it would only mean the duplicity in the registration of Masood as voter. It cannot from any stretch of imagination make Madood Ali out of Masood".

A comparison of the two electoral rolls which were before the Returning Officer and were actually considered by him together with other material brought to his notice will show that any ordinary man of average intelligence could have easily concluded from all the details appearing from Serial No. 72 to Serial No. 81 that the person described at Serial No. 76 was Madood and that only his name was wrongly printed as Masood in Ex. P-13 the electoral roll of 1973.

12. Under the circumstances, the proviso to sub-section (4) of Section 33 of the Act, in my view, applies with all force to the facts of this case and the Returning Officer should have had no difficulty in coming to the conclusion that the person recorded at serial No. 76 in Ex. P-13 was actually Madood Ali, the petitioner. It may be repeated that the deposit also had been made in the name of Madood and that admittedly, there was no mistake in the nomination papers filed on 23-1-1974.

13. It was argued on behalf of the respondent that the filing of the third nomination paper by the petitioner proves that the petitioner had come to know about the mistake in printing his name in the electoral roll of 1973. In view of the provisions of the proviso to Section 33 (4) of the Act it was his duty to have brought this mistake to the notice of the Returning Officer and through him get the mistake corrected. And as the petitioner did not get it done, the Returning Officer rightly rejected his nomination papers. The contention has no force. Of course, the petitioner could have taken such a course but omission on his part to take steps to get the electoral roll rectified did not absolve the Returning Officer of his duty to apply the proviso to sub-section (4) of Section 33 of the Act and to admit the first two nomination papers because of reasons discussed.

14. Under the circumstances after considering the entire evidence on the re-

cord and in view of what has been discussed, I find that within the meaning of Section 100 (1) (c) of the Act the election of the respondent, Shri Vikaram Singh has to be set aside and the same is hereby declared to be void. The petition is allowed. The petitioner shall get Rs. 400/- as costs from the respondent. Let the Election Commission and the Speaker, U. P. Legislative Assembly be informed about the result of this election petition in accordance with Section 103 of the Act and a copy of this judgment be also sent to the Election Commission as soon as possible.

Petition allowed.

AIR 1975 ALLAHABAD 406

M. P. MEHROTRA, J.

Gajraj and others, Appellants v. Ramadhar and others, Respondents.

F. A. F. O. No. 262 of 1971. D/- 23-5-1974.*

(A) Civil P. C. (1908), Order 41, Rr. 23, 27, O. 26, Rule 9 — Suit for possession — Lower appellate court finding that clear demarcation of land was necessary for giving a finding on question of title — Procedure.

The appellate court has the power to issue a commission for local inspection in the same manner in which a trial court can act under Order 26, Rule 9. Thus where the lower appellate court finds that clear demarcation of boundaries is necessary for giving a finding on the question of ownership what it should do is not to remand the entire suit under O. 41, Rule 23 but issue a commission under Order 26, Rule 9. The issuance of a commission for local investigation will not necessitate a recourse to the provisions of taking additional evidence under Order 41, Rule 27. AIR 1932 All 270, Ref.

(Paras 4, 5)

Cases Referred: Chronological Paras
1971 All LJ 244 = ILR (1970) 2 All 689

AIR 1932 All 270 = 135 Ind Cas 243 3, 4

V. K. S. Chaudhary, for Appellants; Narendra Pratap Singh, for Respondents.

JUDGMENT:— This first appeal from order is directed against the order of the lower appellate court allowing an appeal and remanding the suit to the trial court with certain directions.

2. The brief facts are these. The plaintiffs-respondents sued for possession of a piece of land and mesne profits.

*(From order of remand passed by S. R. Bhargava, 4th Addl. Civil J., Banda, in Civil Appeal No. 156 of 1970. D/- 2-6-1971).

They alleged that the land in suit formed part of plot No. 50-B. The boundaries of the disputed land were given in the plaint. The defendants Nos. 1 to 3 were alleged to have taken illegal possession of the land in dispute which formerly had certain structures standing thereon, but after the structures fell down, it was in the shape of a khandhar. The said defendants started raising new constructions and thus arose the necessity for filing the suit. The defendants contested the suit and they denied that the land in dispute formed part of plot No. 50-B. According to them, it formed part of plot No. 51. They attacked the boundaries given in the plaint as vague and incorrect and contended that the land in dispute was part of their house and had been in their possession since long. Certain other pleas were also raised. The trial court framed the necessary issues and tried the suit. It held that the land in dispute had not been specifically demarcated, hence no finding about the title could be given. Issues Nos. 2 and 6 were left undecided on the ground that it was not possible to decide the said issues without deciding the question of title to the disputed land. The suit was, therefore, dismissed by the trial court. The plaintiffs felt aggrieved and filed an appeal in the lower appellate court. The latter passed the order of remand with certain directions. The trial court's decree and judgment were set aside and the suit was remanded for being re-registered at its original number. The trial court was directed to issue a fresh survey commission to get the number of the disputed land fixed. Certain other connected directions were given. The defendants felt aggrieved and came in appeal to this Court and in support thereof I have heard Sri V. K. S. Chaudhary, the learned Counsel for the defendant-appellants and in opposition, Sri N. P. Singh, the learned counsel for the plaintiff-respondents, has been heard.

3. Sri Chaudhary's main contentions are these. There was no justification for remanding the suit under Order 41, Rule 23, Civil Procedure Code. He further submitted that the plaintiffs were given repeated opportunities to get a local inspection made by a commissioner to be appointed by the Court, but they failed to avail of the said opportunity and, therefore, the lower appellate court was not justified in allowing such an opportunity to be given to them. In this connection, the learned Counsel took me through the order sheet of the trial court. I do not propose to discuss the order sheet of various dates. It is sufficient to say that there was some laxity on the part of the plaintiffs in the matter of getting a local inspection made by the Commissioner appointed by the Court. However, the order sheet also discloses that the attitude of

the defendants-appellants on occasions was not very co-operative and the writ of commission could not be executed on account of such non-cooperation from their side on the said occasions. Sri Chaudhary also submitted that the remand order should be set aside and the lower appellate court should be directed to decide the appeal itself on merits. He suggested that in case the plaintiffs wanted to bring on record additional evidence in the shape of a fresh commission to be taken out for the survey of the plot, then recourse was bound to be taken to the provisions of Order 41, Rule 27, Civil Procedure Code and he suggested that the matter should be left to the discretion of the lower appellate court to decide whether to entertain such additional evidence in case the same was sought to be brought on record by the plaintiff-respondents. He placed reliance on Prayag Ice and Oil Mills, Ali-garh v. State of U. P., 1971 All LJ 244. The learned Counsel for the plaintiff-respondents contested the submissions made by Shri Chaudhary.

4. Having considered the matter I feel that Sri Chaudhary is right in his contention that there was no occasion for a remand of the suit under Order 41, Rule 23, Civil Procedure Code. It is well known that a remand of the entire suit under the said provision should be an exception and should be taken recourse to only as a last resort. In the normal course the court should decide the case on the basis of the record in existence. However, the Appellate Courts have been given power to entertain additional evidence, if necessary, or to remit an issue for enquiry and report to the trial court under Order 41, Rule 25, Civil Procedure Code. There is a long catena of case law which has laid down that the provision of remand is not to enable the parties to have a second innings with a view to fill up the lacuna in the pleadings or evidence. I do not propose to refer to these cases as the law is well understood in this respect. The lower appellate court in the instant case felt that without a clear demarcation of the land in dispute, it was not possible to give any finding on the question of title or ownership of the disputed land and, therefore, the suit was remanded to the trial court with a direction that the trial court should issue a fresh survey commission for the demarcation of the disputed land and for ascertaining the number of the plot in which it fell. In my view, for that limited purpose, it was not necessary to remand the entire suit under Order 41, Rule 23, Civil Procedure Code. The said purpose could be well achieved by the issuance of such a commission by the lower appellate court itself. I do not agree with Sri Chaudhary that the issuance of such a commission can only be done by way of the reception of

additional evidence under Order 41, Rule 27, Civil Procedure Code. In my view that provision will not be applicable to a case where the Court itself desires a local inspection of the spot to be made and in such a situation the court can act under Order 26, Rule 9, Civil Procedure Code. It cannot be denied that an appellate Court has the power to issue a commission for local inspection in the same manner in which a trial court can act under Order 26, Rule 9, Civil Procedure Code. This follows from Section 107, Civil Procedure Code and if any authority be needed, then a reference can be made to Ram Dihal Lal v. Lakhpal Lal, (AIR 1932 All 270). In my view 1971 All LJ 244 (supra) does not support the contention raised by Sri Chaudhary. It was observed there as under:—

"Issue of a commission is something which is quite different from production of a document or examination of a witness. Provisions regarding issue of a commission are to be found in Order 26 of the Code. Rule 9 of Order 26 provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court."

5. In my view, therefore, the issuance of a commission for local investigation by the lower appellate Court will not necessitate a recourse to the provisions of Order 41, Rule 27, Civil Procedure Code. I agree with the lower appellate court that in the facts and circumstances of the case, it was desirable in the interest of justice that there should be a local investigation of the land in dispute with a view to ascertain its exact location and then to decide the controversy between the parties.

6. I, therefore, allow this appeal, set aside the order of the lower appellate court and direct that the said Court shall itself decide the appeal after issuing a commission for local inspection of the land in dispute with a view to ascertain its exact location and number and other necessary details. The Commissioner must be directed to prepare a correct map of the spot and to submit the same along with his report. After such report along with the map is obtained and after considering the objections of the parties to the same, if any, the lower appellate court will decide the appeal on the basis of the entire record including the report of the Commissioner. The parties shall bear their own costs.

Appeal allowed.

AIR 1975 ALLAHABAD 408

S. MALIK, J.

Hari Shankar Tripathi, Petitioner v. Sheo Harakh, Respondent.

Election Petn. No. 45 of 1974, D/-10-2-1975.

(A) Representation of the People Act (1951), S. 81 (1) — Limitation for election petition — Period expiring during High Court vacation — Petition filed on first working day of reopening — If and how far not maintainable — (High Court Rules and Orders — Allahabad High Court Rules, Vol. 1, Chapter 15-A, R. 3).

In Allahabad High Court an election petition has to be presented to the Registrar and not to any Judge in view of R. 3 in Chapter 15-A of the Rules of the High Court. During vacation of the High Court though the Judges do not sit for the usual work and the courts are not held, the office remains open and the Registrar is on duty. There is no rule restricting the functions of the Registrar or the office of the High Court during the vacation. Therefore an election petition can be presented to him during the vacation. Thus when the result of the election was declared on 30-4-1974 and the election petition was filed on 8-7-1974, the first working day after reopening of the High Court from vacation extending from 25-5-1974 to 7-7-1974 it is time barred, the limitation period for the petition having expired on 14-6-1974 and there being no justification for the non-presentation of the petition to the Registrar before the expiry of that period. Case law discussed.

(Paras 7, 8 and 10)

Cases Referred: Chronological Paras
 AIR 1974 SC 480 = (1974) 3 SCR 31 4
 AIR 1939 Pat 667 = 20 Pat LT 905 (FB) 9
 (1882) ILR 5 Mad 189 (FB) 9

R. C. Srivastava, Satish Trivedi, O. P. Misra and Jagdish Misra, for Petitioner; S. N. Misra, D. Sharma, V. S. Sanera, S. K. Tewari and S. Shanker, for Respondent.

ORDER:— This election petition has been filed by Hari Shanker Tripathi, one of the ten candidates for the membership of the Uttar Pradesh Legislative Council from Basti cum Gorakhpur Local Authority Constituency, praying that it be declared that the election of respondent No. 1 was void and that actually the petitioner received the majority of valid votes and, therefore, he be declared to have been duly elected.

2. Keeping in view the allegations made by the parties, 20 issues were framed

ES/FS/B631/75/BDB

ed. Issue No. 8 being "whether the election petition has been properly presented and is within time?" was taken up as a preliminary issue and the learned counsel for the parties were heard at length.

3. As laid down in Section 81 (1) of the Representation of the People Act, 1951 (hereinafter referred to as the Act) an election petition has to be presented to the High Court within 45 days from the date of election of the returned candidate. It was conceded by the parties that a High Court has powers to frame rules relating to the presentation and trial of election petitions. The Allahabad High Court has framed rules or special provisions relating to the trial of election petitions embodied in Chapter XV-A of the Rules of Court, Vol. I. Rule 3 of Chapter XV-A lays down "Every election petition shall be presented to the Registrar....."

4. The relevant facts are that after counting of votes respondent No. 1 was declared to have been elected by the Returning Officer on 30th April, 1974. In view of the provisions quoted above, the election petition should have been presented to the Registrar of the High Court within 45 days from 30-4-1974. Therefore, the period of limitation expired on the 14th June, 1974. The High Court had its vacation in 1974 from the 25th of May to the 7th of July, both days inclusive. The petition was presented by the petitioner to the Registrar on the 8th July, 1974, which was the first working day after the vacation. So the question which arises is whether the election petition would be deemed to have been presented within the period of limitation, because the limitation of 45 days expired during the High Court vacation and the petition was presented on the first working day after the vacation. Observations made by the Supreme Court in *Hukumdev Narain Yadav v. Lalit Narain* (AIR 1974 SC 480) afford almost a complete answer.

5. The Supreme Court has observed for reasons which need not be repeated, that just as under Section 86 (1) of the Act, for non-compliance with the provisions of Sections 82 and 117 which are mandatory, an election petition has to be dismissed, an election petition not presented within the period prescribed in Section 81 of the Act, the provisions of which are equally mandatory, has to be dismissed as time-barred. It was further observed that Sections 4 to 24 of the Limitation Act do not apply to election petitions under the Act, but Section 10 (1) of the General Clauses Act does apply and enables the filing of the petition on the next working day of the Court if the period of limitation expired when the High Court was closed.

6. The appeal decided by the Supreme Court was against the judgment of the Patna High Court. The relevant facts of that case were that the election petition was presented to the Court on Monday, March 20, 1972 instead of on Saturday, March 18, 1972 which was the last day of limitation. Under Rules 6 and 7 of the Rules framed by the Patna High Court for disposal of election petitions an election petition could only be filed before a Judge of the High Court sitting in open Court. Therefore, as the Judges do not sit on a Saturday and actually did not sit on Saturday, March 18, 1972 the petition was presented to the Judge concerned sitting in open Court on Monday, March 20, 1972. Even then the Supreme Court held that the election petition was not filed within the time prescribed in Section 81 of the Act in view of Rule 26 of Chapter VII, Part II of the Patna High Court Rules which provides:

"On any Court day on which no Bench is or has been sitting, any memorandum of appeal or application which might be barred by time and which is entertainable only by a Bench may be presented to the Registrar, or, in his absence from Court on that day to the Deputy Registrar, or in their absence to the Assistant Registrar, who shall certify thereon that such memorandum of appeal or application was on that day presented to him....."

It may be pointed out that under the Rules framed by the Patna High Court an election petition had to be presented to a Judge sitting in Court, while under Rule 3 framed by this Court an election petition has to be presented to the Registrar and not to any Judge of the Court.

7. Provisions of Section 10 (1) of the General Clauses Act and as a matter of fact even the provisions of Sections 4 and 5 of the Limitation Act are based on the principle contained in the legal maxim, "*lex non cogit ad impossibilia*" which means that the law will not compel a man to do that which he cannot perform and "*actus curiae neminem gravabit*" which means that an act of the Court will prejudice no man.

Therefore, the relevant question to be considered in the instant case is whether the petitioner in accordance with Rule 3 of the Rules of Court could have presented the election petition during the vacation on or before the 14th of June, 1974. Just as on a Saturday, no court is held or in other words, Judges do not sit but the office of the Court remains open, during the vacation also, though the Judges do not sit for doing the usual civil

work, the office remains open, the Registrar remains on duty and criminal and urgent civil work is disposed of by the Judges appointed by the Chief Justice during the vacation in accordance with Rule 10 of Chapter V of the Rules of Court. If during the vacation the office remained open only for certain specified purposes under the Rules of Court and not for the purposes of receiving election petitions etc. it could be argued that the petition was well within time when filed on the reopening of the Court. There is, however, no rule restricting the functions of the Registrar or power to be exercised by the Registrar or the functions of the office of the High Court during the vacation. Hence it could not be said that the petitioner could not have presented the petition to the Registrar during the vacation. It may be pointed out that just as on a Saturday the courts do not sit but the office remains open, during the vacation though only a few courts function and the courts generally do not sit, the office remains open and the Registrar remains on duty.

8. It was argued on behalf of the petitioner that a Saturday is considered to be a working day, but during the vacation the High Court remains closed. This does not appear to be correct. Just as on a Saturday the Judges do not sit but the High Court office remains open, during the vacation only the courts are not held but the High Court office remains open. It may be repeated that there is no rule laying down that during the vacation the office of the High Court shall remain open only for certain specified purposes and not for the purpose of receiving election petitions.

It may also be pointed out that just as Saturdays are working days for the office, during the vacation all the days in a week leaving Sundays and other holidays which may fall in the vacation, are working days for the High Court office and the High Court office remains open. As under Rule 3 of Chapter XV-A it is specifically laid down that an election petition has to be presented to the Registrar and not to a Judge, there was no justification for the petitioner not to have presented the petition within the period prescribed under Section 81 of the Act.

9. While discussing the question the Supreme Court in paragraph 6 of the ruling cited quoted the observations made by the Patna High Court and the Madras High Court in *Lachmeshwar Prasad v. Girdhari Lal*, (AIR 1939 Pat 667) (FB) and *Nachiyappa v. Ayyasami*, (1882) ILR 5 Mad 189 at p. 192 (FB). Both the High Courts held that though the Judicial sit-

tings of the Court may be adjourned, but as the offices of the Court remain open, it could not be said that the Court was closed for depositing money in a case which had to be deposited within a prescribed period or for presentation of pleadings as the office of the court may still remain open for the presentation of pleadings. It may be repeated that nothing could be brought to the notice of the Court to show that the petition could not be presented to the Registrar by the petitioner during the vacation on or before the 14th of June, 1974.

10. In view of the reasons discussed, I find that the election petition was filed beyond 45 days, the period prescribed under Section 81 (1) of the Act and it is dismissed as time barred. The respondent No. 1 to get rupees one hundred as costs out of the security money deposited by the petitioner.

Petition dismissed.

AIR 1975 ALLAHABAD 410

SATISH CHANDRA, J.

Palak Dhari and another, Petitioners v. Deputy Director of Consolidation, Varanasi and others, Respondents.

Civil Misc. Writ No. 5421 of 1971, D/- 8-5-1975.

(A) Hindu Succession Act (1956), S. 4 (2) — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 169 (2) — Interest of female Bhumidhar — Cannot be bequeathed by will.

Section 4 (2) of the Hindu Succession Act speaks of any law providing for the devolution of tenancy rights. A will regulates testate succession, and succession is a mode of devolution. It is apparent that testate succession being a mode of devolution it is within the purview of Section 4 (2). Section 169 (2) of Zamindari Abolition and Land Reforms Act deals with testate succession. It makes a female Bhumidhar mentioned in sub-section (2) of S. 169 incompetent to bequeath a holding by will. None of the provisions of Hindu Succession Act can affect or override this provision. In view of Section 4 (2) which is a provision which overrides all other provisions of Hindu Succession Act, neither Section 14 nor Section 30 can be relied upon to sustain the will executed by a female Bhumidhar as she was incompetent to execute will. (Case law discussed). (Para 4)

Cases Referred : **Chronological** **Paras**
AIR 1973 All 407 = 1973 All WR (HC) 3
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AIR 1970 All 238 = 1969 All LJ 253 3

HS/IS/C892/75/RSS

AIR 1968 SC 1058 = 1968 All LJ 844 2
1968 RD 9 = 1968 All LJ 11 4

K. B. Mathur and K. B. Sinha, for Petitioner; Sankatha Rai, R. S. Singh, R. C. Srivastava, S. C., for Respondents.

ORDER :— The question of law argued before me in this writ petition was whether a female Bhumidhar, who had inherited a holding from her husband, was competent to bequeath it by a will. The Deputy Director of Consolidation upheld the view of the Settlement Officer (Consolidation) that in view of Section 14 of the Hindu Succession Act the female Bhumidhar became a full owner and was entitled to bequeath the agricultural holding by will. On that basis he repelled the claim of the petitioners.

2. In Ramji Dixit v. Bhargunath, (1968 All LJ 844) = (AIR 1968 SC 1058) the Supreme Court has upheld the view of this Court that a female Bhumidhar governed by sub-section (2) of S. 169 is incompetent to bequeath a Bhumidhari holding by will. Sub-section (2) of S. 169 aforesaid applies, inter alia, to a widow. In the present case Smt. Rameshwari Devi had inherited the holding from her husband and had executed the will on 10th November, 1963 before her death on 18th December, 1963. In view of the decision in Ramji Dixit's case it is clear that she was incompetent to bequeath the holding by will and in this respect the decision of the consolidation authorities cannot be upheld.

3. Mr. Sankatha Rai, appearing for the respondents, contended that Sections 14 and 30 of the Hindu Succession Act would apply and govern the case and thereunder Smt. Rameshwari Devi was competent to execute the will. In Smt. Prema Devi v. Joint Director of Consolidation, (AIR 1970 All 238) a Division Bench of this Court has held that the provisions of the Hindu Succession Act cannot be made applicable to agricultural plots governed by the U. P. Zamindari Abolition and Land Reforms Act. Another Division Bench in Uma Shanker v. Dy. Director of Consolidation, (1973 All WR (HC) 214) = (AIR 1973 All 407) construed Section 4 (2) of the Hindu Succession Act, 1956, which provides :

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holdings."

The Division Bench held that Bhumidhari rights are tenancy rights in respect of agricultural holding and the provisions of Hindu Succession Act of 1956 cannot affect the provi-

sions of U. P. Zamindari Abolition and Land Reforms Act in respect of devolution of tenancy rights of Bhumidhari holdings. In that case the question was of intestate Succession, and the Bench held that the provisions of Sections 171 to 175 have an overriding effect and nothing in the Hindu Succession Act can take away their effect.

4. Section 4 (2) speaks of any law providing for the devolution of tenancy rights. In *Kaniz Zohra v. The Deputy Director of Consolidation*, (1968 RD 9 (All)) a Division Bench of this Court held that a will regulates testate succession, and succession is a mode of devolution. In view of this decision it is apparent that testate succession being a mode of devolution is within the purview of Section 4 (2) of the Hindu Succession Act. The result is that nothing contained in the Hindu Succession Act shall be deemed to affect the provisions of the U. P. Zamindari Abolition and Land Reforms Act which deal with the devolution of tenancy rights, namely, which deal with intestate as well as testate succession to Bhumidhari holdings. Section 169 (2) of the Zamindari Abolition Act deals with testate succession. It makes a female Bhumidhar mentioned in sub-section (2) of S. 169 incompetent to bequeath a holding by will. None of the provisions of the Hindu Succession Act can affect or override this provision. In view of Section 4 (2) of the Hindu Succession Act, which is a provision which overrides all other provisions of the Hindu Succession Act, neither Section 14 nor Section 30 of the Succession Act can be relied upon by the respondents to sustain the will executed by Smt. Rameshwari Devi. She was incompetent to execute the will. The will executed by her was totally ineffective to pass any interest in the holding in dispute.

5. It is common case between the parties that if the will executed by Smt. Rameshwari Devi is ignored the basic year entry in favour of the petitioners will have to be maintained.

6. In the result the petition succeeds and is allowed. The impugned orders of the consolidation authorities are quashed. The objection filed by the respondents is dismissed and it is directed that the basic year entry be maintained. The petitioners will be entitled to costs.

Petition allowed

AIR 1975 ALLAHABAD 411

SATISH CHANDRA AND N. D. OJHA, JJ.

M/s. Advance Insurance Co. Ltd. Applicant v. M/s. Mill Stores Co., Opposite Party.

Supreme Court Appeal No. 759 of 1971, D/- 9-5-1975.

(A) Constitution (Thirtieth Amendment) Act (1972), S. 1 (2) — Date of commencement of the Act.

FS/GS/C260/75/MBR

Since Section 1 (2) of the Amendment Act provided that it shall come into force on such date as the Central Government may by notification in the Official Gazette appoint and the Central Government appointed 27th February, 1973, as the date of commencement of the Act, it is this date on which the Act shall be deemed to have come into force. The date on which the gazette notification has been brought to the actual notice of the person concerned is not at all relevant. (AIR 1965 SC 722, Followed). (Paras 2, 3)

(B) Constitution (Thirtieth Amendment) Act (1972), S. 3 — Decision of High Court in an appeal before commencement of the Act — Grant of certificate of fitness. (Constitution of India, Art. 133 (1)).

Under Section 3 (2), even though a proceeding may have been instituted in any court before the commencement of the Act, no appeal shall lie to the Supreme Court subject to the provisions of sub-section (1) unless such appeal satisfied provisions of Article 133 (1) of the Constitution as amended. In a case where the appeal was decided by the High Court before the commencement of the Act, no certificate of fitness could be granted under Article 133 (1) (a) as it stood prior to its amendment. It could be granted only if the appeal satisfied the requirements of Article 133 (1) as amended. (AIR 1957 SC 540, Rel. on). (Para 5)

Cases Referred: Chronological Paras
AIR 1965 SC 722 = (1965) 1 Cri LJ 641 3
AIR 1957 SC 540 = (1957) SCR 488 4

Gopal Bihari, for Applicant; V. B. Khare, for Opposite Party.

N. D. OJHA, J.:— The opposite party Messrs. Mill Stores Company, Galghar, Gorakhpur, filed an appeal in this Court against an order dated 24th April, 1971 passed by the Civil Judge Gorakhpur refusing to make an award the rule of the Court. The appeal was allowed by a Bench of this Court on 15th October, 1971. The applicant made an application under Article 133 (1) (a) and (b) of the Constitution of India for a certificate that the case was a fit one for appeal to the Supreme Court. The application was presented on 10th December, 1971, and after notices were served on the opposite party it came up for hearing on 30th March, 1973. On that date we granted a certificate in the following terms:—

"The judgment of this Court is of variance. The subject-matter in dispute was and still is above Rs. 20,000/- in value. We accordingly grant a certificate to the applicant under clause (a) of Article 133 (1) of the Constitution. There will be no order as to costs."

Thereafter the present application was made on the allegation that on receipt of the certificate the Assistant Registrar of the Supreme Court raised an objection on 7th August, 1973, to the effect that the certificate was defective in view of the 30th amendment

of the Constitution and that after hearing the counsel for the applicant the Supreme Court directed that the matter may be kept pending to enable the applicant to apply to the High Court for rectification of the certificate. In this application it has been prayed that the certificate may be recalled and after correction resubmitted to the Supreme Court. The correction sought is to the effect that it may now be certified that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.

2. When the application came up for hearing learned counsel for the applicant, however, urged that the certificate as granted on 30th March, 1973, was correct inasmuch as the gazette notification containing the 30th amendment of the Constitution had not been received by that date. According to learned counsel, the notification appointing the date of commencement of the Constitution (Thirtieth Amendment) Act, 1972, could be effective only from the date on which it was brought to the actual notice of the person concerned. In our opinion this submission has no substance. The Constitution (Thirtieth Amendment) Act, 1972, received the assent of the President of India on 22nd February, 1973, and was published in the Gazette of India of that very date. Sub-section (2) of S. 1 of the Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. The Central Government by notification published in the Gazette of India dated 27th February, 1973 appointed the same date namely 27th February, 1973, as the date on which the Act came into force. Section 5 of the General Clauses Act, 1897, is to the effect that where any Central Act is not expressed to come into operation on a particular day then it shall come into operation on the day on which it receives the assent, in the case of an Act of Parliament, of the President. But for sub-section (2) of S. 1 the Amendment Act would have come into operation on 22nd February, 1973 on which date it received the assent of the President. However, since sub-section (2) of S. 1 provided that it shall come into force on such date as the Central Government may by notification in the Official Gazette appoint and the Central Government appointed 27th February, 1973, as the date of commencement of the Act, it is this date on which the Act shall be deemed to have come into force. The question which was canvassed by learned counsel for the applicant was that even though the notification may have been published in the gazette dated 27-2-1973, since this notification was not received till 30th March, 1973 when the order granting the certificate was passed it was a case in which the applicant had no knowledge of the notification till that date and consequently so far as the applicant is concerned it would not be deemed to have come into force on 27th February, 1973 but will be operative only

from the date on which it came to the knowledge of the applicant. According to learned counsel, it will be the date of receipt of the gazette and not the date of its publication that will be relevant.

3. In *State of Maharashtra v. M. H. George*, (AIR 1965 SC 722) the respondent M. H. George was prosecuted for an offence under Section 23 (1-A) read with S. 8 (1) of the Foreign Exchange Regulation Act, 1947. It was in respect of infringement of a notification issued by the Central Government under Section 8 (1) of the said Act. The notification was dated 8th November, 1962, and had been published in the Gazette of India of 24th November, 1962. The case of the respondent was that he left Zurich on 27th November, 1962, and his destination was Manila. His plane arrived in Bombay on the morning of 28th November, 1962, and he was apprehended by the customs authorities and the gold was recovered from him in respect of which he was said to have committed the offence. According to the respondent, he had no knowledge of the notification published in the Gazette of India on 24th November, 1962, even on the 28th of November, 1962, and consequently he could not be said to have committed any offence. The argument submitted on behalf of the respondent was that the notification being merely a subordinate or delegate legislation could be deemed to be in force not from the date of its issue or publication in the gazette but only when it was brought to the notice of the persons who would be affected by it. This argument was repelled and their Lordships of the Supreme Court in paragraph 45 of the report held that publication in the Official Gazette namely the Gazette of India is the ordinary method of bringing a rule of subordinate legislation to the notice of the person concerned and the argument that the notification was not effective because it was not properly published in the sense of having been brought to the actual notice of the respondent must be rejected. In view of the decision in the case of *State of Maharashtra v. M. H. George* (supra) the submission made by learned counsel for the applicant cannot be accepted.

4. It was then urged that since the lis giving rise to the appeal which was decided by this Court on 15th October, 1971, had commenced prior to the coming into force of the Constitution (Thirtieth Amendment) Act, the right to file an appeal being a vested right, the applicant was entitled to a certificate being granted under Article 133 (1) (a) of the Constitution as it had stood before the aforesaid Amendment Act. In our opinion, even this submission has no substance. It is true that the right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by

the law prevailing at the date of the institution of the suit or the proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal as was held by the Supreme Court in *Garikapati v. Subbiah Choudhry*, (AIR 1957 SC 540) but this Rule has an exception which too is to be found in the same case, the same being that this vested right of appeal can be taken away by subsequent enactment if it so provides expressly or by necessary intentment, Section 3 of the Constitution (Thirtieth Amendment) Act, 1972, reads :—

“3. Special Provision as to pending proceedings etc. (1) Nothing in this Act shall affect :—

- (a) any appeal under sub-clause (a) or sub-clause (b) or sub-clause (c) of Cl. (1) of Art. 133 of the Constitution which immediately before the commencement of this Act was pending before the Supreme Court; or
- (b) any appeal preferred on or after the commencement of this Act against judgment, decree or final order in a Civil proceeding of a High Court by virtue of a certificate given by the High Court before the commencement of this Act under sub-clause (1) or sub-clause (b) or sub-clause (c) of Cl. (1) of Art. 133;

and every such appeal may be heard and disposed of or, as the case may be, entertained, heard and disposed of by the Supreme Court as if this Act had not been passed.

(2) Subject to the provisions of sub-section (1) no appeal shall lie to the Supreme Court under clause (1) of Art. 133 of the Constitution from any judgment, decree or final order arising out of a suit or other civil proceeding which was instituted or commenced in any Court before the commencement of this Act unless such appeal satisfies the provisions of that clause as amended by this Act.”

5. Clauses (a) and (b) of S. 3 (1) are admittedly not applicable to the instant case. Sub-section (2) provides expressly that even though a proceeding may have been instituted or commenced in any Court before the commencement of the Amending Act, no appeal shall lie to the Supreme Court subject to the provisions of sub-sec. (1) unless such appeal satisfied the provisions of clause (1) of Article 133 of the Constitution as amended. The fact that the appeal was decided by this Court before the commencement of the Act will also be of no consequence. In this view of the matter, on 30th March, 1973, no certificate could have been granted under Article 133 (1) (a) of the Constitution as it stood prior to its amendment. It could be granted only if it satisfied the requirements of clause (1) of Article 133 as amended. The Certificate granted on 30th March, 1973, therefore, deserves to be recalled and is hereby recalled.

6. In so far as the prayer made by the applicant that a certificate may be granted

under the amended clause (1) of Article 133 of the Constitution we are not satisfied that the case involves any substantial question of law of general importance which needs to be decided by the Supreme Court.

7. The application for certificate is accordingly dismissed. There will however, be no order as to costs.

Application dismissed.

AIR 1975 ALLAHABAD 413

M. P. MEHROTRA, J.

Jado Rai, Applicant v. Onkar Prasad, Respondent.

Civil Revn. No. 688 of 1972, D/- 1-5-1975.*

(A) Civil P. C. (1908), Ss. 10, 151 — Case where S. 10 is not applicable — Power of court to stay suit under S. 151 — When can be invoked.

In a situation where Section 10 is not applicable (in this case court where the earlier suit was filed did not have the jurisdiction to grant the relief claimed in the subsequent suit) the court in which a suit is pending has a jurisdiction to stay the proceedings and to await the decision in another suit pending in a different court. Of course the court would take into consideration various aspects of the matter e.g. convenience of the parties, the implication and the effect of the judgment in the other suit upon the controversies involved in the suit pending before the court which chooses to stay its proceeding. It is not possible to exhaust those aspects and circumstances nor is it desirable to do so.

(Para 6)

Cases Referred: Chronological Paras

AIR 1967 Orissa 172 = ILR (1967) Cut 321

1, 5

AIR 1966 Cal 382 = 70 Cal WN 375

6

AIR 1966 Orissa 53 = 32 Cut LT 563

6

AIR 1965 SC 1144 = (1965) 2 SCR 186 : 1, 4

AIR 1964 SC 215 = (1964) 3 SCR 467

1, 2

AIR 1964 SC 993 = (1964) 5 SCR 946

1, 3

AIR 1962 SC 527 = (1962) Supp 1 SCR

450

1, 6

AIR 1954 Pat 11 = 1953 BLJR 506

6

AIR 1954 Punj 114 = 56 Pun LR 12

6

N. Sahai and B. Dayal, for Applicant;
H. S. Joshi, for Respondent.

ORDER :— This is the second revision. The courts below held, while deciding an issue framed thus in a pending suit “whether the suit is liable to be stayed?” that the suit was not liable to be stayed. That was the finding of the trial court and the lower revisional court affirmed the said finding. In the

*(Against Order Passed by M. L. Agarwal, Dist. J., Muzafarnagar, In Civil Revn. No. 19 of 1972, D/- 7-4-1972).

second revision before me it is contended that the courts below have not properly construed the pleadings in the two suits in question and they were too much pre-occupied with the ingredients of Section 10, Civil P. C. and they failed to consider the applicability of a Section 151, Civil P. C. In my opinion, the courts below were right in holding that the suit in question could not be stayed under Section 10, Civil P. C. This conclusion can be arrived at on the simple and undisputed ground that the court where the earlier suit was filed did not have the jurisdiction to grant the relief claimed in the subsequent suit. The first suit was filed in the court of the Munsif and the second suit was filed in the court of the District Judge. It is obvious that one of the basic ingredients of Section 10 has not been made out in the instant case, and, therefore, the suit could not be stayed under Section 10, Civil P. C. However, I agree with the learned counsel for the applicant that it was possible for the trial court to stay the suit under Section 151, Civil P. C. and the courts below have not properly considered the ingredients of Section 151, Civil P. C. Learned counsel for the opposite party, Shri H. S. Joshi, has contended before me that Section 10 is exhaustive of the situations in which the court can stay a suit and apart from the said provision it is not open to a court to act under Section 151, Civil P. C. to stay the proceedings in a suit. Learned counsel has placed his principal reliance on *Manohar Lal v. Hira Lal*, (AIR 1962 SC 527) where it was laid down:

"When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers of Section 151 is not justified. The provisions of Section 10 do not become inapplicable on a court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract."

Apart from the said case he has placed reliance on four other cases which are as follows:

- (1) *Union of India v. Ram Charan*, (AIR 1964 SC 215);
- (2) *Arjun Singh v. Mohindra Kumar*, (AIR 1964 SC 993);
- (3) *Ramkaran Das v. Bhagwan Das*, (AIR 1965 SC 1144);
- (4) *Khalli Panda v. Dharam Gouda*, (AIR 1967 Ori 172).

2. In AIR 1964 SC 215 it was laid down as under:

"The court is not to invoke its inherent powers under Section 151, Civil P. C. for the purposes of impleading the legal representatives of a deceased respondent, if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for

setting aside the abatement is not allowed on account of its failure to satisfy the court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time."

3. In AIR 1964 SC 993 the Court laid down:

"Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order 9, Rule 7 and Order 9, Rule 13 between them exhaust the whole gamut of situations that might arise during the course of the trial." And on the said finding the court further observed:

"The inherent power of the court cannot override the express provisions of the Law. In other words, if there are express provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates:

4. In AIR 1965 SC 1144 it was laid down as under:

"The inherent powers are to be exercised by the Court in very exceptional circumstances for which the Code lays down no procedure. Rule 4 of Order 37 expressly gives power to a Court to set aside a decree passed under the provisions of that order. Express provision is thus made for setting aside a decree passed under Order 37 and hence if a case does not come within the provisions of that rule, 'here is no scope of resort to Section 151 for setting aside such a decree.'"

5. In AIR 1967 Ori 172 it was laid down as under:

"A money suit by a landlord against the tenant for arrear of rent for a certain period cannot be stayed under the provisions of Sections 10 and 151, Civil P. C. pending disposal of the tenant's application before the House Rent Controller under Sections 5 and 8 of Orissa House Rent Control Act for fixation of fair rent. It is so for the reasons that the proceeding before the Rent Controller is not a 'suit' and the subject-matter of inquiry in the two proceedings is not the same."

6. On the other hand, the learned counsel for the applicant has placed reliance on the following cases which undoubtedly support his contention that in the circumstances where Section 10 is not applicable the Court has an inherent power to stay the suit pending before him:

1. J. T. Republike v. Runkta and Sons, (AIR 1966 Cal 382);
2. Bhagwati Prasad v. Sudheswar Singh, (AIR 1954 Pat 11);
3. Bharat Nidhi Ltd. v. Shadi Lal, (AIR 1954 Punj 114);
4. Banshidhar v. Laxmiprasad (AIR 1966 Ori 53).

It is not necessary to refer to each and every one of the aforesaid cases. In my opinion, AIR 1962 SC 527 is not capable of the interpretation which Shri Joshi has invited me to place upon it. Looking to the facts of the said case it is obvious that the observations relied upon by Shri Joshi were made to emphasise that it was the Indore Court where the subsequent suit had been instituted which could stay the suit under Section 10, Civil P. C. In that situation the Supreme Court laid down that it was wrong on the part of the Asansol court where the earlier suit had been instituted to stay the suit pending before it under Section 151, Civil P. C. In the said background those observations were made. It is obvious that if the subsequent suit deserves to be stayed under Section 10 Civil P. C. then it would not be right for the court where the earlier suit is pending to stay the earlier suit purporting to exercise the inherent powers of the Court. Such a stay will almost lead to a nullification of the provisions of Section 10, Civil P. C. But the Supreme Court's observation cannot be interpreted to lay down that where the ingredients of Section 10 are not made out then a court has no jurisdiction to stay a suit pending before it. It is important that even the observations relied upon did not lay down that the Asansol court had no jurisdiction to stay the suit. The Court merely observed that it was not justified for the Asansol Court to stay the suit when the subsequent suit was liable to be stayed under Section 10. The question of justification is not a question of jurisdiction. The Supreme Court in the said case clearly held that the Indore Court where the subsequent suit had been filed had the jurisdiction to issue an interim injunction restraining the defendant in the said court from proceeding with his Asansol suit. The Supreme Court held that the provisions of Order 39 were not exhaustive of the circumstances in which injunction could be issued and the court had inherent power to issue injunction apart from the provisions of Order 39 Rules 1 and 2. On merits however, the Supreme Court held that it was very wrong of the Indore Court to have restrained the defendants in the said court from proceeding with their earlier suit filed in the Asansol court. In my opinion, the Supreme Court has laid down that the court in which the subsequent suit has been instituted can bring about a stay of the earlier suit pending in another court by issuing an injunction to the party concerned. Then it is not possible to contend that the court itself where the earlier suit is pending has not

the jurisdiction to stay the suit pending before it under Section 151. In my opinion, whether it be an earlier suit or whether it be the latter suit, every court where a suit is pending, has an inherent jurisdiction to stay the proceedings pending before it. But it is obvious that where the ingredients of Section 10 are applicable and the subsequent is liable to be stayed under the said provision the court where the earlier suit is pending would not be justified in staying the earlier suit acting under Section 151, Civil P. C. In my opinion, that is the ratio deducible from the aforesaid observations extracted from the said pronouncement of the Supreme Court reported in AIR 1962 SC 527. The other Supreme Court cases relied upon by Shri Joshi are not of much assistance inasmuch as the court in the said cases was not called upon to consider the provisions of Section 151 in conjunction with Section 10, Civil P. C. In my opinion, the Orissa case is also not of real assistance. I, therefore, hold that in a situation where Section 10 is not applicable the court in which a suit is pending has a jurisdiction to stay the proceedings and to await the decision in another suit pending in a different court. Of course, the court before staying the suit pending before it in the exercise of its powers under Section 151 would take into consideration various aspects of the matter e.g. convenience of the parties, the implication and the effect of the judgment in the other suit upon the controversies involved in the suit pending before the court which chooses to stay its proceeding. It is not possible to exhaust those aspects and circumstances nor is it desirable to do so. In the instant case, I feel that the court below should have considered the pleadings of the parties in both the suits with greater care and should have then decided whether it would be desirable for the subsequent suit to be stayed under Section 151, Civil P. C. This matter is entirely in the discretion of the trial court and it is not desirable that there should be any expression of views by this Court in the matter.

7. The revision is allowed and the orders of the courts below are set aside and the trial court is directed to decide the issue in the light of the observations made above and in accordance with law. In the circumstances of the case, I make no order as to costs. I direct that the record of the court below be sent down immediately.

Revision allowed.

AIR 1975 ALLAHABAD 416

FULL BENCH

K. B. ASTHANA, C. J., R. L. GULATI
AND GOPI NATH, JJ.

Munnalal Gupta, Appellant v. Uttar Pradesh Financial Corporation and another, Respondents.

F. A. F. O. No. 293 of 1969, D/- 7-5-1975.*

(A) State Financial Corporations Act (1951), Ss. 31, 29 and 32 — Recovery of loan advanced by Corporation to industrial concern — Proceedings under S. 31 — Property of surety cannot be subject-matter of proceedings — Surety can be proceeded against under general law. 1971 All LJ 756, Overruled — (T. P. Act (1882), S. 69).

Section 32 shows that the relief which a District Judge can grant under S. 32 must be confined against the borrower of the industrial concern and its property. The District Judge can pass an ad-interim order attaching the security or so much of the property of the industrial concern as would be sufficient in his opinion to satisfy the outstanding liability. The order of attachment is restricted to the property of industrial concern given to the Corporation by way of surety. It does not empower him to attach the property of a person other than an industrial concern. Clearly a surety, who is not a partner or otherwise interested in the industrial concern, cannot be proceeded against under Section 31 so that his property, even if mortgaged with the Corporation, cannot be attached by the District Judge. Moreover, the District Judge in the first instance has to attach only that much of the property of the borrower industrial concern as would be sufficient to meet the outstanding liability against the borrower. It cannot order the attachment and sale of the entire mortgaged property. It follows, therefore, that District Judge upon an application made to him under clause (a) of Section 31 (1) can only proceed against the property of the borrower and that too against such portion of the property as would be sufficient to discharge his liability towards the Corporation. 1971 All LJ 756, Overruled.

(Para 7)

Section 29, no doubt, defines the rights of the Financial Corporation to take over the management of the Industrial concern or realise the mortgage property by way of lease or sale. The right given to the Corporation under Section 29 will extend to the property of the surety also.

*(Against judgment and decree of M. Wahajuddin, 2nd Addl. Dist. J., Kanpur, D/- 20-9-1969.)

HS/IS/C881/75/MVJ

But such a right can be enforced by taking recourse to the ordinary law contained in the Transfer of Property Act and the Code of Civil Procedure. The special and speedy remedy contained in Section 31 of the Act cannot be availed of by the Corporation. There is no conflict between the two provisions. Section 29 defines the general right of the Corporation in cases of default and Section 31 provides for a speedy and summary remedy. From the scheme of the Act, it is clear that the speedy remedy contained in Section 31 is available not against the surety but against the borrower only. (Para 9)

Further the word "borrower" cannot include a surety. A borrower is obviously a person who borrows and it cannot include the surety who guarantees or secures the loan. Any agreement placing the borrower and the surety at par would be contrary to provisions of Ss. 31 and 32 and would be void. (Para 11)

Cases Referred: Chronological Paras
1971 All LJ 756 = ILR (1971) 2 All 185
3, 10

K. C. Saxena and S. N. Kakkar, for Appellant; R. N. Bhalla, for Respondents.

GULATI, J.:— This is a first appeal from order against the judgment and decree of the Second Additional District Judge, Kanpur, dated 20th September, 1969.

2. The first respondent, the U. P. Financial Corporation, entered into an agreement with an industrial concern called "M/s. Raki Electronics, Kanpur" through its proprietor, Sri Ram Kishan Gupta, for the grant of a loan to the latter of a sum of Rs. 70,000 for purposes of setting up a factory for the production of radios and allied equipments. The loan was secured by taking a mortgage of the machineries and properties of the debtor as also by a collateral security in the shape of a house mortgaged by Munna Lal, the appellant. The property mortgaged by Munnalal is detailed in Schedule 'B' of Annexure I to the agreement, while the properties mortgaged by the debtor are detailed in Schedules 'A', and 'C' to the aforesaid Annexure I. The agreement evidencing the loan dated 13th December, 1961 is a composite document embodying the terms and conditions for the repayment of loan with interest and for the mortgage of the properties of the debtor as well as of Munnalal, the surety. According to the terms and conditions in the aforesaid deed, the loan carried interest at the rate of 5 per cent. and the principal amount and interest were payable in instalments. In the case of default, the entire outstanding principal with interest at enhanced rate became payable. It appears that out of a sum of Rs. 70,000 agreed to be advanced, only a

sum of Rs. 26,000 was advanced to begin with. The debtor committed default in the payment of interest as also in the payment of instalments of the principal amount. Thereupon the Financial Corporation filed a petition before the District Judge, Kanpur under Section 31 of the State Financial Corporations Act, 1951 (hereinafter referred to as the 'Act'), claiming a sum of Rs. 26,000 as principal and Rs. 2,746.84 as interest. In the aforesaid application the following prayer was made:—

"It is, therefore, prayed that the following reliefs may be granted to the petitioner against the opposite parties:—

(a) order for the sale of the properties detailed in Schedules 'A', 'B' and 'C' to this petition.

(b) an ad interim injunction restraining the opposite party No. 1 from transferring or removing machinery, plant or equipment particularly those mentioned in Schedule 'C' from its premises without the permission of the Board of Directors of the petitioner.

(c) interest from 16-3-1964 to the date of filing this petition and pendente lite and future interest."

This petition has been allowed by the District Judge and the appellant Munnalal has come up in appeal against it.

3. The appeal came up for hearing before a Division Bench. One of the questions that arose before the Bench was whether an application under Section 31 of the Act was maintainable against the surety so that the property mortgaged by him could be ordered to be sold. A decision of another Division Bench of this Court in Uttar Pradesh Financial Corporation v. M/s. Deekey Industries (P.) Ltd., 1971 All LJ 756 was brought to the notice of the Bench. In that case it was held that such a petition under Section 31 of the Act was maintainable even against a surety. The correctness of this decision was doubted by the Bench. Hence the following question has been referred to a larger Bench:—

"Whether the appellant Munnalal as surety who had mortgaged his property in favour of the Financial Corporation to secure or guarantee the loan advanced to Messrs. Raki Electronics, an industrial concern, could be proceeded against at the instance of the Financial Corporation before the District Judge under Section 31 of the State Financial Corporations Act, 1951?"

This is how the matter has come up before us. As the entire F. A. F. O. has not been referred to us and only a question has been referred, we shall attempt to answer the question only and shall send the case back to the Division Bench for disposal.

4. The Act provides for the establishment of a State Financial Corporation for purposes amongst others of advancing loans to industrial concerns as defined in Section 2 (c) of the Act. This is clear from Section 25 (1) (g) of the Act. Section 25 defines the various kinds of businesses which Financial Corporation may transact. Sub-clause (g) of clause (1) of Section 25 provides for granting loans or advances to or subscribing to debentures of, an industrial concern, repayable within a period not exceeding twenty years from the date on which they are granted or subscribed to, as the case may be. Sub-section (2) of Section 25 provides:—

"(2) No accommodation shall be given under clauses (a), (b) and (g) of sub-section (1) unless it is sufficiently secured by a pledge, mortgage, hypothecation or assignment of Government or other securities, stock, shares, or secured debentures, bullion, movable or immovable property or other tangible assets in the manner prescribed by regulations or unless it is guaranteed as to the repayment of the principal and the payment of interest by the State Government, a scheduled bank or a State Co-operative Bank."

Thus a loan to an industrial concern cannot be advanced unless it is secured by a mortgage of movable or immovable property or the repayment of the loan and the interest is guaranteed by the State Government, a scheduled Bank or a State Co-operative Bank. There was some discussion as to whether the Corporation was entitled to take mortgage of the property of a third person as a surety. But it appears to us that sub-section (2) of Section 25 is so widely worded that the Corporation can take the mortgage of property even belonging to a surety, besides the property of the borrower. Section 29 enumerates the rights of the Corporation in cases of default. Amongst the rights conferred upon the Corporation is the right to take over the management of the industrial concern and the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Section 31 contains special provisions for enforcement of claims by Financial Corporation. This section is material and is reproduced below:—

"31. SPECIAL PROVISIONS FOR ENFORCEMENT OF CLAIMS BY FINANCIAL CORPORATION:—

(1) Where an industrial concern, in breach of any agreement makes any default in repayment of any loan or advance or any instalment thereof or otherwise fails to comply with the terms of its agreement with the Financial Corpo-

ration or where the Financial Corporation requires an industrial concern to make immediate payment of any loan or advance under Section 30 and the industrial concern fails to make such repayment then without prejudice to the provisions of Section 29 of this Act and of Section 69 of the Transfer of Property Act, 1882, any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:—

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board where such removal is apprehended."

(2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed."

5. Section 31, no doubt, contains a speedy and summary mode of recovery of loan by making an application to the District Judge for any of the reliefs contained in clauses (a), (b) and (c) of sub-section (1). Clauses (b) and (c) contemplate action against the borrower. The management of the borrower industrial concern can be taken over by the Financial Corporation or an ad interim injunction can be obtained against it restraining it from removing its machinery, plant, equipments etc. Under clause (a) it can ask for the sale of the property pledged. The question that arises is as to whether under clause (a) the property of a surety can also be put to sale in the summary manner as provided in Section 31. The argument is that the property of the surety can, no doubt, be put to sale for purposes of securing the repayment of the loan and interest, but that can be done only in accordance with the provisions of Section 69 of the Transfer of Property Act and the relevant provisions of the Code of Civil Procedure. It cannot be attached and sold in the summary manner by the District Judge on a mere application of the Corporation.

6. It is contended that Section 31 is restricted only to actions against the borrower industrial concern or the property mortgaged by it, but if the Corporation wants to proceed against the surety also, it has to resort to the normal remedy provided in the Transfer of Property Act and the Code of Civil Procedure.

7. Now, clause (a) of Section 31 (1) unlike clauses (b) and (c) does not refer to the property of the borrower only. It extends to all the properties mortgaged, hypothecated or assigned to the Financial Corporation as security for loan or advances. But when we come to Section 32 it becomes abundantly clear that the contention put forward on behalf of the appellant is correct. Section 32 of the Act provides the procedure which the District Judge has to follow in respect of application under Section 31 and reads:—

"32. (1) When the application is for the reliefs mentioned in clauses (a) and (c) of sub-section (1) of Section 31, the District Judge shall pass an ad interim order attaching the security, or so much of the property of the industrial concern as would on being sold realise in his estimate an amount equivalent in value to the outstanding liability of the industrial concern to the Financial Corporation, together with the costs of the proceedings taken under Section 31, with or without an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment.

(2) When the application is for the relief mentioned in clause (b) of sub-section (1) of Section 31, the District Judge, shall grant an ad interim injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment and issue a notice calling upon the industrial concern to show cause, on a date to be specified in the notice, why the management of the industrial concern should not be transferred to the Financial Corporation.

(3) Before passing any order under sub-section (1) or sub-section (2) the District Judge may, if he thinks fit, examine the officer making the application.

(4) At the same time as he passes an order under sub-section (1), the District Judge shall issue to the industrial concern a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him calling upon it to show cause on a date to be specified in the notice why the ad interim order of attachment should not be made absolute or the injunction confirmed.

(5) If no cause is shown on or before the date specified in the notice under sub-sections (2) and (4), the District

Judge shall forthwith make the ad interim order absolute and direct the sale of the attached property or transfer the management of the industrial concern to the Financial Corporation or confirm the injunction."

Now a close reading of Section 32 shows very clearly that the relief which a District Judge can grant under Section 32 must be confined against the borrower of the industrial concern and its property. The District Judge can pass an ad interim order attaching the security or so much of the property of the industrial concern as would be sufficient in his opinion to satisfy the outstanding liability. The order of attachment is restricted to the property of industrial concern given to the Corporation by way of surety. It does not empower him to attach the property of a person other than an industrial concern. Clearly a surety, who is not a partner or otherwise interested in the industrial concern, cannot be proceeded against under Section 31 so that his property, even if mortgaged with the Corporation, cannot be attached by the District Judge. Moreover, the District Judge in the first instance has to attach only that much of the property of the borrower industrial concern as would be sufficient to meet the outstanding liability against the borrower. It cannot order the attachment and sale of the entire mortgaged property. It follows, therefore that District Judge upon an application made to him under clause (a) of Section 31 (1) can only proceed against the property of the borrower and that too against such portion of the property as would be sufficient to discharge his liability towards the Corporation.

8. Sub-section (4) of Section 32 contemplates a notice to the borrower industrial concern after an interim order has been passed to show cause why the ad interim injunction should not be made absolute. This provision does not contemplate a notice to the surety. It would be unthinkable that the legislature intended that the property of the surety may be attached and put to sale without even a notice to him. This position fortifies the view that the District Judge can proceed only against the industrial concern which alone is entitled to the show cause notice, otherwise a show cause notice should have been provided for the surety also.

9. The learned Advocate-General who appeared for the Corporation, laid emphasis upon Section 29. Section 29, no doubt, defines the rights of the Financial Corporation to take over the management of the industrial concern or realise the mortgage property by way of lease or sale. As we have already mentioned, the right given to the Corporation under

Section 29 will extend to the property of the surety also. But such a right can be enforced by taking recourse to the ordinary law contained in the Transfer of Property Act and the Code of Civil Procedure. The special and speedy remedy contained in Section 31 of the Act cannot be availed of by the Corporation. There is no conflict between the two provisions. Section 29 defines the general right of the Corporation in cases of default and Section 31 provides for a speedy and summary remedy. From the scheme of the Act, it is clear that the speedy remedy contained in Section 31 is available not against the surety but against the borrower only. Now, in the instant case the Corporation has sought to avail of the special remedy contained in Section 31. As is evident from Section 32, the reliefs contained in Section 32 can only be granted against the borrower and his property mortgaged with the Corporation. If the Corporation wants to proceed against the property of the surety also, it may do so by taking recourse to the ordinary law.

10. In the case of the U. P. Financial Corporation v. Messrs. Deekey Industries (P.) Ltd. (supra) the Bench laid emphasis on Section 29 of the Act and took the view that the unfettered right of the Corporation to proceed against all the mortgaged property could not be cut down by Section 31 or Section 32. There is no conflict between Section 29, Section 31 and Section 32. Section 29 defines the right of the Corporation in general to proceed against the mortgaged property. That right is not taken away by Section 31 or Section 32. That right remains intact but is enforceable by modes other than that contained in Section 31. Sections 31 and 32 read together make it amply clear that a speedy remedy of an application to the District Judge is available to the Corporation only against the borrower industrial concern and if the Corporation wants to enforce its right against the surety, it must take recourse to the ordinary law of realising the debt secured by mortgaged property as contained in the Transfer of Property Act and the Civil Procedure Code. We are, therefore, unable to agree with the view taken by the Division Bench in the case of U. P. Financial Corporation v. Deekey Industries (P.) Ltd. (supra).

11. The learned Advocate-General then referred to the Statement of Objects and Reasons of the Act and clause (ix) of paragraph 2 thereof, which says:—

"The Corporation will have special privileges in the matter of enforcement of its claims against borrowers."

To us it appears that the objects and reasons read with clause (ix) of paragraph

2 really support the view that we have taken. The special privileges granted to the Corporation in respect of enforcement of its claim is limited to the borrowers and the borrowers have to be industrial concerns. It is not possible to accept the contention of the learned Advocate-General that the word "borrower" would include a surety. He says that any person who is a party to a contract of loan with the Corporation will come within the term "borrower" and since Munna Lal is also a party to the agreement, he should also be deemed to be a borrower. We have perused the agreement. The preamble of the agreement describes the industrial concern as borrower, and describes Munna Lal as the 'mortgagor' who has mortgaged his property in security of the loan. The distinction between the borrower and the surety has been kept throughout the agreement. The agreement has been signed separately by the borrower as also by Munna Lal as the mortgagor. A borrower is obviously a person who borrows and it cannot include the surety who guarantees or secures the loan. No doubt, in the ultimate paragraph of the agreement it is provided:—

"Whenever the context so demands qua the property mortgaged the term borrower shall include the "mortgagor." But this clause clearly shows that a mortgagor and the borrower are two separate entities and it is only when the context so demands that the word "borrower" may include the mortgagor. This clause does not, however, in any way modify or amend statutory provision contained in Sections 31 and 32 of the Act. Indeed, it would not be open to the parties to enter into a contract contrary to the statutory provisions. We have already shown above that for the purposes of Sections 31 and 32 of the Act the borrower and the surety could not be placed at par. The clause in question refers to the context of the agreement and does not refer to the context of the statutory provisions.

12. For all these reasons we answer the question by saying that the appellant Munna Lal, who mortgaged his property as surety to the Financial Corporation, could not be proceeded against under Section 31 of the Act. Let the case be now remitted to the Bench concerned for disposal.

Answer accordingly.

AIR 1975 ALLAHABAD 420

K. B. ASTHANA, C. J. AND
K. N. SETH, J.

Salik Chand, Applicant v. Mohan Lal,
Opposite Party.

Civil Revn. No. 821 of 1975, D/- 12-5-1975.

(A) Bengal, Agra and Assam Civil Courts Act (1887), S. 25 (1) (As amended by Uttar Pradesh Civil Laws Amendment Act (1972)) — Notification No. 526, D/- 25-10-1972 issued by High Court — Expression 'a District where there is no Court of Small Causes' — Interpretation of — (Provincial Small Cause Courts Act (1887), S. 16).

The words 'a District where there is no Court of Small Causes' occurring in the notification No. 526, dated 25-10-1972 issued by the High Court of Allahabad in exercise of power under S. 25 (1) ought to be read as 'a district where there is no Court of Small Causes exercising jurisdiction' in view of S. 16 of the Provincial Small Cause Courts Act. On all settled rules of interpretation the Court can always in order to effectuate the purpose even supply words which do not in any way defeat the object for which the measure was undertaken. (Para 4)

Held because the Small Cause Court Judge sitting at Meerut did not exercise jurisdiction in the area covered by the Tehsil of Ghaziabad there was no escape from the conclusion that within the meaning of notification dated 25-10-72 there is no Small Cause Court in the district exercising jurisdiction over the cases arising out of the areas covered by the Tehsil of Ghaziabad. The second Civil Judge of Ghaziabad who was a Civil Judge had, therefore, jurisdiction to exercise the powers of a Small Cause Court Judge in the area covered by the Tehsil of Ghaziabad. (Para 5)

G. C. Dwivedi, for Applicant; D. P. Garg, for Opposite Party.

K. B. ASTHANA, C. J.:—Salik Chand presented a plaint in the court of the second Civil Judge, Meerut at Ghaziabad, alleging inter alia that the defendant Mohan Lal was his tenant and had defaulted in payment of rent. The relief claimed in the plaint was that the defendant be ejected and a decree be passed for recovery of arrears of rent and damages. Many other suits of similar nature were presented by other landlords. These suits were not registered as the Munsarim reported that the court had no jurisdiction to entertain the suits on the small cause court side. The learned Second Civil Judge, by his order dated 18-4-1975

accepted the objection and held that the suits were not entertainable by him. When this order was brought to the notice of the Chief Justice in Chambers by a delegation of Advocates from Ghaziabad, who also presented before him a certified copy of the said order of the Second Civil Judge, the Chief Justice suo motu entertained the revision and sent for the record of the leading suit of Salik Chand v. Mohan Lal. The Chief Justice also directed notice to issue to the plaintiff and defendant of the suit fixing 12th May, 1975 for hearing. The Chief Justice further directed that the case be listed before a Division Bench considering the importance of the matter. This is how the case is listed before us today. Sri G. C. Dwivedi appeared before us for Salik Chand, the plaintiff, and Sri D. P. Garg for defendant Mohan Lal. We sent for the previous notifications on the subject and requested the Registrar of the Court to assist us.

2. The learned Second Civil Judge seems to be of the view that inasmuch as there is a small cause court in the district of Meerut, no court in Ghaziabad can entertain a suit of small cause court nature and exercise powers of small cause court under notification No. 526 dated 25th October, 1972. He seems to be further of the view that under notification dated 29th March, 1973 the suits ought to be filed before the court of the small causes at Meerut and then the District Judge could transfer them for trial and hearing to his court in Ghaziabad and, therefore, he returned the plaints to be presented before the proper court, presumably the court of the small causes at Meerut.

3. We have heard the learned counsel for the parties and have also been benefited by the assistance rendered by the Registrar of the Court. The learned counsel for the parties have canvassed for the view that the Second Civil Judge at Ghaziabad has jurisdiction to exercise powers of a small cause court under notification No. 526, dated 25-10-1972 and any reference to the latter notification No. 156 dated 29th March, 1973 would be irrelevant. Under Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887, the High Court as delegate of the State Government by notifications in the Gazette from time to time has been conferring the jurisdiction of a Judge of a court of small causes on Civil Judge and Munsifs. We find that some times by name the powers have been conferred on the Munsifs and the Civil Judges under Section 25 of the Bengal, Agra and Assam Civil Courts Act. It is not clear before us whether any such power was conferred on Sri O. P. Jain, Second Civil Judge,

Ghaziabad by name. It may be mentioned that the proviso to Section 25 permits the delegation of the power of the State Government under that section to the High Court and it is the High Court which has been issuing the necessary notifications as the delegate of the State Government.

4. Section 16 of the Provincial Small Cause Courts Act, 1887 lays down:

"16. Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of small causes by which the suit is triable."

It is clear from this section that in an area or territory over which a Court of Small Causes has jurisdiction, no other court can exercise jurisdiction in suits of Small Cause Courts nature. The emphasis is on the 'local limits of the jurisdiction of the Court of Small Causes' constituted for any particular area or territory. It follows therefrom that if the territory of a revenue district is carved out into different areas Tahsilwise or otherwise and a Small Cause Court is constituted to exercise jurisdiction over some of the Tehsils or areas so carved out then for the remaining areas or Tehsils of that district there is no Small Causes Court exercising jurisdiction. Bearing this in mind and in the background of the scheme under Section 16 of the Provincial Small Cause Courts Act, 1887, we have to construe and interpret notification No. 526 dated 25-10-1972 issued by the High Court in exercise of the powers under Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887. There cannot be any objection to the conferment of power under this section in a general manner on courts constituted. There is nothing in the section which compels the High Court, as delegate of the State Government, to confer powers by name or by particularising an officer. The material part of notification No. 526 dated 25-10-1972 reads:—

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 (Act XII of 1887) as amended by the Uttar Pradesh Civil Laws Amendment Act, 1972 (U. P. Act No. 37 of 1972), delegated by the State Government under sub-section (3) of the said Section 25 to the High Court, and in supersession of all similar notifications issued in this behalf, the High Court is pleased to confer, with immediate effect, upon all the Civil Judges and Munsifs, while posted in a district where there is no court of Small Causes, the jurisdiction of a Judge of a court of Small Causes under the Provincial Small Causes Courts Act, 1887 (Act

IX of 1887) for the trial of suits up to the value specified below:—

.....

An apparent reading of the material words of the notification quoted above certainly gives an impression that if in any district there is a Small Cause Court then the power of Small Cause Courts cannot be conferred on Civil Judges and Munsifs posted in that district but on a deeper consideration it would appear that the real intent and purpose of the said notification was that for those areas or Tehsils in a district over which no Small Cause Court exercises jurisdiction, a Civil Judge or Munsif can be invested with powers of Small Causes Courts for such area or Tehsils, that is to say that the words 'a District where there is no Court of Small Causes' occurring in the notification ought to be read as 'a district where there is no Court of Small Causes exercising jurisdiction'. We think that on all settled rules of interpretation the Court can always in order to effectuate the purpose even supply words which do not in any way defeat the object for which the measure was undertaken. It was suggested at one stage at the bar that since the High Court itself had power it can issue another notification by way of clarification. We do not think that it is necessary to do so when the notification as it exists can be interpreted and construed in the manner indicated above.

5. Serial No. 48 of the Schedule appended to the Bengal, Agra and Assam Civil Courts Act, 1887 shows that the Small Cause Court Judge sitting at Meerut exercises jurisdiction over four Tehsils of Meerut district namely, Meerut, Mowana, Sardhana and Hapur. The Tehsils of Ghaziabad and Bagpat, which are the component of the revenue district of Meerut, have been excluded. The Small Cause Court Judge sitting at Meerut thus does not exercise jurisdiction in the areas covered by the Tehsil of Ghaziabad. We have no hesitation in holding that though there is a Small Cause Court Judge sitting at the headquarter at Meerut, he does not exercise any jurisdiction as a Small Cause Court Judge in the area of Ghaziabad Tehsil. There is no escape from the conclusion then that within the meaning of notification No. 526 dated 25-10-1972 issued by the High Court there is no Small Cause Court in the district exercising jurisdiction over the cases arising out of the areas covered by the Tehsil of Ghaziabad. Under the said notification, therefore, the Second Civil Judge of Ghaziabad who is a Civil Judge has jurisdiction to exercise the powers of a Small Cause Court Judge in the area covered by the Tehsil of Ghaziabad. Thus the complaints presented by Salik Chand and

many other plaintiffs were entertainable in the court of the Second Civil Judge of Ghaziabad who exercises the powers of Small Cause Court in the said area.

6. This revision is allowed and the order of the learned Second Civil Judge dated 18-4-1975 is set aside. He is directed to entertain all the complaints covered by the said order and register them in accordance with the rules. There would be no order as to costs.

Revision allowed.

AIR 1975 ALLAHABAD 422

HARI SWARUP AND K. N. SETH, JJ.

New India Assurance Co. Ltd. and another, Appellants v. Smt. Urmila Bahri and others, Respondents.

Special Appeal No. 67 of 1975, D/-30-4-1975.*

(A) Motor Vehicles Act (1939), Section 110-A (1) — Application for compensation made within time — Subsequent death of the injured — Fact of death can be introduced in application as a pleading without any bar of limitation.

The cause of action for the claim in either case, whether the application is made by the injured or his heirs after death arises with accident. Hence, once an application has been moved within time for a claim, its amendment can always be made as there is no provision in the Act prohibiting the amendment of the application after the lapse of a particular time. The fixation of the amount of compensation is the job of the Tribunal and not the applicant. It is more in the nature of evidence of the consequence of the accident than a pleading. But as it is to be the basis for the award of compensation to the heirs, it can be legally introduced in the application as a pleading. No question of bar of limitation arises in such a case. AIR 1975 All 198, Affirmed.

(Para 3)

G. K. Sahai, for Appellants; L. P. Naithani, Standing Counsel, for Respondents.

HARI SWARUP, J.:— This appeal has been filed against the judgment of a learned Single Judge by which he allowed the writ petition and quashed the order of the Motor Accidents Claims Tribunal by which the Tribunal had rejected the application of the respondents for an enhanced claim under Section 110-A of the Motor Vehicles Act.

2. One Devendra Bahri had suffered motor accident on January 9, 1970,

*(Against judgment and order of C. S. P. Singh J. reported in AIR 1975 All 198.)

FS/GS/C178/75/RSK

and was injured. An application under Section 110-A was moved by him within limitation. Subsequently, he died on November 11, 1970. His heirs, who are respondents in this appeal, moved an application for substitution and amendment of the original application before the Tribunal claiming enhancement of the claim of compensation as the victim of the accident had died. They also urged that if amendments were not possible, the claim may be treated as a fresh claim. The Tribunal allowed the application for substitution but dismissed the other applications holding that the applications for fresh claim and the enhanced claim were barred by limitation and there was no sufficient cause for condoning the delay. Against the order rejecting the applications a writ petition was filed it has been allowed by the learned Single Judge and the order of the Tribunal dismissing the application for amendment has been set aside. The result of the judgment is that the Tribunal will now permit the amendment to be made in the application for enhanced claim.

3. The learned Single Judge has taken the view that the application once moved within time for a claim under Section 110-A can be amended for a higher amount of claim, in case death subsequently occurs, even though it may be moved after the limitation for filing a fresh application has expired. He has further held that the circumstances of the case were sufficient to justify extension of time for entertainment of the claim even if the period of limitation prescribed by law was applicable, and that the Tribunal was in error in not extending that period under the proviso to sub-section (3) of Section 110-A of the Act.

Section 110-A (1) reads as under :

"An application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 110 may be made—

(a) by the person who has sustained the injury; or

(b) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(c) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

(2) Every application under sub-section (1) shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed.

(3) No application for compensation under this section shall be entertained unless it is made within six months of the occurrence of the accident."

The cause of action for the claim in either case, whether the application is made by the injured or his heirs after death, arises with accident. The application contemplated by Section 110-A in either case is only for compensation payable for the injury sustained by the victim during the accident. Hence, once an application has been moved within time for a claim, its amendment can always be made as there is no provision in the Act prohibiting the amendment of the application after the lapse of a particular time. As the application has to be only for compensation for the injury suffered during the accident, the question of the claim becoming barred after the Tribunal has been moved within time through a proper application does not arise. The determination of the quantum of compensation will depend upon the final consequences of the accident. Under Section 110-B, the Tribunal has to award such compensation as may appear to it to be just. It is under law also the duty of the Tribunal to specify the persons to whom compensation shall be paid. The petitioners only sought to bring to the notice of the Tribunal the subsequent event of death which might be proved to be a relevant fact for determination of the quantum of compensation and the persons entitled thereto. The purpose of the law is to give compensation for the injury suffered by a person to the victim, and to his heirs in case he dies. The fixation of the amount of compensation is the job of the Tribunal and not the applicant. It is more in the nature of evidence of the consequence of the accident than a pleading. But as it is to be the basis for the award of compensation to the heirs, it can be legally introduced in the application as a pleading. No question of bar of limitation arises in such a case. We can see no legal justification in the Tribunal's refusing to permit the introduction of this fact through the amendment of the original application.

4. Even if the application for a higher compensation by the heirs were to be treated as a fresh application, there was sufficient cause which had prevented the applicants from making the application earlier. Unless death had occurred the heirs of the victim had no right or cause of action for lodging a claim. They moved the Tribunal within reasonable time after the death of the victim. The Tribunal has in fact not applied its mind to this aspect. It should have condoned the delay. There was no justification in the Tribunal's refusing to proceed to determine the claim of compensation by ignoring the factum of death or by shutting out the claim based on this fact. Whether death was the consequence of the accident or not will of course be a different matter.

5. The appeal is accordingly dismissed and the Tribunal is directed to proceed with the matter treating the claim as based on injuries caused during the accident and that the victim has died, and to award such compensation which may appear to be just to persons who according to the Tribunal be entitled thereto. Costs on parties.

Appeal dismissed.

AIR 1975 ALLAHABAD 424

G. C. MATHUR AND
C. D. PAREKH, JJ.

R. L. Mitra, Appellant v. Smt. Minoti Mazumdar and another, Respondents.

Special Appeal No. 337 of 1974. D/- 30-4-1975.*

(A) Civil P. C. (1908), O. 21, R. 100 —
"Decree for possession of such property"
— Meaning.

The expression "decree for possession of such property" in the first part of R. 100 (1) of O. 21 means a decree for the immovable property from which any person other than the judgment-debtor is dispossessed. The expression does not refer to a decree for the possession of any immovable property. AIR 1947 Mad 458 and AIR 1961 Assam 79, Rel. on; Decision in Writ Petn. No. 2096 of 1973, D/- 9-10-1974 (All.), Affirmed. (Para 4)

Cases Referred: Chronological Paras

AIR 1961 Assam 79 4

AIR 1947 Mad 458 = 1947-2 Mad LJ 97 4

Janardhan Sahai, for Appellant; K. B. Mathur, Standing Counsel, for Respondents.

G. C. MATHUR, J.:— Respondent No. 1, Srimati Minoti Mazumdar, who is the owner of house No. 15-A, Strachy Road, Allahabad, obtained a decree for the ejectment of one Raghubir Singh from a portion of this house. She put the decree in execution. The appellant R. L. Mitra who is the owner of house No. 15, filed two sets of objections purporting to be under Order XXI, Rule 97/99 and under Section 47 of the Code of Civil Procedure. These were dismissed by the executing court. Thereafter the decree-holder obtained possession by the ejectment of Raghubir Singh. Thereupon R. L. Mitra filed another objection under Order XXI, Rule 100 of the Code of Civil Procedure alleging that there had been excessive execution and that the decree-holder had obtained possession not only over a portion of house No. 15-A but also over a portion of house No. 15 of which he was

the owner. It was prayed that R. L. Mitra be put back into possession over the property from which he had been dispossessed.

2. The executing court dismissed the objection on the ground that similar objections filed by him earlier had already been rejected. The executing court observed that R. L. Mitra had also filed a regular suit for cancellation of the decree obtained by Srimati Minoti Mazumdar. Against the dismissal of his application, R. L. Mitra filed a revision before the District Judge. The Additional District Judge who heard the revision, allowed the same holding that the earlier applications of R. L. Mitra were misconceived and that the orders passed thereon did not bar the present application under Order XXI, Rule 100 of the Code of Civil Procedure. The Additional District Judge directed the executing court to consider the application of R. L. Mitra on merits.

3. Against the order of the Additional District Judge, Srimati Minoti Mazumdar filed a writ petition in this Court. The learned Single Judge held that the application filed by R. L. Mitra was not maintainable as it was not covered by the provisions of Order XXI, Rule 100 of the Code of Civil Procedure. He accordingly allowed the writ petition, quashed the order of the Additional District Judge and restored that of the executing court. Against the judgment of the learned Single Judge, R. L. Mitra has filed this special appeal.

4. We have to see whether the application of R. L. Mitra under Order XXI, Rule 100 of the Code of Civil Procedure was maintainable or not. Order XXI, Rule 100 is in these terms:—

"100. Dispossession by decree-holder or purchaser.

(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession;

(2) The court shall fix a date for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

The learned Single Judge has held that the expression "a decree for the possession of such property" in the first part of sub-rule (1) means a decree for the immovable property from which any person other than the judgment-debtor is dispossessed. In other words, he has held that the rule applies only to dispossession from immovable property which is the

* (Against judgment of Single Judge of this Court in C. M. W. P. No. 2096 of 1973, D/- 9-10-1974 (All).)

subject-matter of the decree. Since the dispossession complained of was not from the immovable property in respect of which the decree had been passed, the learned Single Judge held that the application was not maintainable under Order XXI, Rule 100 of the Code of Civil Procedure. We are in agreement with the view taken by the learned Single Judge. In *Kanagasabhai Pathar v. Poornothammal*, AIR 1947 Mad 458, the Madras High Court held that the remedy under Order XXI, Rule 100 of the Code of Civil Procedure was not available in respect of immovable property not covered by the decree. A similar view was taken by the Assam High Court in *Bholanath v. Banarsi Lal*, AIR 1961 Assam 79. We are unable to accept the contention of learned counsel for the appellant that the expression "decree for possession of such property" refers to a decree for the possession of any immovable property. The language of sub-rule (1) of Rule 100 is clear and a plain reading thereof shows that the expression "such property" refers to the immovable property from which the person making the application has been dispossessed. That being so, the application filed by the appellant was not maintainable under Order XXI, Rule 100 of the Code of Civil Procedure.

5. The view taken by the learned Single Judge is correct. The appeal is accordingly dismissed with costs.

Appeal dismissed.

AIR 1975 ALLAHABAD 425

M. P. MEHROTRA, J.

M. P. Mishra, Applicant v. Sangam Lal Agarwal, Opposite Party.

Civil Revn., No. 414 of 1975, D/- 22-4-1975.

(A) Provincial Small Cause Courts Act (1887), S. 17 Proviso — Not limited to suits for money only — Suit for eviction and for arrears of rent, damages etc. is within the section.

There is nothing in S. 17 to show that it will be only a money decree that will stand covered by the Proviso to the section. In any view a decree for eviction and payment of arrears of rent would be within the Proviso. (Para 1)

An application to set aside an ex parte decree, without depositing the decree amount or giving of security is not maintainable. (Para 1)

(B) Provincial Small Cause Courts Act (1887), S. 15 (3) (As amended in U. P.) S. 17 Proviso — Limit of jurisdiction up to Rs. 5,000, does not apply to Civil

Courts invested with jurisdiction to try suits of small cause nature — Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 25 (4).

S. 15 applies only to Courts constituted as Courts of Small Causes. It does not apply to Civil Courts invested with jurisdiction to try suits of a small cause nature. A District Judge or Additional District Judge invested with jurisdictions under S. 25 of the Bengal, Agra and Assam Civil Courts Act to try suits of a small cause nature can try such suits even if the pecuniary jurisdictional value of suits is over Rs. 5,000. Where, in such a suit the District Court or Additional District Court passes a decree ex parte, an application to set aside the same will attract the proviso to S. 17 as to deposit or security. (Paras 8, 11, 12, 13)

The expression 'Court of Small Causes' used at the end of sub-section (4) of Section 25 really means and refers to a District Judge or Additional District Judge on whom the jurisdiction of a Judge of Small Causes has been conferred. AIR 1965 SC 1449, Dist.; AIR 1935 All 690; AIR 1929 Cal 354; AIR 1923 Pat 49 and (1907) ILR 31 Bom 314, Rel. on.

(Para 12)

Cases Referred: Chronological Paras

AIR 1965 SC 1449 = (1965) 2 SCR 800	12
AIR 1935 All 690 = 1935 All LJ 511	12
AIR 1929 Cal 354 = 49 Cal LJ 237	12
AIR 1923 Pat 49 = 4 Pat LT 259	12
AIR 1917 All 62 = 15 All LJ 69	12
(1907) ILR 31 Bom 314 = 9 Bom LR 327	12

A. N. Bhargava and G. P. Bhargava, for Applicant; C. P. Srivastava, for Opposite Party.

ORDER:— This revision is directed against an order passed by the 4th Additional District Judge rejecting an application for setting aside the ex parte decree passed in Original Suit No. 81 of 1974. The said suit was a suit for the eviction of the tenant by the landlord after determining the former's tenancy. Arrears of rent and damages etc. were also claimed in the suit. The court below rejected the application on the ground that there was no compliance with the requirements of Section 17 of the Provincial Small Cause Courts Act and, therefore, the application under Order 9, Rule 13, C. P. C. for setting aside the ex parte decree was not maintainable. The learned counsel for the applicant has contended that in a suit for eviction Section 17 of the said Act will not get attracted. In my opinion, this contention has no force. Section 17 (1) reads as follows:—

"17. (1) The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by

that Code or by this Act, the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of judgment, or give, such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed."

In my opinion, there is nothing to show that it is only the money decree which will stand covered under the said proviso. In any case, in the facts of the suit in question the decree was for arrears of rent also and that part of the decree even on the basis of the argument of the learned counsel for the applicant would be covered by the said proviso. Therefore, the contention of learned counsel that the court below was wrong in holding that Section 17 was attracted to the facts of the case is not correct.

2. The next contention is that the court below i.e., the 4th Additional District Judge had no jurisdiction to entertain the suit inasmuch as the valuation of the suit was admittedly more than Rs. 5,000. The suit was filed in the court of the District Judge, Allahabad who transferred it to the court of the 4th Additional District Judge and the 4th Additional District Judge passed the ex parte decree. Counsel has in this connection drawn attention to Section 15 (3) of the Provincial Small Cause Courts Act which after its amendment at present lays down that in respect of suits between lessor and lessee in respect of building the State Government may direct that such suits up to the value of Rs. 5,000 shall be cognizable by a court of Small Causes. Section 16 of the same Act gives exclusive jurisdiction to the court of Small Causes to try the suits which are cognizable by it. Hence it is contended that the District Judge or the Additional District Judge had no jurisdiction to entertain the suit in question.

3. It is necessary to set out the changes which have been effected in Section 15 of the Provincial Small Cause Courts Act and in Article 4 of the Second Schedule of the said Act and in Section 25 of the Bengal, Agra and Assam Civil Courts Act. Section 15 before the amendment effected by the Civil Laws Amendment Act of 1968 stood as under:—

"15 (1) A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted

from the cognizance of a Court of Small Causes by which the suit is triable.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the State Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order."

The said Act amended Section 15 (2) by substituting Rs. 1,000 for Rs. 500 in Section 15 (2). In Section 15 (3) the expression 'one thousand rupees' was replaced by the expression 'two thousand rupees'. It may be stated here that the Uttar Pradesh Civil Laws Amendment Act, 1968, was the President's Act No. 35 of 1968 and it was repealed by the U. P. Civil Laws Amendment Act of 1970. While repealing the said President's Act the old sub-sections (2) and (3) of Section 15 were re-enacted with the result that basically the position remained as it was brought about by the Amending Act of 1968. Now Section 15 (2) and (3) stood as follows:

"(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a court of Small Causes.

(3) Subject as aforesaid, the State Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed two thousand rupees shall be cognizable by a court of Small Causes mentioned in the order."

By the Civil Laws Amendment Act of 1972 (U. P. Act No. 37 of 1972) a proviso was added to Section 15 (3). The proviso reads as under :

"Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease, or for recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use and occupation thereof after such determination of lease, the reference in this sub-section to two thousand rupees shall be construed as a reference to five thousand rupees.

Explanation.— For the purposes of this sub-section, the expression 'building' has the same meaning as in Article 4 in the Second Schedule."

4. Section 25 of the Bengal, Agra and Assam Civil Courts Act before its amendment in 1968 stood as follows:—

"25. Power to invest Civil Judges and Munsifs with Small Cause Court jurisdiction.— The State Government may, by notification in the official Gazette, confer, within such local limits as it thinks fit, upon any Civil Judge or Munsif the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, for the trial of suits cognizable by such Courts, up to such value not exceeding five hundred rupees in the case of a Civil Judge or two hundred and fifty rupees in the case of a Munsif as it thinks fit, and may withdraw any jurisdiction so conferred :

Provided that the State Government may, by notification in the Official Gazette, delegate to the High Court its powers under this section."

By the aforesaid Civil Laws Amendment Act 1968, for the words 'five hundred rupees' and 'two hundred and fifty rupees' the words 'one thousand rupees' and 'five hundred rupees' were respectively substituted. As stated above, the said Act of 1968 (which was the President's Act) was repealed by the U. P. Civil Laws Amendment Act of 1970 and Section 25 was re-enacted in the same shape in which it stood in consequence of the amendment made by the Act of 1968. Thus the section after the enactment of the Act of 1970 stood as follows:

"25. The State Government may, by notification in the Gazette, confer, within such local limits as it thinks fit, upon any Civil Judge or Munsif the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 (Act IX of 1887) for the trial of suits cognizable by such Courts, upto such value not exceeding one thousand rupees in the case of a Civil Judge or five hundred rupees in the case of a Munsif as it thinks fit, and may withdraw any jurisdiction so conferred :

Provided that the State Government may, by notification in the Gazette, delegate to the High Court its power under this section."

By the aforementioned U. P. Civil Laws Amendment Act of 1972 (U. P. Act No. 37 of 1972) Section 25 was extensively amended. Section 5 of the said Amending Act is reproduced below :

"5. Amendment of Section 25 of Act XII of 1887.— Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887, as amended in its application to Uttar Pradesh shall be renumbered as sub-section (1) thereof, and—

(i) in sub-section (1), as so renumbered, for the existing proviso, the fol-

lowing proviso shall be substituted, namely:—

'Provided that in relation to suits of the nature referred to in the proviso to sub-section (3) of Section 15 of the said Act the references in this sub-section to one thousand rupees and five hundred rupees shall be construed respectively as references to five thousand rupees and one thousand rupees.'

(ii) after sub-section (1) as so renumbered the following sub-section shall be inserted, namely,

(2) The State Government may by notification in the Official Gazette, confer upon any District Judge or Additional District Judge the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Causes Courts Act, 1887, for the trial of all suits (irrespective of their value), by the lessor for the eviction of a lessee from a building after the determination of his lease or for the recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease or of compensation for the use and occupation thereof after such determination of lease, and may withdraw any jurisdiction so conferred.

Explanation.— For the purposes of this sub-section, the expression 'building' has the same meaning as in Article (4) in the Second Schedule to the said Act."

(3) The State Government may by notification in the Official Gazette delegate to the High Court its powers under this section."

5. By the U. P. Civil Laws Amendment Act of 1973 (President's Act No. 19 of 1973) another sub-section, namely, sub-section (4) was added to Section 25. The said sub-section (4) reads as follows :

"Where the jurisdiction of a Judge of a Court of Small Causes is conferred upon any District Judge or Additional District Judge by notification under this section, then, notwithstanding anything contained in Section 15 of the Provincial Small Cause Courts Act, 1887 all suits referred to in sub-section (2) shall be cognizable by Court of Small Causes."

By virtue of Section 1 (3) of the said Act of 1973 it shall be deemed that the said sub-section (4) came into force on the 20th September, 1972, i.e. the date on which the U. P. Civil Laws Amendment Act of 1972 came into force.

6. Certain notifications which have been issued may also be noticed here. Notification No. 4111 (8)/VII-A-580/72, dated September 22, 1972, published in Uttar Pradesh Gazette, dated 30-9-72, Part I (Page 5252), issued by the State Government lays down as under :

"In exercise of the powers conferred by sub-section (3) of Section 15 of the

Provincial Small Cause Courts Act, 1887 (Act IX of 1887) as amended by the U. P. Civil Laws Amendment Act, 1972 (U. P. Act No. 37 of 1972) and in continuation of Government Notification No. 1 (8) 69-Nyaya (Ka-II), dated September 23, 1969, the Governor is pleased to direct, that subject to the exceptions specified in the Second Schedule to the first mentioned Act, and to the Provisions of any enactment for the time being in force, all suits referred to in the proviso to the said subsection of which the value does not exceed five thousand rupees, shall, with effect from the date of publication of this notification, be cognizable by the Courts of Judge, Small Causes, Bareilly, Moradabad, Meerut, Gorakhpur, Aligarh, Kanpur, Allahabad, Varanasi, Agra, Lucknow, and the Court of additional Judge, Small Causes, Lucknow."

7. The State Government issued another notification on the same day i.e. Sep. 22, 1972 dated September 22, 1972, published in Uttar Pradesh Gazette, Part I, dated October 7, 1972 (page No. 5973), which lays down as under:

"In exercise of the powers under subsection (3) of Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 (Act XII of 1887) as amended by the Uttar Pradesh Civil Laws (Amendment) Act, 1972, (U. P. Act No. 37 of 1972) and in supersession of all earlier notifications issued in this behalf, the Governor is pleased to delegate to the High Court of Judicature at Allahabad the powers of the State Government under the said section."

8. By Notification No. 525 dated 25-10-1972 the High Court conferred "upon all the District Judges and Additional District Judges, the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 (Act IX of 1887), for the trial of all suits (irrespective of their value) of the nature referred to in the said subsection (2)."

9. By Notification No. 526 dated 25-10-1972 the High Court directed as under:

"..... the High Court is pleased to confer with immediate effect, upon all the civil Judges and Munsifs, while posted in a district where there is no Court of Small Causes, the jurisdiction of a Judge of a Court of Small Causes, under the Provincial Small Cause Courts Act, 1887 (Act IX of 1887), for the trial of suits up to the value specified below:

(i) all suits of the nature referred to in the proviso to sub-section (3) of Section 15 of the said Act IX of 1887, cognizable by a Court of Small Causes,—

(a) Civil Judges— of any value not exceeding five thousand rupees;

(b) Munsifs—of any value not exceeding one thousand rupees;

(ii) all other suits cognizable by a Court of Small Causes,—

(a) Civil Judges— of any value not exceeding one thousand rupees;

(b) Munsifs—of any value not exceeding five hundred rupees."

10. Lastly, it may be mentioned that Article 4 in the Second Schedule of the Provincial Small Cause Courts Act was amended by the U. P. Civil Laws Amendment Act of 1972 (U. P. Act No. 37 of 1972). Originally Article 4 stood as follows:

"a suit for the possession of immovable property or for the recovery of an interest in such property."

After its amendment the Article stands as under:—

"(4) a suit for the possession of immovable property or for the recovery of an interest in such property but not including a suit by a lessor for the eviction of a lessee from a building after the determination of his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

Explanation.— For the purposes of this Article, the expression 'building' means a residential or non-residential roofed structure and includes any land (including any garden), garages and out-houses, appurtenant to such building, and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof."

11. The amendments which were effected by the U. P. Civil Laws Amendment Act of 1972 were motivated by a consideration that the suits for eviction filed by the lessors against the lessees of buildings took an unduly long time to be finally decided and, therefore, it was thought advisable that such suits should be tried as suits of the nature of small causes suits so that they could be disposed of expeditiously and there could be no appeal against the decision of the trial Court. This change was sought to be brought about by amending Article 4 of the Second Schedule of the Provincial Small Cause Courts Act so that a suit by a lessor for the eviction of a lessee from a building after the determination of his lease and for the recovery from him of compensation for the use and occupation of the buildings after such determination of lease was no longer excepted from the cognizance of the court of small causes. Such suits, therefore, became triable by

the Courts of Judge, Small Causes and by virtue of Section 16 of the Provincial Small Cause Courts Act they became exclusively triable by such courts. Of course, the limitation on account of the valuation of the suit remained. This limitation was contained in Section 15 (2) and in Section 15 (3). Ordinarily, the jurisdiction of the Small Causes Court stretched up to Rs. 1,000 under Section 15 (2) of the Provincial Small Cause Courts Act. But under Section 15 (3) the State Government was empowered to raise the pecuniary limit of such jurisdiction to Rs. 5,000 in respect of suits between the lessors and the lessees for eviction of the latter after the determination of their tenancy from buildings. This result was brought about by the addition of the proviso to Section 15 (3) by the U. P. Civil Laws Amendment Act, 1972. As has been stated, the State Government issued a Notification dated Sept. 22, 1972, whereby the Court of Judge, Small Causes situated at Bareilly, Moradabad, Meerut, Gorakhpur, Aligarh, Kanpur, Allahabad, Varanasi, Agra, Lucknow and the Court of Additional Judge, Small Causes, Lucknow were empowered to take cognizance of the suits between the lessors and the lessees for the latter's eviction from buildings whose value does not exceed Rs. 5,000. In view of the addition of sub-section (2) to Section 25 of the Bengal, Agra and Assam Civil Courts Act it became possible to confer upon the District Judge or Additional District Judge the jurisdiction of a Judge of a Court of Small Causes for the trial of suits for eviction of lessees and for recovery of rents and damages (disregarding some minor aspects of the matter). Such a jurisdiction has been conferred upon the District Judges and the Additional District Judges by the aforesaid Notification dated 25-10-1972 issued by this Court.

12. In view of the aforesaid amendments, in the district of Allahabad (from where this revision has arisen) the Court of Judge of Small Causes had a jurisdiction to take cognizance of the suits between the lessors and the lessees in respect of the latter's eviction from buildings provided the valuation of such suits does not exceed Rs. 5,000. If the valuation exceeds Rs. 5,000 then the court of the District Judge and the Additional District Judge who have been empowered to take cognizance of such suits can try the same in the manner in which suits of the Small Cause Court nature are tried. In Section 25 (2), it is clearly stated that the District Judge or the Additional District Judge will have the jurisdiction of a Judge of a Court of Small Causes for the trial of the aforesaid variety of suits irrespective of their value. In my view,

if the contention on behalf of the applicant were to be accepted then it will be doing violence to the said expression. Any interpretation which seeks to put a limitation on the valuation of the suits cognizable by the District Judge or the Additional District Judge will be contrary to the clear expression used in sub-section (2) of Section 25 "irrespective of their value". Learned counsel for the applicant placed reliance on the pronouncement of the Supreme Court reported in *Raja Soap Factory v. S. P. Shantharaj* (AIR 1965 SC 1449). In my view, the said pronouncement does not support the contention on behalf of the applicant. Counsel also sought to support his contention by inviting my attention to sub-section (4) added to Section 25 by the U. P. Civil Laws Amendment Act of 1973. The said sub-section (4) has been reproduced above and in the concluding portion thereof the words used are "..... all suits referred to in sub-section (2) shall be cognizable by court of Small Causes". It is urged that if the legislative intention were that the District Judge or the Additional District Judge on whom the powers of a Judge of a Court of Small Causes have been conferred should take cognizance of the aforesaid variety of suits between the lessor and the lessee then in the concluding portion of sub-section (4) the legislature would not have used the words "Court of Small Causes" but would have used the expression "District Judge or Additional District Judge." counsel contended that there is a distinction between a Court of Small Causes established under the Provincial Small Causes Court and officers who are invested with the powers of a Judge of Court of Small Causes. In my opinion this contention is not valid. In *Mt. Sukha v. Raghunath* (AIR 1917 All 62); *D. D. Vidyarthi v. Ram Pearey Lal* (AIR 1935 All 690); *Badal Chandra v. Srikrishna Dey* (AIR 1929 Cal 354); *Bhagwan Das v. Keshwar Lal* (AIR 1923 Pat 49) and *Narayan Sitaram v. Bhagu*, ((1907) ILR 31 Bom 314) it has been laid down that the Courts on which Small Cause Court's powers are conferred shall also be deemed to be Courts of Small Causes. Section 4 of the Provincial Small Cause Courts Act lays down as under:—

"In this Act, unless there is something repugnant in the subject or context, "Court of Small Causes" means a Court of Small Causes constituted under this Act, and includes any person exercising jurisdiction under this Act in any such Court."

It is clear that the expression "Court of Small Causes" has to be interpreted in the context in which the said expression is used. In my view, the expression 'Court

of Small Causes' used at the end of sub-section (4) of Section 25 really means and refers to a District Judge or Additional District Judge on whom the jurisdiction of a Jud. of Small Causes has been conferred.

13. It was next contended that without an amendment of Section 15 of the Provincial Small Cause Courts Act a mere amendment of Section 25 of the Bengal, Agra and Assam Civil Courts Act could not serve the legislative intention. Again, I do not see any force in this contention. The purpose of Section 15 (3) of the Provincial Small Cause Courts Act is different from the purpose underlying Section 25 of the Bengal, Agra and Assam Civil Courts Act. Section 15 (3) enables the State Government to raise the pecuniary jurisdiction of a Court of Small Causes. Normally the State Government can raise such limit to try suits whose value does not exceed Rs. 2,000 but in the case of suits between the lessor and the lessee of the aforesaid variety such enhancement can be up to the limit of Rs. 5,000. It should be clear that Section 15 (3) has a reference to the regular Court of Small Causes established in a District. Section 25 of the Bengal, Agra and Assam Civil Courts Act enables the State Government (and after delegation the High Court) to confer upon any Civil Judge or Munsif or upon a District Judge or Additional District Judge the jurisdiction of a Judge of Small Causes. Whereas in Section 25 (1) there are pecuniary limits in the case of Civil Judges and Munsifs, in Section 15 (2) there are no such pecuniary limits in respect of the District Judge or the Additional District Judge. If under Section 25 the State Government or the High Court is empowered to confer on special officers the jurisdiction of a Judge of Court of Small Causes there is no reason to hold that such conferment must be restricted to the pecuniary jurisdiction of a Court of Small Causes. Admittedly, in Sec. 25 itself there is no such restriction about the pecuniary jurisdiction. Section 15 (2) of the Provincial Small Cause Courts Act has been made in explicit terms "subject to the provisions of any enactment for the time being in force". It is this subsection which puts a limit on the pecuniary jurisdiction of the Courts of Small Causes. But as it is clearly stated that the provision is subject to the provisions of any other enactment, therefore, it is possible for the State Government acting under the provisions of Section 25 of the Bengal, Agra, and Assam Civil Courts Act, 1887, to confer a higher pecuniary jurisdiction on the District Judge and the Additional District Judge.

14. In my view, therefore, the contentions raised on behalf of the appli-

cant have no force and the same stand rejected.

15. In the end learned counsel made a prayer that in view of the importance of the controversy involved in the revision the matter should be referred to a Division Bench. As I do not entertain any doubt about the interpretation to be placed on the relevant provisions, I have not found it necessary to accede to the said prayer of the learned counsel for the applicant.

16. The revision is accordingly dismissed, but in the facts of the case I make no order as to costs.

Revision dismissed.

AIR 1975 ALLAHABAD 430

CHANDRA PRAKASH, J.

Chandrapati Tripathi, Applicant v. Suryamani and others, Opposite Parties.

Civil Revn. No. 1252 of 1969, D/- 19-3-1975.*

(A) Suits Valuation Act (1887), S. 304 — Suit for possession and demolition of constructions — Valuation — (Civil P. C. (1908), S. 9).

The plaintiff claimed permanent injunction, a prohibitory injunction, possession and demolition of the constructions already made by the defendants or which they might make during the pendency of the suit. The court below, held, should have found out by taking evidence of the parties what construction had already taken place before the filing of the suit and what constructions had been made by the contesting defendant after the filing of the suit and regarding which there was a prayer for demolition. After valuing these constructions etc., the court should then have proceeded with the decision of the question of jurisdiction and court-fees. AIR 1957 All 402 (FB), Ref. (Para 7)

Cases Referred: Chronological Paras AIR 1957 All 402=1957 All LJ 431 (FB) 7

Harihar Pd. Dubey, for Applicant.

ORDER:— This is an application in revision against the order dated 10-5-1969 of Shri D. N. Shukla, Additional Civil Judge, Mirzapur, holding the valuation of the suit for the purposes of jurisdiction and court-fees at Rs. 500.

2. The suit giving rise to this application in revision was instituted by the plaintiff-opposite party No. 1 against the applicant-defendant No. 1 and opposite parties Nos. 2 to 7 for a declaration that the plaintiff was the owner of land de-

*(Against order of D. N. Shukla, Civil J., Mirzapur, D/- 10-5-1969.)

noted by letters Aa Ba Sa Da Ka Kha Ga Gha in the map attached in the plaint and defendants Nos. 1 to 4 had no concern with it. He also claimed a permanent injunction restraining defendants Nos. 1 to 4 from taking possession of the land belonging to the plaintiff and defendants Nos. 5 to 7. It was also prayed that the defendants should restore the land Aa Ba Ya Ra to the former position after demolition of constructions which defendants Nos. 1 to 4 had made over it. By subsequent amendment of the plaint the plaintiff added the relief for possession after demolition of certain constructions which had already been made by defendants Nos. 1 to 4.

3. One of the pleas taken in defence by defendant No. 1 applicant in the written statement was that the suit was undervalued and the court-fees paid was insufficient.

4. The learned Civil Judge to whom the case has been transferred framed preliminary issues on these points and after taking evidence of the parties the Court below has held that the valuation of the suit should be Rs. 500 and not Rs. 200 as valued by the plaintiff in the original plaint and the court-fees should also be paid on it.

5. Against that order the defendant No. 1 has now come up in revision before me.

6. I have heard the learned counsel for the parties. I have also gone through the record. I am afraid the order of the Court below cannot be allowed to stand.

7. While disposing of the two issues the Court below had observed that the value of the building and other machinery etc. on the land belonging to the defendants shall not be taken into consideration in determining the question of jurisdiction and court-fees. This view is erroneous and not correct. In his plaint the plaintiff was claiming permanent injunction, a prohibitory injunction, possession and demolition of the constructions already made by the defendants or which they might make during the pendency of the suit. Defendant No. 1 in his written statement disclosed certain constructions which he had already made. The Court below should have found out by taking evidence of the parties what construction had already taken place before the filing of suit and what constructions had been made by the contesting defendant after the filing of the suit and regarding which there is a prayer for demolition. After valuing these constructions etc., the Court should then proceed with the decision of the question of jurisdiction and court-fees. This has not been done. This Court

in the ruling reported in *Shanti Prasad v. Mahabir Singh*, 1957 All LJ 431 = (AIR 1957 All 402) (FB) has laid down guidelines while disposing of the questions of the valuation and the court-fees.

8. The application in revision is allowed and the order of the Court below is set aside and the learned Civil Judge is directed to dispose of the case in view of the decision contained in the Full Bench case of this Court quoted above. The costs of this revision shall be cost in the case.

Revision allowed.

AIR 1975 ALLAHABAD 431

JAGMOHAN LAL, J.

Mstt. Nafisun Nisa, Appellant v. Mohd. Ishaque, Respondent.

Second Appeal No. 105 of 1969, D/- 13-2-1975.*

(A) Easements Act (1882), Ss. 8 Illustration (c), 12 — Sale deed stipulating an easement by way of passage — If sale deed not ratified by minors on becoming major easement would not be valid in view of S. 8 illustration (c). (Para 8)

(B) Easements Act (1882), S. 8 — Rights of owner of servient tenement.

The owner of a servient tenement can by his unilateral act impose an easement on his property even though the owners of the dominant tenement are not parties to that transaction. In the present case the executants of the sale deed dated 4-4-1952 were the full owners of the property that was left with them after the transfer dated 13-9-1950 made in favour of the plaintiff. So it was open to them to impose any easement on their property whether that easement was for the beneficial enjoyment of the property that was sold by them under that sale deed or for the property which they had earlier sold or for the beneficial enjoyment of that property which was still left with them after that sale or even for the beneficial enjoyment of the property of other persons with which they had no concern. In respect of the property which the owners had sold earlier they would have to comply with the provisions of S. 9 before imposing a fresh easement. AIR 1930 Mad 382 (FB), Distinguished. (Para 9)

Cases Referred: Chronological Paras
AIR 1930 Mad 382 = ILR 53 Mad 270 (FB) 9
(1912) 39 Ind App 49 = ILR 34 All 213 (PC) 8

*(Against judgment and decree passed by P. K. Agarwal, Addl. Civil J. (Addl. J. Sm. C. C.) Lucknow in Civil Appeal No. 66 of 1966, D/- 23-12-1958.)

FS/HS/C80/75/RSK

Naziruddin and S. B. Singh, for Appellant; K. L. Saxena, for Respondent.

JUDGMENT:— This is a defendant's second appeal against whom a decree for injunction has been passed by the lower appellate court though originally the suit of the plaintiff was dismissed by the trial court.

2. The brief facts of the case so far as relevant for the decision of this appeal were that one Azizuddin and his wife Smt. Safia Khatoon were owners of a house situate within a compound known as Waheed Manzil. Azizuddin died leaving his widow Smt. Safia Khatoon, a major son Gawasul Aziz, two minor sons Raisul Aziz and Nafisul Aziz and a minor daughter Noorafsa Begum as his heirs who inherited the share of Azizuddin in this house and the rest of his property situate in the compound of Waheed Manzil. On 13-9-1950 Gawasul Aziz, and Smt. Safia Khatoon in her own right as well as acting as guardian of her two minor sons and one minor daughter executed a sale deed in respect of that house in favour of Mohd. Ishaq plaintiff-respondent. In the sale deed it was stipulated that the vendee Mohd. Ishaq shall have a passage at least 6 ft. wide towards the east for ingress into and egress from the house so sold to him. By the time this sale deed was executed no guardian of the minor had been appointed under the Guardians and Wards Act. Subsequently, Gawasul Aziz was appointed by the District Judge as guardian of the person and property of his minor brothers and sister. Thereafter, Gawasul Aziz after obtaining permission from the District Judge executed a sale deed on 4-4-1952 in favour of Smt. Nafisun Nisa, defendant-appellant before us. This sale deed was executed by Smt. Safia Khatoon in her own right and by Gawasul Aziz in his own right as well as on behalf of minors whose guardian he had been appointed by the District Judge. Under this sale deed the vendors transferred an open piece of land situate in Waheed Manzil to Smt. Nafisun Nisa. Simultaneously, they imposed an easement by way of right of passage on a part of their remaining property of which the executants were full owners. This easement was imposed by stipulating that towards the south of the land sold an open land 8 ft. wide shall be left for passage to the land sold under that sale deed as well as to other houses situate in the compound of Waheed Manzil including the house of Mohd. Ishaq (plaintiff-respondent) and also for house known as Waheed Manzil aforesaid belonging to and owned by the executants. It appears that Smt. Nafisun Nisa while constructing a house on the land purchased by her under this sale deed dated 4-4-1952 projected a balcony over this pas-

sage land and also paved it with Pucca bricks. The plaintiff Mohd. Ishaq apprehending that in doing so, the passage to his house would become narrow filed a suit for injunction against the defendant.

3. The suit was contested on behalf of the defendant on a number of grounds. It is not necessary to mention all the pleas taken by the defendant for the purposes of this appeal. The main pleas which are relevant for this appeal were that the sale deed dated 13-9-50 executed in favour of the plaintiff was void so far as the share of the minors was concerned and that Smt. Safia Khatoon though she was mother of these minors had no power to alienate their share under this sale deed. It was, therefore, pleaded that neither the plaintiff gets any title in the house in respect of which he claims a right of passage nor the covenant contained in that sale deed that 6 ft. wide passage would be available to him as a binding and valid covenant. With regard to covenant contained in the subsequent sale deed executed in favour of defendant it was alleged that the plaintiff was not a party to that document and no grant was made in his favour and as such he could not enforce that covenant contained in that sale deed under which a passage 8 ft. wide was to be left for the right of way to the houses of the vendor and the vendee and other persons among whom the name of the plaintiff was also included.

4. The trial court held that though the sale deed dated 13-9-50 was void with regard to the share of the minors, it was valid in respect of the share of Smt. Safia Khatoon and Gawasul Aziz and under that sale deed the plaintiff was entitled to a passage 6 ft. wide which was still available. The plaintiff could not avail of the second sale deed executed in favour of the defendant and enforce the covenant contained in it that 8 ft. wide passage will be left. On these findings the suit was dismissed.

5. The plaintiff filed an appeal. The lower appellate court held that the plaintiff could claim passage 8 ft. wide on the basis of the sale deed dated 4-4-1952 executed by Smt. Safia Khatoon and others in favour of the defendant. He further found that the projection of the balcony did not interfere with that passage and the passage that was still in existence was 8 ft. wide. He, therefore, granted a prohibitory injunction in favour of the plaintiff restraining the defendant from erecting any building in future on the disputed passage with a width of 8 ft.

6. Feeling aggrieved by that decree the defendant filed this second appeal.

at the instance of the transferee decree-holder. On 3-12-1956 the transfer of the decree in favour of the appellant was recognised. On 17-1-1957 attachment of the properties was ordered. On 9-8-1957 E. P. 379 of 1956 was dismissed with a direction that the attachment should subsist. The dismissal was made by reason of the fact of the pendency of the insolvency proceedings against the judgment-debtor. Unnumbered E. P. — of 1964 and E. A. No. 424 of 1964 were filed by the transferee decree-holder to exclude the time taken by the insolvency proceedings and continue execution proceedings. On 6-7-1965 E. A. No. 424 of 1964 was allowed by the Sub-Court Visakhapatnam. The unnumbered E. P. also was numbered as E. P. No. 207 of 1965. As by that time, the judgment-debtor died in the execution petition, there was a prayer to add the legal representatives of the deceased judgment-debtor and also order attachment and sale of the properties. On 7-10-1966 the Sub-Court, Visakhapatnam, ordered the properties to be attached by 28-11-1966. The attachment was effected and further steps were ordered thereon. On 24-10-1968 the E. P. was dismissed for the default of the transferee decree-holder. The decree-holder thereupon filed E. A. No. 642/1968 for restoration of the E. P. dismissed for default. On 7-12-1968 E. P. 207 of 1965 was restored. Subsequently there was a change of jurisdiction in respect of the properties attached. The High Court in C. R. P. No. 1410 of 1969 had directed that the execution proceedings from the Visakhapatnam be transferred to the Vizianagaram Court. In Vizianagaram, the transferred E. P. was numbered as E. P. No. 22 of 1971. Even when the terms of the sale of the properties were about to be settled, the judgment-debtors filed a memo objecting to the sale on the ground that the earlier E. P. No. 207 of 1965 was dismissed for default of the decree-holder in the Visakhapatnam Court and after it was restored, there was no attachment again made and that therefore the sale proceedings could not be ordered. The contention was when E. P. No. 207 of 1965 was dismissed for the default of the decree-holder, the attachment had also ceased and that the restoration of the execution petition did not have the effect of restoring the attachment also. The contention of the judgment-debtors had found favour with the Subordinate Judge, Vizianagaram. He was of the view that when the Execution Petition which was dismissed for default was restored, it could not be presumed that the attachment also revived particularly when the Execution Petition was dismissed for default of the decree-holder and the attachment had ceased. He, therefore, ordered a fresh attachment.

3. The aggrieved transferee decree-holder had preferred an appeal to the Court of the District Judge, Visakhapatnam. It was noticed by the learned Judge, that even by the date the attachment was ordered at the instance of the transferee decree-holder in E. P. No. 207 of 1965, the attachment effected in the prior E. P. No. 379 of 1956 did not cease and that in effect the property was re-attached in E. P. No. 207 of 1965. He posed the question, whether by reason of the dismissal of E. P. 207 of 1965 for default of the decree-holder and its subsequent restoration to file, the continuance of the earlier subsisting attachment effect on the prior E. P. No. 379 of 1956 was in any manner effected. On this point, the learned Judge had correctly held that the order in E. P. No. 207 of 1965 to attach the properties which were already attached in the earlier E. P. was redundant. He also expressed the opinion that the parties and the lower court had lost note of the fact that the attachment made in E. P. No. 379 of 1956 did not cease. But the learned Judge expressed the view that the appeal to the District Court was not maintainable, upholding a preliminary objection raised on behalf of the judgment-debtors. He considered the combined effect of Section 2 (2) of the Code of Civil Procedure which defined a decree and Section 47, C.P.C. and thought that the order of the Court below did not amount to a decree and therefore no appeal lay. He was of the view that the appeal before him was only against the order of the lower court directing the attachment of the properties in execution proceedings. Though on merits, he expressed the view in favour of the decree-holder, he had dismissed the appeal as not maintainable.

4. The First Point that arises, therefore, for consideration is whether the appeal to the lower appellate court was maintainable.

5. The view of the lower appellate court that the appeal to it was against an order directing attachment and that therefore it could not be said to conclusively determine the rights of the parties and that the matter did not really fall under Section 47, C.P.C. does not appear to me to be correct. No doubt the executing court had directed a fresh attachment of the properties, but in making that order had expressed the view that by reason of the dismissal of E. P. No. 207 of 1965 for default of the decree-holder, there was no revival of the attachment and therefore a fresh attachment had to be ordered. The real bone of contention between the parties was whether by reason of the restoration of E. P. 207/65 the attachment effected in the

E. P. stood revived. Section 47 (1) of the Code of Civil Procedure requires that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit." Section 47, C.P.C. gives effect to the rule of law that in cases where there is an executable judgment as between the parties thereto or their representatives the only remedy is execution and no other action by way of suit would lie. The section is intended to provide a cheap and expeditious procedure for determination of questions which relate to execution, discharge or satisfaction of a decree. If the questions that arise relate to execution, discharge or satisfaction of the decree, then it does not matter whether such question arises before or after the decree had been executed. In dealing with S. 244 of the old Code of Civil Procedure (now Section 47, C.P.C.) their Lordships of the Privy Council in *Prosumno Coomar Sanyal v. Kalidas Sanyal*, (1892) ILR 19 Cal 683 (PC) had expressed their satisfaction that Courts in India have not placed any narrow construction on the language of Section 244 of the old Code. In the latest case reported in *H. Badridas v. D. B. Prasad*, (1974) 2 SCJ 196 = (AIR 1973 SC 2423) their Lordships observed that Section 47, C.P.C. should, in their view, be construed liberally and if so construed, I fail to see why objections by parties to attachment or non-attachment of the properties before a sale takes place should not be held to be covered by the words "relating to the execution" within the meaning of Section 47 (1), Civil Procedure Code. If that is so, there is no difficulty in holding that the question involved in this case is covered by the definition of decree contained in Section 2 (2) of the Code of Civil Procedure, which expressly provides that the decree shall be deemed to include the determination of any question within Section 47, C.P.C. I, therefore, hold disagreeing with the lower appellate Court that the appeal to the Court below was competent and a second appeal to this court lies.

6. It was contended by Sri Ratna Sastry for the appellant that on the facts of this case, the dismissal of E. P. 207 of 1965 for default of the decree-holder had not the effect of terminating the attachment already made and which by reason of the order in E. P. No. 379 of 1956 was directed to subsist. The attachment that was sought by the decree-holder in E. P. 207 of 1965, the learned counsel contended, was indeed superfluous and redundant. In other words, he contended that the dismissal of E. P. 207 of 1965 on ac-

count of the default of the decree-holder did not have the effect of terminating the prior attachment made in the earlier E. P. He contended that an attachment will cease only if the E. P. in which the attachment was effected was dismissed for default and not when a subsequent petition was dismissed for default. Even otherwise, the learned counsel contended that when E. P. 207 of 1965 was restored pursuant to E. A. 642/68 the effect was to restore the E. P. to a position in which it was on the date of its dismissal viz., the attachment effected in the E. P. also stood revived and restored. I am of the view that both the contentions are well-founded and supported by authority.

7. In *Karuppan Chettiar v. Rajangam* (AIR 1940 Mad 172), it was held that an attachment will cease only if the application for execution on which the attachment was effected was dismissed for default and not when a subsequent application was dismissed for default. This decision was followed by *Satyanarayana Rao, J. in Subrahmanian v. Official Receiver* (AIR 1949 Mad 594). The facts in that case are somewhat similar. In that case, certain property was attached in execution of a Rangoon High Court decree in E. P. 73 of 1937. As insolvency proceedings against the judgment-debtor had intervened, E. P. 73 of 1937 was not pursued and the petition was closed. After the adjudication of the judgment-debtor was set aside the decree-holder had filed E. A. No. 46 of 1941 to continue the execution in E. P. 73 of 1937. The executing court had directed the decree-holder to file a draft sale proclamation and after it was filed the properties were directed to be attached. The learned Judge observed that it was difficult to see why the order of attachment was made notwithstanding that the properties were already under attachment in E. P. No. 73 of 1937. However, the application of 1941 came to be dismissed on 10-3-1941, as batta was not paid for attachment of the property. The learned Judge opined that the direction by the Court that batta should be paid for attachment was an unnecessary direction and the non-compliance with such a direction would not entail the penal consequence contemplated by Order 21, Rule 57, C.P.C. Following the judgment in *Karuppan Chettiar v. Rajangam* (AIR 1940 Mad 172) (supra), the learned Judge held that the dismissal of E. P. No. 46 of 1941 did not terminate the attachment effected in E. P. 73 of 1937.

8. In the light of the above authorities, it has to be held in this case that the attachment effected earlier had not ceased. The fact that in E. P. No. 207 of 1965 the decree-holder sought the attachment of the properties does not make

any difference. It was superfluous and wholly unnecessary. The fact that E. P. No. 207 of 1965 was dismissed for default of the decree-holder may be held to have put an end to the redundant attachment made at the instance of the decree-holder, but it would not operate against the attachment earlier made in E. P. 379 of 1956.

9. The matter also can be looked at from another angle. What is the effect of setting aside the order of dismissal of E. P. 207 of 1965 for the default of the decree-holder and restoring the E. P.? Does it have the effect of reviving or restoring the order attaching the property in that E. P.? That the attachment also stands restored when the execution petition which was dismissed for default is restored, is supported by the authority of a Division Bench of the Madras High Court reported in *Annapurna v. Lakshmana* (AIR 1950 Mad 740). It was observed by the Bench (at page 742) as follows:

"In the case we are here considering, the attachment of the property was not an ancillary or interlocutory order, but part of the process of execution. If, in the case of a dismissal for default even ancillary and interlocutory orders have to be restored if the dismissal for default is set aside on appeal, then a fortiori in a case such as we are here considering, the order attaching the property would have to be restored. When an order for dismissal for default is set aside, the effect of the appellate order which declares the order of the trial court to be wrong is to restore the original application; and the trial court would have to proceed with it from the stage at which it had interrupted in by dismissing it for default. If, therefore, in the present case the original order is set aside, the execution proceedings would have to be continued from the stage at which they were when the petition was dismissed for default. At that stage the property had already been attached."

10. A reference may profitably be made to the Full Bench case reported in *Veeraswami v. Ramanna* (AIR 1935 Mad 365) (FB).

11. That was a case where a suit was dismissed for default and it was set aside on an application made. In that case, an order of attachment before judgment was sought and granted in the suit; but it was raised on security being furnished by the defendant. The Full Bench held that when the order dismissing the suit for default was set aside, the suit remained as it was on the day when it was dismissed and that all proceedings taken upto that date must be deemed to

be in force when the order of dismissal was set aside. All interlocutory orders will be revived on the setting aside of that order of dismissal and similarly an order for attachment of the property would also be revived. Since on a restoration of the suit, all ancillary orders also stand restored without any further orders, the security bond given for the raising of the attachment before judgment was held to have stood restored. It was, therefore, held that the decree-holder was entitled to enforce the security bond.

12. In any view of the matter, the direction for a fresh attachment given by the executing court in this case cannot stand. Sri M. S. R. Subrahmanyam sought to contend that having regard to the provisions of Order 21, Rule 57, C.P.C. the ceasing of an attachment owing to the default of the decree-holder is a consequence of the dismissal for default. He also urged that when an E. P. is dismissed for default, the Court is bound to order ceasing of the attachment. Even if no such order is made, still the effect in law is that the order of attachment ceases and that it was incompetent for the court in cases where the E. P. is dismissed for the default of the decree-holder to give a direction to continue the attachment. He referred me to a Division Bench ruling of this Court in *L. R. Goud v. Raju Bai*, (AIR 1971 Andh Pra 336). He contended that there should have been another application to restore the attachment also and as that was not done, the consequential ceasing of attachment did not ipso facto stand revived. The authority relied on lays down no proposition which supports the contention urged.

13. This argument does not have the merit of either law or logic in it. The discussion with reference to the authorities made by me above effectively forecloses any argument of the type advanced by the learned counsel for the respondents.

14. There is no need for any further attachment of the properties. The execution proceedings in the court below can go on according to law. The C. M. S. A. is accordingly allowed setting aside the judgments and decrees of the courts below. The appellant will get his costs here and in the lower appellate court.

Appeal allowed.

AIR 1975 ANDHRA PRADESH 308

RAMACHANDRA RAJU, J.

B. D. Mohan Rao, Petitioner v. Co-operative Industries Estates (Ltd.), Respondent.

Civil Revn. Petn. No. 1719 of 1973, D/- 3-9-1974.*

(A) Civil P. C. (1908), O. 23. R. 3 — Recording compromise — Is a judicial and not a ministerial act.

The recording of compromise is not purely a formal matter, but a question of substance. Under Order 23, Rule 3 the court has to find out if there is any agreement between the parties for compromise. The terms of settlement must be examined with care and caution and see that the parties understood the terms of the compromise and there is no fraud or misrepresentation. A court making a decree by consent would be performing a judicial and not a ministerial act.

(Para 7)

(B) High Court Rules and Orders — A. P. Civil Rules of Practice, R. 19, Form 12 — Power of the counsel to enter into a compromise — Authorization must be by a special Vakalat.

If, for any reason, the party cannot appear before the Court or sign in the compromise petition, the Court can give permission to the counsel to admit the compromise in Court on behalf of the party, by filing a separate vakalat (which is usually called a special vakalat) from his party, specifically authorising him either to enter into compromise or admit compromise on his behalf in Court or both. Then, after the court is satisfied it records the compromise. That is what is meant by 'otherwise ordered by the Court' mentioned in Rule 19 of the Civil Rules of Practice.

(Para 10)

Cases Referred: Chronological Paras
AIR 1929 Oudh 211 = 121 Ind Cas 283 5

I. Seshagiri Rao, for Petitioner: V. Bonthaiah, for Respondent.

ORDER:— This C. R. P. arises out of suit O. S. No. 14 of 1971 on the file of the Court of Munsif Magistrate, Hyderabad (West). The revision is directed against an order refusing to set aside the order passed in I. A. No. 890 of 1973 filed in I. A. 133/71. The petitioner herein filed the suit against the respondent which is the Co-operative Industrial Estates Limited, Sanathnagar (Balanagar), Hyderabad West, represented by its Chairman, for a declaration that the suit scheduled property, which is a site of an extent of 400 sq. yards at Sanathnagar (Balanagar),

*(To revise order of Munsif Magistrate, West Hyderabad, D/- 7-7-1973.)

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Hyderabad West, in his property and to restrain the respondent permanently from interfering with his right, title and possession of the site and also to restrain the respondent from making any further construction of any structure thereon and also for a mandatory injunction to pull down and remove the structure already constructed by him thereon. Along with the suit, the petitioner filed the I. A. No. 133/71 and a temporary injunction against the respondent was granted in April, 1973. Thereafter, the suit was posted for trial after summer vacation. During the vacation, before the vacation Court, on 10-5-1973, I. A. No. 890/73 was filed, signed by the Advocates of the two parties under Order 39, Rule 4, C.P.C. to amend the temporary injunction order passed in I. A. No. 133/71. After the vacation, the plaintiff filed the present I. A. No. 254/73 against the order in which the C. R. P. is directed to set aside the order in I. A. No. 890/73. As it was refused by the lower court, the petitioner has come forward with this revision petition.

2. The two advocates filed the I. A. No. 890/73 in the following terms:—

"The parties agree that this Hon'ble Court may be pleased to modify the order passed in I. A. No. 133/71 on the following terms and conditions:—

- (1) That the defendant or any constituent member of it is permitted to complete the construction of the building, erect machinery, to do other ancillary acts on the said land, plot No. 76, Survey No. 123/B, admeasuring 400 square yards at Balanagar (Sanathnagar, Hyderabad).
- (2) On declaration being granted by the Court the plaintiff will be entitled for adequate compensation only and not for possession of the said land.
- (3) That the compensation can be recovered from the party who will be found liable to pay ultimately."

3. This was signed only by the Advocates of the petitioner and the respondent, and the petitioner and the respondent did not sign on it.

4. As per the above terms, the lower court changed the temporary injunction order passed on 19-4-1973 in the I. A. No. 133/71, which was a simple one, namely, that a temporary injunction was granted in respect of the relief prayed for by the petitioner in the suit.

5. The petitioner filed the application I. A. 254/73 alleging that he did not instruct or authorise his counsel to the agreed order, as mentioned in I. A. No. 890/73. It was done without his consent, secretly and behind his back. He

did not sign on the compromise petition. The entire compromise proceedings are illegal, highly irregular and against all principles of natural justice and that he was neither called upon nor was asked whether he agreed to the compromise terms. The lower court dismissed the application of the petitioner on the ground that the petitioner has got a remedy to prefer an appeal against the order passed in I. A. No. 890/73 but, without exercising that option, he has chosen the remedy by filing a petition under Section 151, C.P.C. which can be exercised only to undo the effect of fraud practised on Court, and according to the allegation made by the petitioner, the fraud that was practised was on the petitioner by his counsel for which there are different remedies open to the petitioner. Following the decision of the Oudh High Court in *Paran Kuer v. Manni Lal*, AIR 1929 Oudh 211, wherein it was held that where a consent decree is passed by a court on confession of judgment by a party's pleader, it must be assumed that the court must have satisfied itself before passing of the consent decree that the pleader confessing judgment had authority on behalf of the party to act in the manner in which he did and that the person, challenging the authority, must prove to the contrary by positive evidence, the lower court came to the conclusion that the order dated 10-5-73 in I. A. No. 890/73 is based on proceedings properly and regularly held and that the court has satisfied itself, before passing of the consent order, that the counsel for the petitioner-plaintiff had authority on his client's behalf to act in the manner in which he did. Accordingly, the lower court dismissed the application of the petitioner. It is this dismissal order which is assailed in this revision petition.

6. By a reading of the terms of the application in I. A. No. 890/73, signed only by the counsel of the respective parties without obtaining the signatures of the parties, which was filed for obtaining the consent order, it appears clear that it was not filed merely for obtaining a change in the terms of the temporary injunction order only. As a matter of fact the temporary injunction order was obtained in order to prevent the defendant from making further construction on the suit land during the pendency of the suit. By means of the consent order that temporary injunction order is completely vacated and the defendant is allowed to proceed with further construction of the buildings and erection of the machinery. Besides that the right of the petitioner to get possession of the land was given up. In the suit, the petitioner claimed title to the suit

land and also for a mandatory injunction for removal of the construction already made on it by the respondent. By reason of the terms of the compromise filed in I. A. No. 890/73, the petitioner gave up his right to the land and agreed to take compensation only in lieu of it, in case he is found to be entitled to the land in the suit. By means of the compromise, ownership of the land was conferred on the defendant and he was allowed to continue the construction and complete it and also to erect the machinery and to do other ancillary acts. Therefore, in substance, that is a compromise with regard to the subject-matter of the suit itself to some extent, though the right to receive compensation was reserved to the petitioner, in case his title to the land is to be found.

7. Therefore, when the application I. A. 890/73 was filed, the lower court should have proceeded to record the compromise in the manner provided under Order 23, Rule 3 of the Code of Civil Procedure. A compromise decree under Order 23, Rule 3 can be passed only after there has been an order recording the compromise. The recording of compromise is not purely a formal matter, but a question of substance. Under Order 23, Rule 3 the court has to find out if there is any agreement between the parties for compromise. The terms of settlement must be examined with care and caution and see that the parties understood the terms of the compromise and there is no fraud or misrepresentation. A court making a decree by consent would be performing a judicial and not a ministerial act.

8. In this connection, it is necessary to consider the authority of an Advocate to enter into compromise. It is provided under Rule 19 of the Civil Rules of Practice that "every Vakalat shall unless otherwise ordered by the Court, be in form No. 12 and shall authorise the pleader to appear in all execution and miscellaneous proceedings in the suit or matter subsequent to the final decree or order passed therein."

9. Form No. 12 is as follows:—

"I do hereby appoint and retain..... to appear for me in the above..... and to conduct and prosecute or defend the same and all proceedings that may be taken in respect of any application for execution of any decree or order passed therein. I empower my vakil to appear in all miscellaneous proceedings in the above suit or matter till all decrees or orders are fully satisfied or adjusted and to obtain the return of documents and draw any moneys that might be payable to me in the said suit or matter and I do further empower my vakil

to accept on my behalf, service of notice of all or any appeals or petitions filed in any court of Appeal, Reference or Revision with regard to the said suit or matter before the disposal of the same in this Honourable Court."

"'Accepted' The address for service of the said pleader is....."

10. On a perusal of the terms given in the above form, it is immediately clear that it does not authorise to enter into a compromise with regard to the subject-matter of the litigation for conducting which vakalat is to be given. That is why, normally, in all compromise petitions, besides their counsel, the parties also would sign and the parties also would appear in Court and express their consent to the compromise to the Court directly. It is then, the court records the compromise as provided under Order 23, Rule 3, C.P.C. If, for any reason, the party cannot appear before the Court or sign in the compromise petition, the Court can give permission to the counsel to admit the compromise in Court on behalf of the party, by filing a separate vakalat (which is usually called a special vakalat) from his party, specifically authorising him either to enter into compromise or admit compromise on his behalf in Court or both. Then, after the court is satisfied about the authorisation given to the counsel under the special Vakalat, when the compromise petition is signed by the counsel mentioning the special power given to him, it records the compromise. That is what is meant by 'otherwise ordered by the Court' as mentioned in Rule 19 of the Civil Rules of Practice, mentioned above. It is true that in the vakalat originally given by the petitioner to his counsel, there is a term authorising him to enter into compromise. But, that is not enough. Special vakalat is necessary and there should be an order of the Court with regard to it empowering the counsel to act as per the special vakalat.

11. Admittedly, no special vakalat from the petitioner was filed by his counsel at the time I. A. No. 890/73 was filed. The counsel for the petitioner merely signed in the application as filing the petition. There is nothing on it by way of any endorsement made by him to indicate that he signed it on behalf of his client in exercise of the authority given to him to compound.

12. Therefore, if there be anything more or not by way of fraud, the consent order was passed by the lower court in I. A. No. 890/73, without following the proper procedure and without the compromise petition being signed by the petitioner or there being any special vakalat from the petitioner authorising the

counsel to enter into the compromise on his behalf. If that order was passed irregularly by the lower court, by some mistake, without following the proper procedure, certainly it can be set aside by it, exercising the inherent powers given under Section 151, C.P.C. for the ends of justice and to prevent abuse of the process of the Court.

13. Accordingly, the Civil Revision Petition is allowed with costs and the consent order passed by the Lower Court in I. A. No. 890/73 is set aside.

Revision allowed.

AIR 1975 ANDHRA PRADESH 310

SAMBASIVA RAO AND
SRIRAMULU, JJ.

Ganesh Parshad, Appellant v. Adi Hindu Social Service League represented by its Hony. Secretary M. S. Goutom, Respondent.

Letters Patent Appeal No. 8 of 1973,
D/- 23-8-1974.

(A) Civil P. C. (1908), S. 144 — Doctrine of restitution — Principles of — Conditions to be satisfied for granting restitution, pointed out — Ex parte decree for eviction — Execution — Decree-holder receiving possession of suit property from judgment-debtor — Decree reversed in appeal — Judgment-debtor held entitled for restitution, even if property was sold by judgment-debtor in the meanwhile. A. A. O. No. 16 of 1971, D/- 24-8-1972 (Andh. Pra.), Reversed.

The doctrine of restitution is based upon the principle that the acts of Courts should not be allowed to work injury on the suitors. It contemplates a case where the property has been received by the decree-holder under his decree and that decree is subsequently, wholly or partially, reversed or varied in other proceedings. In such a case, the law imposes an obligation on the party, who receives the benefit of such erroneous judgment, to deliver back the property to the person who had lost it. (Para 14)

Section 144 is a salutary provision of law and, in order that this section may apply to a case, three conditions are necessary to be satisfied. They are: (i) the restitution sought must be in respect of a decree or order which had been varied or reversed; (ii) the party applying for restitution must be entitled to the benefit under a reversing decree or order and (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order. If these conditions are satisfied, it gives no choice or discretion to the court, and the only

course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree, or order. Case law discussed.

(Paras 15, 16)

Where in execution of the ex parte decree for eviction the decree-holder received possession of the suit property from the judgment-debtor but that very ex parte decree under which the decree holder derived the benefit has been reversed and set aside by the appellate court, the judgment-debtor is entitled for the restitution of the property which he had lost in execution of the erroneous decree.

(Paras 18, 27)

Even if the property has been sold in the meanwhile by the judgment-debtor it cannot be said that by deprivation of his possession the judgment-debtor had not suffered any loss. Still he had to deliver possession of the same to the purchaser; otherwise, he would be liable in damages to the purchaser.

(Paras 18, 27)

Section 144 imposes no limitations on the rights of the judgment-debtor to get back the benefit, to which he is entitled under the appellate Court's decree, which has reversed or varied the trial court's decree. The question whether the balance of convenience is in his favour or not, is irrelevant for the purpose of granting restitution. A. A. O. No. 16 of 1971, DJ-24-8-1972 (Andh. Pra.), Reversed.

(Para 18)

Cases Referred: Chronological Paras

AIR 1973 Andh Pra 27 = (1972) 2 Andh LT 23 9, 25

AIR 1966 SC 948 = (1966) 3 SCR 24 9, 26, 27

AIR 1965 SC 1477 = (1965) 2 SCR 436 9, 24

AIR 1953 SC 136 = 1953 SCR 559 10, 21

AIR 1952 Nag 275 = 1952 Nag LJ 264 10, 22

AIR 1941 PC 128 = ILR (1941) Kar PC 150 10, 20

Peri Subba Rao, for Appellant; B. V. Subbarayudu, for Respondent.

SRIRAMULU, J.:— This Letters Patent Appeal is directed against the judgment of our learned brother, Madhava Reddy J. in A. A. A. O. No. 16 of 1971, allowing the appeal and setting aside the judgments and decrees of the lower courts.

2. The material facts are: The respondent Society, called "Adi Hindu Social Service League" is a society registered under the Hyderabad Societies Registration Act. The respondent-Society runs a girls' school in the main building bearing No. 480 at Esamiah Bazar, Hyderabad; adjacent to the main building there is an open plot of land measuring

about 81 sq. yards. After executing a rental agreement, the appellant herein obtained the said open plot of land, bearing Municipal No. 4-7-1081 from the then Secretary of the respondent-Society on a monthly rent of Rs. 7. The appellant put up a thatched hut in the said vacant land. The appellant agreed to remove the hut when he vacates the plot of land.

3. Since the appellant herein failed to pay rents in respect of the said plot of land from July, 1953 onwards, the respondent-Society filed small cause suit No. 449 of 1965 against the appellant for the recovery of arrears of rent. The appellant herein resisted the said suit on the ground that he is the true owner of the said plot of land; that, he had obtained the suit land from his brother who, in his turn, got the said land by way of gift from one Johandrunnissa Begum and that he has perfected his title to the said land by being in long, open continuous and un-interrupted possession of the same for over 34 years. He further denied that he was a tenant of the respondent, or that he had, at any time, paid the rents.

4. Later on, the small cause suit was transferred to the court of the IV Additional Judge City Civil Court, Hyderabad. By his judgment dated 17-11-1966, the IV Additional Judge, City Civil Court, Hyderabad held that the tenancy and the rental agreement were proved and that, the arrears of rent were due, but dismissed the suit on the ground that, since the tenancy had been terminated by the plaintiff, the suit should have been only for compensation or damages for use and occupation and that, such a suit was outside the cognizance of the Small Causes Court.

5. Since the respondent's suit for arrears of rent against the appellant was dismissed, for want of jurisdiction, the respondent filed O. S. No. 22 of 1968 in the Court of the II Asst. Judge, City Civil Court, Hyderabad, for the eviction of the appellant from the suit plot of land. The appellant raised the same defences in the suit as he had raised in the small cause suit which was filed against him for the recovery of arrears of rent. In his written statement, the appellant herein had also stated that on 9-2-1968 he had sold away the said plot of land to one Kumari Anupameswari Bai through her father and natural guardian, Kailash Prashad and that, she was a necessary party to the suit. Since the said purchaser was not made a party to the suit, the suit was bad for non-joinder of necessary parties. The eviction suit O. S. No. 22 of 1968, was heard and decreed ex parte on 2-8-1969. In execution of the ex parte decree, the respondent obtained the pos-

session of the said vacant plot of land from the appellant.

6. The appellant then filed an appeal against the ex parte decree in the court of the Chief Judge, City Civil Court at Hyderabad. The Chief Judge, City Civil Court, by his judgment dated 15-10-1969, allowed the appeal and set aside the ex parte decree. The appellant herein then filed E. A. No. 11 of 1969 for restitution of the suit property which was taken from him by the respondent in execution of the ex parte decree.

7. The IV Asst. Judge, City Civil Court Hyderabad, allowed the said E. A. and directed the restitution of the suit property to the appellant. On appeal, the order of restitution was upheld by the Chief Judge, City Civil Court subject to the direction that the stair-case constructed in the premises by the respondent, during the pendency of the appeal against the ex parte decree, should be maintained, as far as possible, in the same conditions as it was at the time of delivery of possession to the respondent. The appellant was, however, allowed to open a 10' door in front, in the suit plot of land.

8. Aggrieved by the above judgment and decree of the Chief Judge City Civil Court, Hyderabad granting restitution of the suit property to the appellant, the respondent-Society filed A. A. A. O. No. 16 of 1971 in this court. Our learned brother, Madhava Reddy, J. by his order dated 24-8-1972 allowed the respondent's appeal and set aside the concurrent order of the courts below. Hence this Letters Patent Appeal by the appellant.

9. The learned counsel, Sri Peri Subba Rao, appearing for the appellant, contended that Section 144 of the Code of Civil Procedure is mandatory and leaves no discretion to the court to grant or refuse to grant restitution in case of the variation or the reversal of the decree and that, it is obligatory on the part of the court to order restitution. The grounds on which Madhava Reddy, J. refused to uphold restitution are irrelevant and not sound. The learned Judge refused to allow restitution on three grounds viz. (i) restitution is not an invariable rule of universal application without exception; (ii) balance of convenience was in favour of the respondent herein; and (iii) the appellant sold away the said plot of land to Kumari Anupameswari Bai and has been carrying on his business elsewhere and has, therefore, no interest in praesenti in the suit property and he would, therefore, suffer no loss if restitution is not ordered. The learned counsel for the appellant submitted that all these grounds are not sound, and are

irrelevant for the purposes of granting restitution. In support of these arguments, the learned counsel relied upon the decision in State Govt. of Andhra Pradesh v. Manickchand Jeevraj & Co., (AIR 1973 Andh Pra 27), Binayak Swain v. Rameshchandra, (AIR 1966 SC 948) and Mahibhai v. Manibhai, (AIR 1965 SC 1477).

10. The learned counsel Sri Subbarayudu appearing for the respondent-Society on the other hand, supported the judgment of our learned brother, Madhava Reddy J. by relying upon the reasons given by him in his order. He further submitted that the possession of the suit property was obtained by the respondent-Society from Kumari Anupameswari Bai and not from the appellant herein. The appellant is a stranger and cannot therefore, claim restitution. The learned counsel also invited our attention to the decisions in S. N. Banerji v. K. L. & S. Co. Ltd. (AIR 1941 PC 128) and Laxmi-chand v. Sundrabai (AIR 1952 Nag 275); and Bhagwant Singh v. Sri Kishen Das, (AIR 1953 SC 136).

11. Before we enter upon a discussion on the question of law as to whether the appellant is entitled to the restitution of the suit property it is necessary for us to record a finding on the question as to whether the respondent herein received the possession of the suit property from the appellant, or from Kumari Anupameswari Bai.

12. E. P. No. 11 of 1969 in O. S. No. 22 of 1968 was filed by the respondent (decree-holder) against the appellant Ganesh Pershad. In pursuance of that E. P. a warrant for delivery of possession was issued by the executing Court and, in execution of that warrant, the bailiff delivered the possession of the suit property to the respondent, before the Panchas. The relevant portion of the Panchanama reads thus:—

"..... We the panch members were called for to hold the panchanama in the above case do hereby certify that the bailiff of the court along with the D. H. i.e., Shri M. B. Gautham, came to the J. D. house situated at Esamia Bazar today the 9th August, 1969 at 8 A. M. and intimated the purpose of arrival to the J. D. Sri Ganesh Pershad; accordingly he evicted the premises and vacant possession of land admeasuring 80 sq. yards bearing Municipal No. 4-7-1081 has been handed over to the D. H. and obtained receipt from him which is enclosed herewith and the same has been produced there at the site of having delivered the possession to the D. H. after evicting the J. D. from the said premises through the peon on the beat of drum by the drummer Shanker R/o Chaderghat, Hyderabad....." In view of the proceedings in the E. P.

and the Panchanama regarding the delivery of possession, it is incorrect or untrue to say that the respondent herein had taken the possession of the suit property from Kumari Anupameswari Bai. Our finding is that the respondent received the possession of the suit property by dispossessing the appellant from it.

13. Section 144 of the Civil Procedure Code, which provides for restitution, reads thus:

"Section 144 (1): Where and in so far as a decree or an order is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

14. The doctrine of restitution is based upon the cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors. Section 144, C.P.C. contemplates restitution in a case where the property has been received by the decree-holder under his decree and that decree is subsequently, wholly or partially, reversed or varied in other proceedings. In such a case, the law raises an obligation on the party, who receives the benefit of such erroneous judgment, to deliver back the property to the person who had lost it.

15. Section 144, C.P.C. is a salutary provision of law and, in order that this section may apply to a case, three conditions are necessary to be satisfied. They are: (i) the restitution sought must be in respect of a decree or order which had been varied or reversed; (ii) the party applying for restitution must be entitled to the benefit under a reversing decree or order and (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order.

16. If those conditions are satisfied, it gives no choice or discretion to the court, and the only course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree or order.

17. It is in execution of the ex parte decree at the instance of the respondent

(decree-holder) that the appellant herein was deprived of his possession of the suit property, and the respondent received the benefit of possession of the suit land. That very ex parte decree, under which the decree-holder derived the benefit, has been set aside by the appellate Court and in consequence of the appellate Court's judgment and decree, the appellant in this case seeks restitution.

18. We are unable to agree with the learned counsel, Sri Subbarayudu, that the appellant in this case did not suffer any loss because he had sold away the said plot of land to Kumari Anupameswari Bai and because the possession of the said property was received by the respondent from Kumari Anupameswari Bai. We have already found that the respondent herein, through the execution proceedings, received the possession of the suit property from the appellant herein. Even if the property had been sold in the meanwhile, by the appellant to Kumari Anupameswari Bai, still he had to deliver possession of the same to her; otherwise, he would be liable in damages to Kumari Anupameswari Bai. Therefore, by deprivation of his possession, the appellant must, undoubtedly, be held to have suffered loss. To such a case, Section 144, C.P.C. is attracted and the appellant is entitled for the restitution of the suit property. Section 144, C.P.C. imposes no limitations on the rights of the judgment-debtor to get back the benefit, to which he is entitled under the appellate Court's decree, which has reversed or varied the trial Court's decree. On a perusal of Section 144, it is obvious that the question whether the balance of convenience is in his favour or not, is irrelevant for the purpose of granting restitution.

19. Let us then see whether the authorities cited by the parties before us say anything different from what we have stated.

20. In *S. N. Banerji v. K. L. & S. Co.* (AIR 1941 PC 128), the Privy Council held that

"..... where the persons who have been dispossessed are found to be trespassers and the persons in subsequent possession are lawfully in possession by virtue of a valid lease in their favour it is not necessary for the ends of justice that the trespassers should be restored to possession though they may succeed in a suit for possession."

The Privy Council observed that the decree in that particular case was not varied but the party seeking restitution relied upon Section 151, C.P.C. The power expressed in Section 151, C.P.C. is the inherent power of the Court to make

such orders as may be necessary for the ends of justice. Certainly, the ends of justice would not require delivery of possession to a trespasser as against a person who holds the property in a lawful manner. The decision in that case has no application to the facts of this case, because the appellant herein is not a trespasser. According to the respondent, the appellant was a tenant, and according to the appellant himself he was the true owner of the property. In either case, his possession would not be illegal. Nor could he be considered as a trespasser.

21. In Lal Bhagwant Singh v. Sri Kishen Das (AIR 1953 SC 136) the Supreme Court observed that:—

"..... In this situation it cannot be said that there was any alteration in the position of the parties by the Privy Council setting aside the compromise decree and restoring the decree passed by the Civil Judge, Sitapur, in 1936....."

"..... It is true that it is one of the first and the highest duty of a Court to take care that its acts do not injure any of the suitors and if any injury was caused to the judgment-debtor by the sale held in February 1939, it was our duty to undo the wrong caused to him. It, however, cannot be said that in this case any wrong has been done to the judgment-debtor which we are called upon to redress. It is not possible to hold that he was under no obligation to satisfy either one or the other of the two decrees....." The Supreme Court further observed that:—

".....An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case. The decree-holder in the present case has derived no advantage to which he was not entitled and the judgment-debtor has lost nothing."

From the observations so made, it is abundantly clear that although the appellate court had set aside the judgment of the lower court, it had not the effect of varying or reversing the lower court's decree and the judgment-debtor did not suffer any loss, and the decree-holder did not derive any benefit to which he was not entitled. On these facts, the Supreme Court did not grant restitution. It must therefore, be held that in the

facts of that case, the Supreme Court upheld the refusal of restitution.

22. In Laxmichand v. Sundrabai (AIR 1952 Nag 275), the Nagpur High Court held that:

".....The Court has no jurisdiction to order restitution at the instance of a stranger. The functions of the Court under Section 144 require the presence of those parties who are affected by the variation or reversal of the decree. Where the applying party is not the one to whom the benefit of the variation or reversal of the decree goes, and the party against whom such variation or reversal of the decree has been ordered is absent, the Court in effect tries the matter in the absence of any of the parties to the dispute. Such a case, according to the well-accepted principles of jurisdiction would be no case at all, the initial jurisdiction of the Court must be taken to be entirely absent....."

23. In the instant case, the appellant was not a stranger to those proceedings and, therefore the decision of the Nagpur High Court does not help the respondent.

24. In Mahijibhai v. Manibhai (AIR 1965 SC 1477), by a Majority, the Supreme Court held that:—

".....An application for restitution under Section 144, C.P.C. is an application for execution of a decree and therefore, such application is governed by Art. 182, Limitation Act and not by Art. 181 of the Limitation Act which is a residuary article of limitation....."

We are not concerned in this case with the question whether an application for restitution is or is not an application for execution of a decree.

25. In State Govt. of Andh. Pra. v. Manickchand Jeevraj & Company (AIR 1973 Andh Pra 27) a Division Bench of this Court observed that:—

".....No party can take advantage of the wrongful acts or orders or decrees of any Court. The provisions of Section 144, are mandatory. The use of the word "shall" makes it obligatory on the court on the application of any party entitled for restitution to place the parties in the position which they would have occupied but for such erroneous or illegal decree or order or any part thereof as has been varied or reversed. The Court has no discretion to refuse the application to grant restitution if the ingredients of Section 144 are satisfied."

26. In Binayak Swain v. Ramesh Chandra (AIR 1966 SC 948) the question that came up for consideration before the Supreme Court was, whether the appellant was entitled to restitution of his properties purchased by the decree-holder in execution of the decree passed by

the District Judge on the ground that the decree was set aside by the High Court and the suit was remanded for rehearing and fresh disposal under the provisions of Section 144 of the C.P.C. The facts in that case are that the properties of the appellant were sold in execution, at the instance of the respondent who was executing the *ex parte* decree passed by the District Judge on March 9, 1943. In execution of that decree, the properties of the appellant were sold and the respondent got delivery of possession of those properties on May 17, 1946. The suit was eventually decreed, after remand, on August 27, 1954 by the judgment of the High Court. The Supreme Court refused to accept the argument of the respondents that the execution of the sale-deed under the previous *ex parte* decree, which was set aside by the High Court, was varied by the passing of the subsequent decree and, therefore, the appellant was not entitled to any restitution. The Supreme Court laid down that:

"..... We are of the opinion that the appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties, so far as they can be restored to the same position they were in at the time when the court by its erroneous action had displaced them from."

27. The decision in *Binayak Swain v. Ramesh Chandar* (AIR 1966 SC 948) is on all fours with the facts of this case. In execution of the *ex parte* decree, the respondent herein received possession of the suit property from the appellant and that *ex parte* decree has been reversed and set aside by the appellate court which remanded the matter for fresh disposal. The suit is now pending disposal and has not come to an end. The truth or otherwise of the averments of the respondent and the defences raised by the appellant have to be gone into by the court, and a final decision has to be given thereon. Before a final decision is given after a consideration of the evidence on those points, it is not possible to say that the

defences raised by the appellant in that suit are all false or untenable and that, the appellant did not suffer any loss when he was dispossessed of the suit property. Both on the date of execution of the warrant of delivery of possession and also on the date on which he applied for restitution, the appellant had a subsisting interest in the suit property. It is not, therefore, necessary in this case to decide whether or not an applicant, for getting the relief of restitution, should possess interest in *praesenti* in the suit property. Certainly the appellant in this case is entitled to the restitution of the property which he had lost in execution of the erroneous decree.

28. All the three requirements of Section 144, C.P.C. have been satisfied in this case and the reasons on which the learned Judge has set aside the concurrent orders of the Courts below are, in our opinion irrelevant for the purpose of grant of restitution to the appellant. We, therefore, allow the appeal, set aside the order of our learned brother, Madhava Reddy, J. and direct the restitution of the suit property to the appellant herein.

29. However, in order to safeguard and protect the interests of both the parties, it is necessary to order that both the parties shall not make any new additions or alterations in the existing structures. The staircase constructed by the respondent for the use of the girl students to go to the school building shall remain in the same condition in which it is on the date of this order, and shall continue to be so till the final disposal of the suit. We, accordingly order, the appellant shall not open the door of 10' in the front as permitted by the lower appellate Court. In the circumstances of this case, each party shall bear its own costs.

Appeal allowed.

AIR 1975 ANDHRA PRADESH 315

FULL BENCH

RAMACHANDRA RAO, MUKTADAR
AND SHIV SHANKER, JJ.

Maddukuri Venkatarao and others,
Petitioners v. The State of Andhra Pradesh and another, Respondents.

Writ Petns. Nos. 35, 403, 528, 552, 628, 298, 300, 1366, 1374, 351, 453, 565, 886, 1449, 1606, 466, 467, 468, 540, 562, 624, 674 to 677, 1144, 576, 598, 607, 614, 623, 625, 631, 942, 1077, 1078, 1079, 1145, 1146, 1153, 629, 630, 632, 1808, 671, 719, 775, 798, 863, 1205, 1489, 651, 765 to 767, 768, 769, 770, 1441 to 1444, 822, 862, 922, 923, 990, 1306, 1365, 901, 903, 921, 985,

1136, 953, 1045, 1059, 1075, 1080, 1097, 1111, 1464, 1465, 1096, 1258, 1342, 1206, 1510, 1568, 1207 to 1211, 1261, 1466, 1488, 1264 and 1340 of 1975, D/- 11-4-1975.

(A) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Pre. and Section 3 (f) — Constitutional validity of Act — The Act is a measure of agrarian reform and falls within the scope of Article 31-A — Expressions 'estate' and 'rights' in Article 31-A, meaning of — Definition of 'family unit' satisfies requirement of Article 31-A. (Constitution of India, Article 31-A).

The preamble to the Act states, that it is an Act to consolidate and amend the law relating to the fixation of ceiling on agricultural holdings and taking over of surplus lands and to provide for the matters connected therewith. The provisions of the Act show that the Act is a measure of agrarian reform. The several provisions of the Act provide for fixation of ceiling on agricultural holdings, and for acquisition of the surplus in excess of the ceiling area and for distribution of the same to agricultural labourers, village artisans or other poor persons or weaker sections, either for the purpose of agriculture or purposes ancillary thereto. (Case law discussed.) (Paras 50, 58)

The expression, "estate" in Article 31-A (2) includes any land held under ryotwari settlement and the expression "rights" in Art. 31-A (2) (b) includes any rights in such an "estate". For the purpose of fixing the ceiling limit, the lands held by each member of the family unit are aggregated and it is only the rights of each member of the family unit in the surplus lands in excess of the ceiling limit that are acquired. Therefore the whole of the Act including the definition of 'family unit' is covered by Article 31-A. (Para 60)

(B) Constitution of India, Articles 368, 14, 19, 31-A, 31-B, 31-C and 39 — Powers of Parliament to amend Constitution — Articles 14, 19 and 31 whether constitute basic structure or essential features of the Constitution — A. P. Land Reforms (Ceiling on Agricultural Holdings) Act whether protected by Articles 31-A, 31-B and 31-C from challenge on ground of violation of Articles 14 and 19. (A. P. Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Pre.)

Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. But the fundamental rights under Articles 14, 19 and 31 in so far as they relate to property rights do not constitute the basic structure or essential features of the Constitution. Right to property conferred by Articles 19 and 31 and the right of equality in its relation to right to property cannot form the basic structure or essen-

tial features of the Constitution, and are not outside the purview of the amending power of Parliament. AIR 1973 SC 1461, Foll. (Paras 78, 96, 100, 104)

First part of Article 31-C which was held valid by the Supreme Court in AIR 1973 SC 1461 is similar to Article 31-A and protects a law giving effect to the policy of the State towards securing the principles specified in Clauses (b) and (c) of Article 39 from challenge on the ground of infringement of the rights under Articles 14, 19 and 31 of the Constitution. The second part of Article 31-C ousts the jurisdiction of the Court to find out whether the law gives effect to the principles in Article 39 (b) and (c). (Para 103)

Thus so far as the rights under Articles 14, 19 and 31 in relation to property are concerned the Parliament has power to abridge or abrogate the same by exercising the power of amendment under Article 368 of the Constitution. Therefore the impugned provisions of the A. P. Land Reforms (Ceiling on Agricultural Holdings) Act are protected by the provisions of Articles 31-A, 31-B and the first part of Article 31-C of the Constitution from attack on the basis of Articles 14, 19 and 31. (Case law discussed.) (Paras 107, 108)

(C) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Sections 3 (f), 3 (o), 4, 8, 7 (1), (4) and (5) read with Section 8 (1), Expl. 2, and 24 — Validity of — Competence of State Legislature — Impugned provisions are related to land and are covered by Entry 18 of List 2 and hence not beyond the legislative competence of the State Legislature. (Constitution of India, Article 246, Sch. 7, List 2, Entry 18.)

All the aforesaid provisions of the Act are not merely ancillary but are necessary in any legislation relating to fixation of ceiling on agricultural holdings. AIR 1972 SC 425, Foll. (Paras 113, 115)

(D) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Sections 7 (3) and 3 (i) — Validity of — Provisions of Section 7 (3) read with definition of 'land' in Section 3 (i) in so far as they are made applicable to lands converted as Salt Pans are not outside Entry 18 of List 2 and hence are within legislative competence of State Legislature. (Constitution of India, Sch. 7, List 2, Entry 18).

Entry 18 confers widest powers on the State Legislature with regard to rights in or over land. The word 'lands' occurring in Entry should be given the widest meaning and it includes not only agricultural land but also non-agricultural land. AIR 1972 SC 425 and AIR 1962 SC 1563, Foll. (Paras 117, 118)

It is well settled that once a law in pith and substance falls within the Legislative entry, an incidental encroachment on an entry in another list does not affect its validity. (Para 120)

Therefore, it cannot be said that the lands being already converted into salt pans the provisions of Section 7 (3) read with Section 3 (i) cannot by adopting the device of deeming provisions, treat the lands as agricultural lands falling within the purview of Entry 18. The said provisions are merely incidental and ancillary to the main provisions of the Act imposing ceiling on agricultural holdings and are therefore within the legislative competence of the State Legislature. (Paras 119, 121)

Section 7 (3) which provides for ignoring conversions made with a view to avoid or defeat the object of the law relating to reduction in the ceiling on agricultural land holdings is a legislative device introduced by the legislature for rendering ineffective conversions of agricultural land made with a view to avoiding or defeating the provisions of the ceiling law. This provision is therefore made in aid of the main object of the Act and is within the competence of the State Legislature. AIR 1962 SC 50 and AIR 1967 SC 930, Foll. (Paras 124, 126)

(E) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Sections 7 (3) and 3 (i) — Validity — Provisions of Section 7 (3) read with Section 3 (i) in so far as they are sought to be applied to the lands converted into Salt Pans are neither beyond the legislative competence of State Legislature nor repugnant to provisions of the Central Excises and Salt Act. (Central Excises and Salt Act (1944), Sections 31, 32) — (Constitution of India, Art. 254).

The pith and substance of the Act is land covered by Entry 18, List II and the impugned provision is ancillary and incidental to the main provisions of the Act. The pith and substance of the impugned Act is to introduce ceiling on agricultural holdings and acquire lands in excess of the ceiling limit and distribute the same to agricultural labourers and other poor persons, or transfer the same to the weaker sections of the people dependent on agriculture. The mere fact that the enforcement of the Act would affect to some extent the carrying on of the business of manufacture of salt, would not render the said provisions ultra vires. AIR 1975 Andh Pra 262, Foll. (Paras 128, 129)

(F) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Sections 3 (f) and (o) and 4 (1) — 'Family unit' and 'Person' — Definitions of 'family unit' and 'person' do not offend Second proviso to Art. 31-A (1) — AIR 1974 Punj and Har 162 (FB), Dis-

sented from. (Constitution of India, Article 31-A (1) Proviso 2). (General Clauses Act (1897), Section 3 (42).)

So far as the concept of the individual is concerned, the Act which relates to agrarian reform, deals with the individual's rights whether he is a member of the family unit or not. For the purpose of imposing the ceiling, the legislature thought fit to adopt different devices for fixing the ceiling limit with regard to the lands held by the various persons as defined in the Act. It is competent for the legislature to define a person in the Act and create an artificial unit. The definition of a 'person' in General Clauses Act, would not restrict the powers of the State Legislature to define 'a person' and adopt a meaning different from or in excess of the ordinary acceptance of the word or as defined in the General Clauses Act. Therefore, it cannot be said that the State Legislature lacks competence to define a person so as to include an artificial family like the 'family unit', for the purpose of the Act. AIR 1967 SC 1776 and AIR 1972 SC 425 and AIR 1957 SC 121 and AIR 1975 Kant 55 and (1974) 78 Cal WN 639, Foll.; AIR 1974 Punj & Har 162 (FB), Dissented from. (Paras 136, 143, 144)

(G) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Sections 7 (1), 10 (5) (ii) and 3 (1), Explanation — Validity — Provisions whether offend Article 31-A (1) Proviso 2 — Whether protected by Art. 31-B. (Constitution of India, Articles 31-A (1), Proviso 2 and 31-B).

The said provisions are saved from challenge by reason of the protection given by Article 31-B by including the Act in the Ninth Schedule by the Thirty-fourth Constitution Amendment Act. Article 31-B stands independent of Article 31-A and any act or any provision of the Act included in the Ninth Schedule cannot be challenged as violating any provisions of Part III of the Constitution. The second proviso to Article 31-A is a provision in Part III of the Constitution and is covered by Article 31-B and therefore the challenge to the Act on the ground of infringement of the provisions of Part III is precluded by reason of the provisions of Article 31-B.

(Paras 162, 163)

The second proviso to Article 31-A (1) confers a fresh fundamental right. Even assuming that some of the impugned provisions of the Act offend the second proviso to Article 31-A (1) in view of the Constitutional protection conferred by Article 31-B the said provisions of the Act are constitutionally valid. (Case law discussed). (Paras 168, 169)

(H) Constitution of India, Articles 31-A (1) Proviso 2 and 14 — Scope — Provisions whether confer rights or are merely constitutional prohibition or in-

junction imposed against legislature. (Constitution of India, Article 31 (2).)

Second proviso to Article 31-A (1) does not merely constitute a prohibition or an injunction. It confers a right. The proviso is similar to Article 31 (2) with regard to payment of compensation for the land acquired. While Article 31 (2) confers a right to payment of 'amount' for the lands acquired, the second proviso to Article 31-A (1) provides for payment of compensation at not less than the market value for the lands acquired which are within the ceiling limit and under the personal cultivation of a person. It is not disputed nor can it be disputed that Article 31 (2) confers a fundamental right and if so, the second proviso to Article 31-A (1) which provides for payment of compensation at not less than the market value, confers a higher right than Article 31 (2) after its amendment by the Twenty-fifth Amendment Act. (Para 164)

Article 14 also confers a fundamental right on a person, though in another sense it may amount to an injunction prohibiting the Legislature and the executive organs from making any invidious or hostile discrimination. (Para 166)

(I) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Pre — Validity of Act — Act whether entitled to protection of Article 31-C — Article 31-C whether operates only in industrial sphere and not in agrarian sphere. (Constitution of India, Articles 31-C and 39).

The fact that directive principles in Article 39 (b) and (c) were set in motion in some States to achieve reforms in land law and that Article 31-C is inextricably bound up with Article 39 (b) and (c) shows that Article 31-C is not confined to industrial sphere but it covers both the industrial as well as agrarian spheres. The legislation relating to land reforms is a device for bringing about radical alterations in property rights and economic obligations and aims at removal of concentration of wealth and distribution of means of production and material resources of the community. These objectives are contained in Article 39 (b) and (c). It is to give protection to the laws giving effect to the policies in Article 39 (b) and (c) that Article 31-C has been introduced by the Constitution Twenty-fifth Amendment Act the first part of which has been held to be valid in Kesavanand's case. AIR 1973 SC 1461. (Para 172)

Therefore, the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act is entitled to the protection of Article 31-C of the Constitution. (Para 172)

(J) Constitution of India, Article 245 — Retrospective legislation — Powers of the legislature — A. P. Land Reforms

(Ceiling on Agricultural Holdings) Act (1973) can be given retrospective effect so as to take away the vested rights under A. P. (Ceiling on Agricultural Holdings) Act (1961) — A. P. Land Reforms (Ceiling on Agricultural Holdings Act (1 of 1973), Section 30).

The Legislature is competent to repeal a law and take away the vested rights. The A. P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 by Section 30 not only repealed the 1961 Act but also provided that proceedings pending under the said Act shall abate. This clearly shows that the rights accrued under the 1961 Act, were intended to be taken away by the Act. (Para 174)

(K) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Pre. — Constitutional validity — In view of the inclusion of the Act in the Ninth Schedule of the Constitution and constitutional immunity conferred by Article 31-B, it cannot be challenged on the score of violation of Articles 14, 19 and 31. AIR 1972 SC 425, Foll. (Constitution of India, Articles 31-B, 14, 19 and 31). (Para 175)

(L) Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Section 10 Explanation I (a) — Validity — Provision is not unconstitutional on ground of abdication of legislative function. (Constitution of India, Article 245).

Explanation I (a) to Section 10 which provides for surrender of surplus lands by agreement of parties is not unconstitutional on the ground that it amounts to abdication of a legislative function. The said provision is within the legislative competence of the State Legislature and is a provision conferring a benefit on the persons who have to surrender land which is in excess of the ceiling area. (Para 178)

(M) Constitution of India, Article 368 — Power of Parliament to amend constitution — Whether subject to any limitation.

Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. Therefore it cannot be said that the power of Parliament to amend the Constitution is plenary and is not subject to any limitations. AIR 1973 SC 1461, Foll. (Para 179)

(N) Constitution of India Article 141 — Law declared by the Supreme Court — Binding on all courts within territory of India — Decision of Supreme Court in AIR 1973 SC 1461 cannot be said to be not binding on the High Court on ground that the ratio decidendi in that decision is not discernible — High Court is bound by the said decision. (Precedents — Law declared by Supreme Court). (Para 180)

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RAMACHANDRA RAO, J.:— In this batch of Writ Petitions filed under Article 226 of the Constitution of India, common questions as to the constitutional validity of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1972 (hereinafter referred to as the Act) are raised.

2. The Act was passed on 31-7-1972 and received the assent of the President of India on 1-1-1973 and came into force from 1-1-1975 according to the notification issued by the Government of Andhra Pradesh in the Andhra Pradesh Extraordinary Gazette dated 18-12-1974. The Act was included in the Ninth Schedule of the Constitution of India by the Thirty Fourth Constitution Amendment Act, 1974. Earlier, with a view to prevent alienations of agricultural lands in anticipation of the ceiling law, the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Ordinance, was promulgated on 2-5-1972, in and by which all alienations made from that date, have been declared null and void. The Ordinance was subsequently replaced by the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act, 1972. The said Act has however been repealed by the present Act.

3. The constitutionality of the Act and its provisions is challenged on the grounds that they are beyond the legislative competence of the State legislature and that they violate the provisions of Articles 14, 19, 31 (2) the second proviso to Article 31-A of the Constitution, and they are not saved by the provisions of Articles 31-A, 31-B and 31-C of the Constitution.

4. Before we consider the main attack on the constitutionality of the Act, it is necessary to briefly outline the scheme of the Act. The Act fixes a ceiling on agricultural land holdings and provides for acquisition of land which is in excess of the ceiling limit and for distribution of the lands acquired, to the landless and poor agriculturists. The Act contains thirty sections and two schedules. Section 2 declares that the Act is for giving effect to the policy of the State towards securing the principles specified in clauses (b) and (c) of Article 39 of the Constitution. The expressions 'family unit', 'holding', 'owner', 'person', are defined in Section 3 clauses (f), (i), (n) and (o) which are as follows:—

"3 (f). 'Family unit' means:—

(i) in the case of an individual who has a spouse or spouses, such individual the spouse or spouses and their minor sons and their unmarried minor daughters, if any;

(ii) in the case of an individual who has no spouse, such individual and his or her minor sons and unmarried minor daughters;

(iii) in the case of an individual who is a divorced husband and who has not remarried, such individual and his minor sons and unmarried minor daughters, whether in his custody or not;

(iv) where an individual and his or her spouse are both dead, their minor sons and unmarried minor daughters.

Explanation: Where a minor son is married, his wife and their offspring, if any, shall also be deemed to be members of the family unit of which the minor son is a member;

3 (i) 'Holding' means the entire land held by a person:

"(i) as an owner;

(ii) as a limited owner;

(iii) as an usufructuary mortgagee;

(iv) as a tenant;

(v) who is in possession by virtue of a mortgage by conditional sale or through part performance of a contract for the sale of land or otherwise; or in one or more of such capacities; and the expression 'to hold land' shall be construed accordingly:

Explanation: Where the same land is held by one person in one capacity and by another person in another capacity, such land shall be included in the holding of both such persons.

3 (n). 'Owner' includes a person by whom or in whose favour a trust is created and a person entitled to a vested remainder; but does not include a limited owner; and

In the case of any land not held under ryotwari settlement, a person who is or would be entitled to the grant of a ryotwari patta or to the registration as an occupant in respect of such land under any law for the time being in force providing for the conversion of such land into ryotwari tenure and where there is no such law, any person holding such land immediately before the specified date otherwise than in any one of the capacities specified in items (ii) to (v) of clause (i);

3 (o). 'Person' includes an individual a family unit, a trustee, a company, a firm, a society or an association of individuals, whether incorporated or not."

5. 'Ceiling Area' specified in Section 4 is as follows:

4. Ceiling Area:

"(1) The Ceiling area in the case of a family unit consisting of not more than five members shall be an extent of land equal to one standard holding.

(2) The ceiling area in the case of a family unit consisting of more than five members shall be an extent of land equal to one standard holding plus an additional extent of one-fifth of one standard holding for every such member in excess of five, so however that the ceiling area shall not "exceed two standard holdings".

(3) The ceiling area in the case of every individual who is not a member of a family unit, and in the case of any other person shall be an extent of land equal to one standard holding.

Explanation: In the case of a family unit, the ceiling area shall be applied to

the aggregate of the lands held by all the members of the family unit."

6. The standard holding for different classes of lands and the computations of the holdings are mentioned in Section 5 and the First Schedule.

7. Section 6 refers to the Constitution of Tribunals for the purpose of the Act.

8. Section 7 contains a special provision in respect of certain transfers by way of sale, gift, usufructuary mortgage etc., made prior to the Act and it reads as follows:

"7. Special provision in respect of certain transfers etc., already made:

(1) Where on or after the 24th January, 1971, but before the notified date, any person has transferred whether by way of sale, gift, usufructuary mortgage, exchange, settlement, surrender or in any other manner whatsoever, any land held by him or created a trust of any land held by him, then the burden of proving that such transfer or creation of trust has not been effected in anticipation of, and with a view to avoiding or defeating the objects of any law relating to a reduction in the ceiling on agricultural holding shall be on such person, and where he has not so proved, such transfer or creation of trust, shall be disregarded for the purpose of the computation of the ceiling area of such person.

(2) Notwithstanding anything in subsection (1), any alienation made by way of sale, lease for a period exceeding six years, gift, exchange, usufructuary mortgage or otherwise, any partition effected or trust created of a holding or any part thereof, or any such transaction effected in execution of a decree or order of a Civil Court or any award or order of any other authority, on or after the 2nd May, 1972 and before the notified date, in contravention of the provisions of the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act, 1972 shall be null and void.

(3) Where at any time within a period of five years before the notified date, any person has converted any agricultural land held by him into a non-agricultural land, then the land so converted shall be deemed to be agricultural land on the notified date for the purpose of this Act.

(4) Where on or after the 24th January, 1971, but before the notified date:

(a) any declaration of dissolution of marriage has been made by a court on an application made on or after the 24th January, 1971; or

(b) any other dissolution of marriage in accordance with any law or custom has taken place, then the land held by each spouse immediately before the date of such dissolution shall, for the purposes

of this Act, be deemed to be the land held on the notified date by the family unit of which they were members immediately before such dissolution.

(5) Where on or after the 24th January, 1971, but before the notified date, any person has been given in adoption, then the land held by such person immediately before the date of such adoption shall, for the purposes of this Act, be deemed to be held on the notified date by the family unit of which he was a member immediately before such adoption.

(6) In every case referred to in sub-section (4) or sub-section (5), the computation of the ceiling area shall first be made in respect of the family unit referred to in the said sub-section, and after the surrender of the land held in excess of the ceiling area by such family unit, the remaining land held by such divorced spouse or adopted person, as the case may be, shall be included in the holding of such divorced spouse or adopted person, whether as an individual or as a member of a family unit of which such spouse or person has become a member.

(7) If any question arises,—

(a) whether any transfer or creation of a trust effected on or after the 24th January, 1971, had been effected in anticipation of, and with a view to avoiding or defeating the objects of any law relating to a reduction in the ceiling on agricultural holdings;

(b) Whether any alienation made, partition effected or trust created on or after the 2nd May, 1972, is null and void;

(c) Whether any conversion of agricultural land into non-agricultural land had taken place within a period of five years before the notified date;

(d) Whether any dissolution of a marriage had taken place on or after the said date, or in accordance with any law or custom;

(e) Whether any person had been given in adoption on or after the 24th January, 1971, such question shall be determined by the Tribunal, after giving an opportunity of being heard to the affected parties, and its decision thereon shall, subject to an appeal and a revision under this Act, be final.

(8) If the Tribunal decides that any transfer, or creation of trust had been effected in anticipation of, and with a view to avoiding or defeating the objects of, any law relating to a reduction in the ceiling on agricultural holding or that any alienation made or partition effected or trust created is null and void and if as a result of such transfer, alienation or creation of trust, the holding of the person or the family unit, that remains on the notified date, does not exceed the extent of land that he or the family unit is

liable to surrender, then, the Tribunal shall treat the entire holding thus left over as the extent of land to be surrendered under the provisions of this act by the person or the family unit, as the case may be;

Provided that the balance of extent of land that remains liable to be surrendered by the person or family unit shall, subject to such rules as may be prescribed, be surrendered by the alienee who is in possession of such holding by virtue of any transaction effected in contravention of the provisions of the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act, 1972.

9. Section 8 requires the filing of declarations of the holdings in the forms prescribed and is as follows:—

8. Declaration of holding: (1) Every person, whose holding on the notified date together with any land transferred by him on or after the 24th January, 1971, whether by way of sale, gift, usufructuary mortgage, exchange, settlement, surrender or in any other manner whatsoever, and any land in respect of which a trust has been created by him on or after the 24th January, 1971, exceeds the specified limit, shall, within thirty days from the notified date or within such extended period as the Government may notify in this behalf, furnish declaration in respect of his holding together with such land, to the Tribunal within whose jurisdiction the whole or a major part of his holding is situate containing such particulars including those relating to lands held by him in any part of India outside the State, and in such form as may be prescribed.

Explanation I: Where the land is held by a minor, lunatic, an idiot or other person subject to like disability, not being a member of the family unit, the declaration shall be furnished by the guardian, manager or other person in charge of the property of such person; and where the land is held or is deemed to be held by a company, firm, association or other corporate body, the declaration shall be furnished by any person competent to act for such company, firm, association or corporate body in this behalf.

Explanation II:— Where the land is held or is deemed to be held by a family unit, the declaration shall be furnished by a person in management of the property of such family unit and the declaration so furnished shall be binding on all the members of the family unit:

Provided that the Tribunal shall in the event of a dispute as to the declaration furnished by the person in management, give to the other members of the family unit an opportunity of making their representation or of adducing evidence, if any, in respect of such declaration and shall consider such representations and

evidence before determining the ceiling area under this Act.

Explanation III: In this sub-section specified limit means,

(a) In the case of wet land — 4.05 hectares (10 acres);

(b) in the case of dry land — 10.12 hectares (25 acres), and for the purpose of computing the specified limit in a case where the holding of any person includes both wet land and dry land, one hectare of wet land shall be deemed to be equal to two and half hectares of dry land.

(2) Without prejudice to the provisions of sub-section (1), the Tribunal shall have power to issue notice requiring any person holding land or residing within its jurisdiction who, it has reason to believe, holds or is deemed to hold land in excess of the ceiling area, to furnish a declaration of his holding, or that of his family unit under sub-section (1) within such period as may be specified in the notice, not being less than fifteen days from the date of its communication, and such person shall furnish the declaration accordingly.

(3) If any person who is liable to furnish a declaration under sub-section (1) or sub-section (2) fails to furnish the declaration within the specified time, the Tribunal may obtain the necessary information in such manner as may be prescribed.

10. Under Section 9, the Tribunal has to hold an enquiry and pass orders determining the ceiling area in respect of a person, and the extent of land in excess of the ceiling area.

11. Section 10 provides for the surrender of the land in excess of the ceiling area.

12. Under Section 11, the lands surrendered are to vest in the Government and any claim or liability enforceable against the lands surrendered immediately before the date of vesting in the Government may be enforced only against the amount payable under the Act in respect of such land or against any other property of the owner.

13. Section 12 provides for reversion of the lands surrendered by a tenant or an usufructuary mortgagee to the owner and for payment of the mortgage money by the owner and proportionate rent by the tenant.

14. Section 13 excludes the lands held by a protected tenant from the holding of the owner. Under Section 14, the lands vested in the Government shall be disposed of by the Government by allotment for use as house-sites for agricultural labourers, village artisans or other poor persons owning no houses or house-sites or for transfer to the weaker sections of the people dependent on agriculture for purposes of agriculture or for purposes ancillary thereto. Proviso to

Section 14 (1) requires that as far as may be practicable, not less than one half of the total extent of land so allotted or transferred shall be allotted or transferred to the members if the Scheduled Castes and the Scheduled Tribes and out of the balance, not less than two thirds shall be allotted to members of the backward classes of citizens notified under Article 15 (4) of the Constitution.

15. Section 15 specifies the amount payable for the lands vested in the Government and it reads as follows:—

"The amount payable for any land vested in the Government under this Act, shall be a sum calculated at the rates specified in the second Schedule and it shall be paid at the option of the Government, either in cash or in bonds or partly in cash and partly in bonds. The bonds shall be issued on such terms and carry such rate of interest as may be prescribed."

16. Claims for the aforesaid amounts will be determined by the Tribunal under Section 16 in accordance with the rules prescribed.

17. Section 17, prohibits alienation of holdings by any person or a member of a family unit after the notified date until he has furnished a declaration under Section 8, and the extent of the land if any to be surrendered, has been determined by the Tribunal and an order has been passed by the Revenue Divisional Officer taking possession of the land in excess of the ceiling area, and a notification published under S. 16 and alienations made in contravention of this Section are declared to be null and void.

18. Section 18 refers to filing of declarations in respect of future acquisitions and Section 19 provides for declarations to be furnished before the registering officer to the effect that the holding of the transferor does not exceed the ceiling area.

19. An appeal is provided against an order of the Tribunal under Section 20 and a further revision to the High Court under Section 21.

20. Section 23 exempts certain categories of lands from the operation of the Act.

21. Section 24 provides for imposition of penalties for contravention of the provisions of the Act.

22. Section 30 repeals the Andhra Pradesh Ceilings on Agricultural Holdings) Act, 1961 (Act X of 1961) and the Andhra Pradesh Agricultural Lands (Prohibition of Alienation) Act, 1972.

23. First Schedule to the Act relates to the classification of lands according to terms or Bhagannas; and second schedule lays down the manner in which the amount payable for the lands vested in the Government, has to be calculated.

24. The Act has been included in the Ninth Schedule by the Thirty Fourth Amendment Act and is protected by Article 31-B which gives protection to the Act from attack on the ground of violation of any of the rights conferred by the provisions of Part III of the Constitution. Further the challenge to the Act on the basis of Articles 14, 19 and 31 would not be available to the petitioners if the Act falls within the purview of Articles 31-A, 31-C of the Constitution.

25. We shall now refer to the contentions urged on behalf of the petitioners in these petitions. Sri P. A. Chowdary, appearing for the petitioners in W. P. No. 35 of 1975 started by contending that several of the contentions based on Articles 14, 19, 31, are covered by the Judgments of the Supreme Court. However he raised the following points:—

(1) The definitions of 'family unit' and 'person' are ultra vires the powers of the State Legislature, that any law made under Article 245 is subject to the provisions of second proviso to Article 31-A, that the State Legislature could not by definition create an artificial 'family unit' or 'person', that the 'family unit' as defined in the Act, is an artificial family, that under the second proviso to Article 31-A, the Legislature can only make a law with regard to fixation of ceiling limit in respect of an individual, or a natural or juristic person, and not an artificial person like the family unit as defined in the act and that impugned provisions are therefore void ab initio for want of legislative competence.

(2) The provisions of Article 14 and the second proviso to clause (1) of Article 31-A are injunctions against the legislature from enacting a law contrary to the aforesaid provisions, and any law made in contravention of the aforesaid provisions, would be void for want of legislative competence and therefore the said law is not protected by Article 31-B which applies only to rights conferred by Part III and not to Constitutional limitations imposed on the legislative power by Article 14, and second proviso to clause (1) of Article 31-A of the Constitution.

(3) (a) Article 31-B became unconstitutional after Kesavananda's case (AIR 1973 SC 1461).

(b) At any rate, the inclusion of the Act in the Ninth Schedule by Thirty Fourth Amendment, affects the basic structure or essential feature of the Constitution, and does not get the protection of Article 31-B.

(4) The definition of "family unit" is unrelated to agrarian reform, therefore Article 31-A does not protect the law from challenge under Articles 14, 19 and 31.

(5) Section 4 (1) fixing the 'ceiling area' in respect of a family unit read with the definitions of 'family unit' and 'person' affect the basic structure, as the said provision deprives a citizen to hold minimum property as provided by Section 4 (3) in respect of an individual. The right to hold minimum property is secured by the preamble to the Constitution and the provisions of Articles 19 (1) (f), 23, 24, 31, 39 (a) and therefore the deprivation of the said right of minimum existence by the aforesaid provisions affect the basic structure.

(6) Section 7 (1) which provides for computation of ceiling area by including lands already transferred on or after 24-1-1971, and before notified date, and Section 8 relating to filing of declarations, are unrelated to 'land' and therefore not within the legislative competence of the State Legislature. Similarly the lands 'deemed to be held' in Explanation II read with Section 7 (4) and (5) are unrelated to 'land'. Section 24 imposing penalty is also beyond its legislative competence.

(7) (a) Section 14 (1) proviso regarding allotment of lands to Scheduled Castes/Scheduled Tribes and to Backward Classes notified by Government for purposes of Article 15 (4) is arbitrary and discriminatory.

(8) Article 31-C does not protect the impugned law as 31-C applies only to laws relating to industry and not agrarian reforms.

(b) Further, an Act giving effect to the principles in Art. 39 (b) and (c) to get the protection under Article 31-C, must deal with an individual as a unit and not a body of individuals.

(9) Ratio decidendi in Kesavananda Bharati's case (AIR 1973 SC 1461) is not discernible; therefore it is not binding as a precedent.

26. Sri M. Natesan, submitted that for the purpose of this case, it is not necessary to determine whether right to property is a basic structure or essential feature of the Constitution and that he is confining his challenge to the ground that the provisions of the Act are arbitrary and discriminatory and offend the provisions of Article 14 of the Constitution.

27. He raised the following contentions.

1. Article 14, the right of equality, constitutes a basic structure or an essential feature of the Constitution and therefore the impugned law could be challenged on the ground of Article 14; and the provisions of Articles 31-A, 31-B and 31-C would not confer Constitutional immunity from challenge under Article 14.

2. The provisions of Section 3 (f), (i) (n), (o) Sections 5 (3) (4) (5) and 7 and

8, 10 (5) and 11 are not related to agrarian reform and deprive the individual of adequate means of livelihood and offend the right of equality under Article 14 and are not saved by Articles 31-A, 31-B and 31-C.

3. Article 31-C is inapplicable as it applies only to laws made for giving effect to principles in Article 39 (b) and (c) which relate to the sphere of Industry and Commerce, and not to laws relating to agrarian reform.

4. Even if the impugned law relates to agrarian reform, it is hit by the second proviso to clause (1) of Article 31-A as it purports to take away the land under the personal cultivation of a person and which is within the ceiling limit, and Article 31-B does not bar challenge to the Act as offending the second proviso to Article 31-A (1) of the Constitution.

28. Sri G. R. Subbarayan, while adopting the contentions of Sri P. A. Chowdary and Sri M. Natesan raised the following contention.

1. The provisions of Explanation read with Sec. 3 (1) defining 'holding', Sec. 10 (5) (ii), "surrender of land by vested remainderman", Sec. 7 (1) relating to burden of proof regarding transfers in anticipation of ceiling laws, are ultra vires the powers of the legislature as they are hit by the second proviso to Article 31-A (1).

29. Sri P. Babul Reddy, raised the following contentions:

1. The right of equality and the right to property constitute the basic structure or essential features of the Constitution and the impugned law in so far as it offends the said basic structure or essential features is ultra vires.

2. The impugned law offends the second proviso to clause (1) of Article 31-A of the Constitution and is not saved by Article 31-B.

3. The definitions in the Act, of 'family unit', 'holding', 'owner', 'person', 'double crop wet land', and fixation of compensation under Section 15 of the Act, are arbitrary and discriminatory and are unrelated to agrarian reform and violate Articles 14, 19 and 31 of the Constitution.

4. The State while making a law for giving effect to the directive principles under Article 39 (b) and (c) of the Constitution, should not derogate from the directive principles contained in Article 39 (a), that minimum property and adequate means of livelihood should be assured to every individual as required by Article 39 (a) and that the impugned Act offends the provisions of Article 39 (a) of the Constitution.

5. Articles 39 (b) and (c) of the Constitution contemplate distribution of the ownership and control of the material re-

sources of the community and the removal of concentration of wealth and means of production; but they do not provide for acquisition of property of an individual, and the impugned law which provides for acquisition of lands is unrelated to the objects of Article 39 (b) and (c) and the law is therefore not saved by Article 31-C of the Constitution.

30. Sri P. Kodandaramayya, contended that right to property and the right of equality constitute basic structure or essential features of the Constitution and Articles 31-A, 31-B and 31-C cannot have the effect of overriding basic structure or essential features of the Constitution and therefore the impugned Act in so far as it offends the said rights is not saved by Articles 31-A, 31-B and 31-C of the Constitution. He further submits that according to the majority view in Kesavananda's case (AIR 1973 SC 1461), fundamental rights constitute the basic structure and therefore are outside the amendatory power of the Parliament.

31. Sri K. V. Narasinga Rao, learned counsel appearing for the petitioners in W. P. No. 1059 of 1975 raised the following contentions:

1. The impugned Act deprives the owners of their individual holdings by adopting artificial definitions with regard to 'family unit' and 'person' and thus offends the directive principles contained in Article 39 (a) which requires the State to provide adequate means of livelihood to every citizen and that the said definitions are unrelated to agrarian reform and not covered by Articles 31-A and 31-C of the Constitution.

2. Section 14 (1) contemplates allotment of lands mainly for house-sites, and the Government may not distribute the lands for agricultural purposes and therefore the section is wholly unrelated to agrarian reform and is not protected by Article 31-A of the Constitution.

3. The Act offends the provisions of the second proviso to clause (1) of Article 31-A and is not saved by Article 31-B of the Constitution.

4. The provisions of Sections 4, 8 and 10 of the Act provide for transfer of ownership or control or possession, and surrender of land belonging to one person by another, and that it is not a legislation with respect to land and is not covered by Entry 18, List II of the Seventh Schedule of the Constitution and are therefore ultra vires the powers of the State Legislature.

5. In Telangana area, there has been no classification of lands for over 50 years, that the classification made by Section 5 of the Act is unrelated to the quality and fertility of the lands obtaining today and the section is arbitrary and

unworkable and is therefore unenforceable.

32. Sri T. Ananta Babu, contended, that the concept of individual right is the very basis of a democratic way of life, that the provisions of the Constitution lay special emphasis on the rights of an individual, that the basic structure of the Constitution is the protection of the individual's right and that the definition of 'family unit', destroys the separate legal identity of the individual by merging the individual in the 'family unit' and therefore the said definition offends the basic structure:

2. That the definition of 'family unit' also offends the second proviso to clause (1) of Article 31-A of the Constitution as the Act does not contemplate surrender of land by the 'family unit' but by the individual owner who is a member of the family unit and that in respect of a member of a family unit, no ceiling has been fixed under the Act and therefore the Act is unenforceable against a member of the family unit.

3. That Explanation 1 (a) to Section 10 of the Act, provides for surrender of excess land by agreement of the members of the family unit and where there is no such agreement, extent surrendered shall be in proportion to the land held by each member of the family unit; and the ceiling should be fixed by the Statute and not by agreement of the parties, and that in so far as Explanation 1 (a) provides for surrender of excess land by agreement, it amounts to abdication of a legislative function and is unconstitutional; and

4. That the provisions of the Act, are unrelated to agrarian reform.

33. Sri M. Suryanarayana Murty, learned Counsel appearing for the petitioners in Writ Petitions Nos. 1207 to 1211 of 1975 contended that the definition of family unit does not satisfy the requirements of Article 31-A of the Constitution as the 'family unit' is not the proprietor of any 'estate' or entitled to any rights therein as mentioned in Articles 31-A (1) (a) and 31-A (2) (b) of the Constitution and therefore it is not saved by Article 31-A of the Constitution.

34. He also contended that the Act is unrelated to agrarian reform and therefore Article 31-A does not save the impugned Act; that the Article 31 does not apply to law relating to agrarian reforms and that even otherwise, the provisions of the Act do not have any nexus with the objects mentioned in Article 39 (b) and (c) of the Constitution and therefore the protection of Article 31-C is not available.

35. He adopted the arguments of the other Counsel that Article 14 constitutes a basic structure of the Constitution

and therefore the Act is not saved by Article 31-B from attack on the ground of violation of Article 14. He also contended that the provisions of Sections 7 and 8 of the Act offend the provisions of the proviso to Clause (1) of Article 31-A and therefore they are not saved by Article 31-B of the Constitution.

36. Sri S. Venkata Reddy, and Sri K. Nagaraja Rao, adopted the arguments of the other counsel and contended that the Act offends the provisions of the proviso to clause (1) of Article 31-A of the Constitution.

37. Sri M. Jagannadha Rao, and Sri B. V. Subbarayudu while adopting the arguments of the other counsel, raised an additional contention that the petitioners were holding lands within the ceiling area as fixed by the Andhra Pradesh Ceilings on Agricultural Holdings Act, 1961, (Act No. X of 1961), that the impugned Act further reduced the ceiling area thereby depriving the petitioners of the lands held by them under the 1961 Act and that the impugned Act cannot be given retrospective effect so as to take away the rights vested in the petitioners.

38. Sri P. V. Sessaiah, learned counsel for the petitioner in W. P. No. 651 of 1975 contended that the provisions of Section 8 in so far as they require a person to make a declaration in respect of lands held by him including the lands situate outside the State, are ultra vires the powers of the State Legislature.

39. Sri K. Kameswara Raju, learned counsel for the petitioners in W. P. No. 623 of 1975 etc., submitted that he is not challenging the Act on the ground of infringement of any provisions of part III or on the ground that the Act does not relate to agrarian reform. He proceeds on the assumption that the Act is intended to give effect to the policy in Article 39 (b) and (c) of the Constitution but seeks to challenge the Act mainly on the ground of want of legislative competence. His contentions are as follows:

Fixing of ceiling limit in respect of land does not fall under Entry 18 of List II or Entry 42, List III but falls under the residuary Item 97, of List I of the Seventh Schedule to the Constitution and therefore the impugned Act fixing ceiling on agricultural holdings is ultra vires the powers of the State Legislature.

The definition, of 'family unit' violates the directive principles particularly those contained in Article 39 (a) and 39 (f) of the Constitution as the impugned Act does not ensure adequate means of livelihood and that it also results in moral or material abandonment of minors.

In the context of Art. 31-A and the definition of 'estate' and other expressions like 'holding', 'personal cultivation', 'existing law', 'fixation of ceiling area',

occurring in the said Article, 'ceiling has to be fixed with reference to the individual and not a family unit and that the definition of 'family unit' and the ceiling fixed for a family unit violate the provisions of Article 31-A of the Constitution.

The ceiling limit for a family unit, violates the Constitutional concept of a person as contemplated by Article 31-A read with the definition of person in Section 3 (42) of the General Clauses Act, and that the family unit as defined in the Act in so far as the members constituting the unit do not have any common right or interest or management, cannot be called a person as known to law; and the inclusion of 'family unit' in the definition of 'person' in Section 3 (o) of the Act has the effect of widening the definition of a person in Article 31-A of the Constitution and is ultra vires the powers of the State Legislature.

Article 31-A is a special provision, and Article 31-B does not preclude challenge of the Act on the ground of violation of the provisions of Article 31-A of the Constitution.

40. In W.P. 1077 of 1975 the Learned Counsel raised an additional point that Section 7 (3) read with the definition of land in Section 3 (j) of the Act which provides that land converted into non-agricultural land within a period of five years before the notified date shall be deemed to be an agricultural land on the notified date, is ultra vires the powers of the State Legislature as the said provisions are unrelated to land and not covered by Entry 18 of List II of the Seventh Schedule to the Constitution and that the said provisions which apply to lands converted into Salt Pans long prior to coming into force of the Act, are repugnant to the provisions of the Central Excises and Salt Act, 1944, and the impugned Act in its application to lands converted into Salt Pans, is ultra vires the powers of the State Legislature.

41. Sri Soli Sohrabji, contended that the definition of 'family unit' is beyond the competence of the State Legislature as the definition of 'family unit' contravenes the Constitutional concept of a 'person' in Article 31-A clause (1) second proviso. He also contended that Articles 31-A and 31-B do not confer rights but only confer Constitutional immunity from challenge on the ground of violation of rights in Part III, that Article 31-A (1) second proviso does not confer a right and that it constitutes a prohibitive condition for making a law and that any law transgressing the said condition is ultra vires.

42. The learned Advocate-General appearing on behalf of the State of Andhra Pradesh contended as follows: The fundamental rights under Articles 14,

19 and 31 do not constitute the basic structure or essential features of the Constitution, that according to the majority view in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, the fundamental rights can be abridged or abrogated by the Parliament by exercising the power of amendment, that Articles 31-A, 31-B and the First Part of 31-C have been held to be valid by the decisions of the Supreme Court, that the challenge to the Act on the ground of violation of the rights under Articles 14, 19 and 31. of the Constitution is precluded by the provisions of Articles 31-A, 31-B and 31-C of the Constitution.

Agrarian Reforms have been given special protection even at the time the Constitution was framed, as is clear from Clauses (4) and (6) of Article 31, that subsequently the First Amendment to the Constitution introduced Articles 31-A and 31-B the validity of which has been upheld by the Supreme Court, that *Kesavananda Bharati's* case AIR 1973 SC 1461 also proceeded on the assumption that Articles 31-A and 31-B are valid.

The fact that Article 31-C first part, was upheld shows that the right of equality and right to property conferred by Articles 14, 19 and 31 do not constitute basic structure or essential features of the Constitution.

The State Legislature is competent to legislate and create an artificial 'family unit' and treat the said 'family unit' as a person for the purpose of giving effect to the law relating to agrarian reform.

The definitions of 'family unit' and 'person' do not offend the proviso to clause (1) of Article 31-A of the Constitution as it is competent for the State to club the several individuals for the purpose of fixing the ceiling on holdings.

The impugned Act is covered by Entry 18, List II and Entry 42 of List III of the Seventh Schedule and is within the legislative competence of the State Legislature.

The pith and substance of the legislation is land in Entry 18, List II, and therefore the provisions of the Act are not repugnant to the Central Excises and Salt Act, 1944.

The impugned Act while repealing the Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961, further enacted that all proceedings pending under the said Act, shall abate and therefore the Act has been given retrospective effect and the rights accrued under the 1961 Act, have been validly taken away.

43. He further contended that Art. 31-A (1) second proviso confers another fundamental right with regard to payment of compensation for acquisition of lands held by a person which are under

his personal cultivation and which are within the ceiling limit.

44. He submitted that the definition of 'family unit' fixing the ceiling area does not violate the provisions of the said proviso, but conceded that the provisions of Section 7 of the Act, violate the provisions of the said proviso. But this challenge on the ground of violation of the second proviso, is precluded as the Act is included in the Ninth-Schedule and the provisions of Article 31-B of the Constitution protects the Act from such an attack.

45. Sri K. Subramanya Reddy, the Central Government standing Counsel adopted the arguments of the learned Advocate-General, and further contended that the Act cannot be struck down on the ground that it is unreasonable or unworkable, that the Act relates to agrarian reform, that the several contentions urged by the petitioners challenging the validity of the Act, are precluded by reason of the provisions of Articles 31-A, 31-B, 31-C of the Constitution. He also raised a larger point that there is nothing like a basic structure or essential features in the Constitution which cannot be amended by the Parliament in the exercise of the power under Article 368 of the Constitution.

46. Sri V. Venkata Subbarao, learned Counsel appearing for the party respondents who have been impleaded, contended that the rights under Articles 14 and 19 do not constitute the basic structure or essential features of the Constitution and that the Articles 31-A, 31-B and 31-C confer on the impugned Act immunity from challenge on the ground of violation of Articles 14, 19 and 31 of the Constitution.

47. The various contentions urged on behalf of the petitioners can be conveniently brought under the following heads:

1. The impugned Act and in particular the provisions of Section 3 (f) (i), (n) and (o) and Sections 4 (1), 5, 7, 8, 10, 11 and the proviso to Section 14 (1), Section 15 and Section 24 of the Act are arbitrary and discriminatory and offend the rights of the petitioners under Articles 14, 19 and 31 of the Constitution.

2. The aforesaid provisions of the Act are unrelated to agrarian reform and therefore they are not covered by Article 31-A of the Constitution.

3. The provisions of the Act in so far as they affect the fundamental rights under Articles 14 and 19 of the Constitution which constitute the basic structure or essential features of the Constitution, are not protected by the provisions of Articles 31-A, 31-B and 31-C of the Constitution.

4. The impugned provisions of the Act, are beyond the legislative competence of the State Legislature as they are not covered by Entry 18, List II and Entry 42, List III of the Seventh Schedule of the Constitution.

5. The provisions of Section 7 (3) read with the definition of land in Section 3 (j) of the Act, in so far as they apply to salt pan lands, are not covered by Entry 18, List II but by Entry 58 of List I, and are not therefore within the competence of the State Legislature.

6. The said provisions of Section 7 (3) read with Section 3 (j) in so far as they are sought to be applied to lands converted into Salt Pans, are repugnant to the provisions of the Central Excises and Salt Act, 1944.

7. The definitions of 'family unit' and 'person' are ultra vires the powers of the State Legislature as they offend the provisions of the second proviso to clause (1) of Article 31-A of the Constitution.

8. The protection given by Article 31-B of the Constitution by including the Act in the Ninth Schedule by the Thirty Fourth Constitution Amendment Act, does not save the impugned Act from challenge on the ground of violation of the second proviso to clause (1) of Article 31-A of the Constitution.

9. Assuming that the impugned Act is a measure of agrarian reform, it does not get the protection of Article 31-C as the said Article applies only to laws relating to the industrial sphere and not to agrarian reform.

10. The impugned Act has no retrospective effect so as to take away the vested rights accrued to the petitioners under the Andhra Pradesh Ceilings on Agricultural Holdings Act, 1961.

48. Now it is clear, the challenge to the Act and its provisions based on Articles 14, 19 and 31, would be available to the petitioners only if the Act and the impugned provisions do not have the immunity conferred by Articles 31-A, 31-B and 31-C of the Constitution. All the learned counsel appearing for the petitioners sought to get over the Constitutional immunity conferred by Articles 31-A, 31-B and 31-C of the Constitution on the grounds that the impugned Act offends Articles 14 and 19 of the Constitution which constitute the basic structure or essential features of the Constitution and that the Act is unconstitutional for want of legislative competence.

49. It is contended that the protection of Article 31-A is not available as according to the learned Counsel for the petitioners, the various provisions of the Act are unrelated to agrarian reforms and fall outside the purview of Article 31-A.

50. But it is difficult to accept this contention. The preamble to the Act

states, that it is an Act to consolidate and amend the law relating to the fixation of ceiling on agricultural holdings and taking over of surplus lands and to provide for the matters connected therewith. The provisions of the Act which have been extracted earlier, show that the Act is a measure of agrarian reform. The several provisions of the Act provide for fixation of ceiling on agricultural holdings, and for acquisition of the surplus in excess of the ceiling area and for distribution of the same to agricultural labourers, village artisans or other poor persons or weaker sections, either for the purpose of agriculture or purposes ancillary thereto. The legal position as to what constitutes an agrarian reform is now well-settled by the decisions of the Supreme Court.

51. In *Sri Ram Narain v. State of Bombay*, AIR 1959 SC 459 dealing with the Constitutional validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act (Act No. 13 of 1956), Bhagwati, J., after referring to the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 observed as follows:—

"These instances culled out from some of the provisions of the 1948 Act go to show that the agrarian reform which was initiated by that Act was designed to achieve the very same purpose of distribution of the ownership and control of agricultural lands so as to subserve the common good and eliminate the concentration of wealth to the common detriment which purpose became more prominent when the Constitution was ushered in on January 26, 1950 and the directive principles of State Policy were enacted inter alia in Articles 38 and 39 of the Constitution."

52. In *The Kannan Devan Hills Produce Co. Ltd. v. State of Kerala*, AIR 1972 SC 2301 the Constitutional validity of Kannan Devan Hills, (Resumption of Lands) Act (Act No. 5 of 1971), was challenged and it was contended that the Act was not a measure of agrarian reform and was not protected from challenge by Article 31-A of the Constitution. Their Lordships held that Section 9 of that Act envisaged three purposes namely: (1) reservation of lands for promotion of agriculture; (2) reservation of land for the welfare of agricultural population and (3) assignment of remaining lands to agriculturists and agricultural labourers, and that all the purposes mentioned above were comprised within the concept of agrarian reform. Their Lordships referred to the decision in *Ranjit Singh v. State of Punjab*, AIR 1965 SC 632, where Hidayatullah, J. (as he then was) gave a wide meaning to the concept of agrarian reform in the following words:—

"The scheme of rural development today envisages not only equitable dis-

tribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few on the other, but envisaged also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to village Panchayat for the use of the general community or for hospitals, schools, manure pits, tanning grounds etc., enure for the benefit of rural population and must be considered to be an essential part of the redistribution of holdings and open lands to which no objection is apparently taken. If agrarian reforms are to succeed, mere distribution of land to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the village Panchayat is best designed to promote welfare than individual owners of small portions of lands."

53. Their Lordships further held that:—

"in a sense agrarian reform is wider than land reform. It includes besides land reform something more and that something more is illustrated by the definition of "common purpose" which was sustained in *Ranjit Singh's case*."

54. In a later decision in *State of Kerala v. G. R. Silk Mfg. (Wvg.) Co.*, AIR 1973 SC 2734, Kerala Private Forests (Vesting and Assignment) Act, 1971 was challenged on the ground that it was not a measure of agrarian reform and not protected by Article 31-A of the Constitution, Palekar, J., observed in paragraph 19 as follows:—

"What then is the scheme of agrarian reform envisaged in the impugned Act? The title of the Act shows that it is an Act to provide for the vesting in the Government or private forests for the assignment thereof to agriculturists and agricultural labourers for cultivation. The preamble shows that such private forests which the legislature thought to be agricultural lands in the sense, already explained should be so utilised as to increase their agricultural production in the State to promote the welfare of the agricultural population in the State. It is further stated in the preamble that in order to give effect to the above objects it was necessary that the private forests should vest in the Government. The objectives of increasing the agricultural production and the promotion of the welfare of the agricultural population are clearly a predominant element in agrarian reform. How these objectives are to be implemented are generally stated in Sections 10 and 11. All the private forests, after certain reservations are to be assigned to agriculturists or agricultural labourers and to the poorer classes of the rural po-

pulation desiring bona fide to take up agriculture as a means of their livelihood."

55. Krishna Iyer, J., observed in Paragraph 30 as follows:—

"The concept of agrarian reform is a complex and dynamic one promoting wider interests than conventional reorganisation of the land system or distribution of land. It is intended to realise the social function of the land and includes—we are merely giving, by way of illustration, a few familiar proposals of agrarian reform—creation of economic units of rural production, establishment of adequate credit system, implementation of modern production techniques, construction of irrigation systems and adequate drainage, making available fertilizers fungicides, herbicides and other methods of intensifying and increasing agricultural production, providing readily available means of communication and transportation, to facilitate proper marketing of the village produce, putting up of silos, warehouses etc., to the extent necessary for preserving produce and handling it so as to bring it conveniently within the reach of the consumers when they need it, training of village youth in modern agricultural practices with a view to maximising production and help solve social problems that are found in relation to the life of the agricultural community. The village man, his welfare, is the target."

56. Again His Lordship observed in paragraph 31 as follows:—

"Agricultural economists have focused attention on the need of underdeveloped countries to upgrade the standards of living of village communities by resort to schemes for increasing food production and reorganising the land system. The main features of the agrarian situation in India and in other like countries are the gross inequality to land ownership, the disincentives to production and the desperate backwardness of rural life."

57. In a recent decision in *Kh. Fida Ali v. State of Jammu and Kashmir*, AIR 1974 SC 1522 the Constitutional validity of the Jammu and Kashmir Agrarian Reforms Act (26 of 1972) was challenged on the ground of violation of Articles 14, 19 and 31 and that it was not protected by Article 31-A of the Constitution, as it was not a legislation relating to agrarian reform. On a consideration of the relevant provisions of the Act, it was held that the Act was a measure of agrarian reform. In coming to the said conclusion, the learned Judge made the following observations in paragraphs 13, 14, 15 and 17.

"13. From a review of the foregoing provisions it is obvious that the Act contains a clear programme of agrarian reforms in taking stock of the land in the State which is not in personal cultivation (Section 3) and which though in personal

cultivation is in excess of the ceiling area (section 4). A ceiling area is fixed for land or orchards or both measuring 12 1/2 standard acres. After the land vests in the State, in accordance with the provisions of the Act, a provision is made for disposal of the surplus land in accordance with the rules.

14. The main focus of the Act is to see that the tillers, who form the backbone of the agricultural economy, are provided with land for the purpose of personal cultivation subject to the ceiling provision even in their case. The Act makes effective provisions for creating a granary of land at the disposal of the State for equitable distribution, subject to the limit, amongst the tillers of the soil and even the owners who would make 'personal cultivation' of the same within the meaning of the Act. In the nature of things it is imperative that a ceiling area has to be fixed and those who have so far enjoyed land in large tracks mostly without personally cultivating the same; are required to share with others who have no land of their own but are genuine tillers of the soil. Even so, no one is allowed to own more than the ceiling area.

15. In fixing the ceiling area again land and orchards are both included.

xx xx xx xx

17. On the other hand, the predominant object underlying the provisions of the Act is agrarian reforms. Agrarian reforms naturally cannot take the same pattern throughout the country. Besides the availability of land for the purpose, limited in scope in the nature of things, the scheme has to fit in with the local conditions, variability of climate, rainfall, peculiarity of terrain, suitability and profitability of multiple crop patterns, vulnerability to floods and so many other factors in formulating a scheme of agrarian reforms suitable to a particular State. Where a modest beginning is made with the land at disposal, modern methods of mechanisation and other improvements can be resorted to with the help of the State machinery available to the tillers of the soil. Such details can be worked out gradually by various processes in the course of implementation of the provisions of the Act and the rules which definitely provide sufficient elasticity. We are of opinion that the impugned Act has been passed with the definite object of agrarian reforms and cannot be successfully challenged on the score of violation of Article 14, Article 19 and Article 31 in view of the provisions of Article 31-A."

58. The impugned Act also provides for acquisition by the State of the surplus lands above the ceiling limit and for disposal of the said lands by allotment to agricultural labourers and other poor persons for the purpose of agricul-

ture and other purposes ancillary thereto. We therefore hold that the impugned Act is a measure of agrarian reform and falls within the scope of Article 31-A of the Constitution.

59. Sri M. Suryanarayana Murthy, however sought to contend that the definition of 'family unit' does not satisfy the requirements of Articles 31-A (1) (a) and 31-A (2) (b) of the Constitution on the ground that the lands sought to be acquired are not an "estate" within the meaning of Article 31-A (1) (a) and that no rights of any proprietor in such an estate are being acquired.

60. But we do not find any merit in the submission. The expression, "estate", in Article 31-A (2) includes any land held under ryotwari settlement and the expression "rights" in Article 31-A (2) (b) includes any rights in such an "estate". For the purpose of fixing the ceiling limit, the lands held by each member of the family unit are aggregated and it is only the rights of each member of the family unit in the surplus lands in excess of the ceiling limit that are acquired. Therefore the whole of the Act including the definition of 'family unit' is covered by Article 31-A of the Constitution.

61. We shall now refer to the contention urged on behalf of the petitioners that Articles 14 and 19 of the Constitution constitute the basic structure or essential features of the Constitution, and that the impugned provisions of the Act are not protected by the provisions of Articles 31-A, 31-B and 31-C from challenge on the ground of violation of the rights conferred by Articles 14 and 19. The contention of all the learned counsel for the petitioners is that the Supreme Court has held in *Kesavananda Bharati's case* AIR 1973 SC 1461 that Parliament, cannot in exercise of the power of amendment conferred by Article 368 of the Constitution, destroy or damage the basic structure or essential features of the Constitution, and that fundamental rights including Articles 14, 19 constitute the basic structure or essential features of the Constitution and therefore Articles 31-A, 31-B and 31-C of the Constitution would not preclude challenge on the ground of violation of the basic structure or essential features of the Constitution. The learned counsel for the petitioners and the respondents have cited passages from the Judgments of all the learned Judges in *Kesavananda Bharati's case* (supra) and contended that the majority view of the Supreme Court in the said decision is that fundamental rights constitute the basic structure or essential features of the Constitution and therefore the Constitution Amendment Acts introducing Articles 31-A, 31-B and 31-C, would not consider Constitutional immunity of the Act from challenge on the

ground of violation of Articles 14 and 19 of the Constitution.

62. In order to appreciate the contention raised on behalf of the petitioners, it is necessary to refer briefly to the circumstances under which the aforesaid Article came to be introduced in the Constitution and the decisions of the Supreme Court upholding the validity of the said Articles.

63. Both the Articles 31-A and 31-B were introduced by the Constitution First Amendment Act, 1951 with retrospective effect with a view to validate the abolition of Zamindaries, and intermediaries and permanent settlement and confer immunity from challenge in Courts. Article 31-A as enacted in 1951 provided that no law affecting the rights of any proprietor or intermediate holder in any estate, shall be void on the ground that it was inconsistent with any of the Fundamental Rights in Part III of the Constitution. Article 31-B was inserted to save the particular acts included in the Ninth Schedule, from challenge on the ground of contravention of any of the rights conferred by Part III of the Constitution. In the Ninth Schedule, originally thirteen Acts relating to abolition of Zamindaries were included. The Constitutional validity of the First Amendment Act was challenged before the Supreme Court in *Shankari Prasad v. Union of India*, AIR 1951 SC 458 = (1952 SCR 89), on the ground inter alia that the Constitution First Amendment Act passed by the Parliament in exercise of its power of amendment under Article 368 of the Constitution was 'law' within the meaning of Article 13 (2) of the Constitution, and that the amendment Act inserting Articles 31-A and 31-B which took away the fundamental rights conferred by Part III of the Constitution was void. The Supreme Court unanimously held that there was a clear demarcation between an ordinary law and an Amendment of the Constitution made in exercise of the constituent power under Article 368 and that in the context of Article 13, the law should be taken to mean rules and regulations made in exercise of ordinary legislative power and not amendment to the Constitution made in the exercise of constituent power with the result that Article 13 (2) did not affect amendments made under Article 368.

64. Subsequently in the case of *State of West Bengal v. Mrs. Bela Banerji*, AIR 1954 SC 170. The Supreme Court held that the word compensation in Article 31 (2), meant full cash equivalent of the property deprived of, and that it was open to the court to invalidate laws if they did not provide for adequate compensation for properties compulsorily acquired or requisitioned. With a view to

widen the scope of Constitutional protection to the laws covered by Articles 31-A and 31-B, Parliament enacted the Constitution (Fourth) Amendment Act, 1955 whereby Article 31 (2) was amended, providing that the validity of laws authorising compulsory acquisition and requisition is not liable to be questioned on the ground that the compensation is inadequate. Article 31-A was also amended so as to bring within its purview laws relating to social welfare. But the immunity is restricted to challenge on the basis of Articles 14, 19 and 31 of the Constitution and not all the rights conferred by Part III. The Ninth Schedule was amended by adding seven more Acts to confer protection of Article 31-B. Even after the amendment, there were conflicts of views with regard to the question as to whether the amendment of Article 31 (2) would bar the question of adequacy of compensation from being challenged in Court: vide *Vajravelu v. Special Deputy Collector*, AIR 1965 SC 1017; *Union of India v. Metal Corporation*, AIR 1967 SC 637 and *Shanti Lal Mangal Das*, (1969) 3 SCR 341 (365) = (AIR 1969 SC 634 (650)).

65. In *Bank Nationalisation case*, *R. C. Cooper v. Union of India*, (1970) 1 SCC 248 = (AIR 1970 SC 564) the view taken in *Shanti Lal Mangal Das*, AIR 1969 SC 634, was overruled and the question of compensation once again became justiciable but on certain limited grounds. Further it was also found that the protection afforded by Article 31-A was not effective to cover the legislation relating to ryotwari lands, and the several measures of Land Reforms were successfully challenged in Court, vide *K. Kunhikoman v. State of Kerala*, AIR 1962 SC 723, *Krishnaswamy Naidu v. State of Madras*, AIR 1964 SC 1515. With a view to further enlarge the scope of the protection of Articles 31-A and 31-B, Parliament enacted the Constitution Seventeenth Amendment Act of 1964, by which Article 31-A was amended by enlarging the definition of 'estate' so as to include inter alia land held under ryotwari settlement but at the same time adding a second proviso in clause (1) of Article 31-A providing for payment of compensation at a rate not less than the market value in respect of land held by a person which is under his personal cultivation and which is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto. In the Ninth Schedule, forty-four Acts were inserted.

66. The validity of the Seventeenth Amendment Act was upheld by the Supreme Court in *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845. The Seventeenth Amendment Act was again challenged before the Supreme Court in

Golaknath v. State of Punjab, AIR 1967 SC 1643 on the ground that the Seventeenth Amendment Act was beyond the amending power of Parliament under Article 368 of the Constitution.

67. His Lordship Subba Rao, C. J., speaking for the majority held in paragraph 53 (1), (2), (3), (4) and (5) as follows:—

"The aforesaid discussion leads to the following results:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964 abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court they were valid.

(4) On the application of the doctrine of 'Prospective overruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein."

68. In view of the Constitutional limitations on the power of Parliament as declared by the Supreme Court in the aforesaid two decisions in *Golaknath Case* AIR 1967 SC 1643, and *Bank Nationalisation Case* 1970-1 SCC 248 = (AIR 1970 SC 564) Parliament first enacted Constitution Twenty Fourth Amendment Act, 1971 in and by which Articles 13 and 368 were amended, expressly conferring power on Parliament to amend the Constitution in exercise of its constituent power, and further providing that it was not subject to the limitations in Article 13.

69. Later Parliament in exercise of the power of amendment conferred by Article 368 as amended by Twenty Fourth Amendment Act, enacted the Constitution Twenty-fifth Amendment Act, 1971 in and by which sub-clause (2) of Article 31 has been amended by substituting the word 'amount' for the word 'compensation' and further providing that the law determining the amount or laying down the principle for determination of the amount shall not be called in question in

any Court on the ground that the amount so fixed or determined is not adequate or that such amount is to be given otherwise than in cash. A new clause 2 (b) has been inserted stating that nothing in Article 19 (1) (f) shall affect any law referred in Article 31 (2).

70. Another Amendment made was the insertion of Article 31-C which reads as follows:—

"31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

71. By this Article it was provided that a law giving effect to the policy for securing the principles in clauses (b) and (c) of Article 39 shall not be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31, and that no law containing a declaration that it is for giving effect to the policy aforesaid shall be called in question in any court on the ground that it does not give effect to such policy.

72. By the date of passing of Twenty-Fourth and Twenty-Fifth Amendment Acts, a Writ Petition filed by H. H. Kesavananda Bharati, challenging the validity of the provisions of the Kerala Land Reforms Act, 1963 (Act No. 1 of 1964) as amended by the Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act No. 35 of 1969) was pending before the Supreme Court. During the pendency of the said Writ Petition, the Kerala Land Reforms (Amendment) Act, 1971 (Act No. 25 of 1971) was passed and the validity of the said Amendment Act was also permitted to be challenged in the said Writ Petition. While the said Writ Petition was pending, the Supreme Court by Judgment dated 26-4-1971 in *Kunju-kutti v. State of Kerala*, AIR 1972 SC 2097 upheld the Judgment of the Kerala High Court striking down certain sections of the Kerala Act. It was then that The Constitution (Twenty Ninth Amendment) Act, 1972 was passed inserting the two Kerala Acts in the Ninth Schedule. The challenge to the validity of the Twenty Ninth Amendment Act was also

allowed to be raised as an additional ground in the Writ Petition then pending in the Supreme Court.

73-75. Before the Supreme Court the correctness of the view of the majority in *Golaknath's case* (AIR 1967 SC 1643) and the validity of the provisions of Twenty-fourth, Twenty-fifth and Twenty-ninth Constitution Amendment Acts were assailed. The contentions among others before the Supreme Court broadly were:

That the Amendment of the Constitution by Parliament under Article 368, is a law within the meaning of Article 13 (2) and that the said power of Parliament to amend the Constitution is subject to the limitations contained in Article 13 (2).

That Parliament's power to amend the Constitution under Article 368, is not absolute or unlimited, that the amending power of Parliament, apart from the limitations contained in Article 13 (2), is inherently limited by the basic structure and essential features of the Constitution, and that the fundamental rights constitute basic structure or essential features of the Constitution and they could not be abrogated or abridged by exercise of the amending power by Parliament.

76. The case was heard by all the thirteen Judges of the Supreme Court and the majority view set out at the end of the Judgment is as follows:—

"The view by the majority in these writ petitions is as follows:—

1. *Golaknath's case* (AIR 1967 SC 1643) is overruled.

2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

3. The Constitution (Twenty-fourth Amendment) Act, 1971 is valid:

4. Sections 2 (a) and 2 (b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid.

5. The First part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid. The second Part, namely 'and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy' is invalid;

6. The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to this stage.

Sd/- S. M. Sikri, C. J., J. M. Shelat, J., K. S. Hegde, J., A. N. Grover, J., P. Jaganmohan Reddy, J., D. G. Palekar, J.,

H. R. Khanna, J., A. K. Mukherjea, J., Y. V. Chandrachud, J.”.

77. The final order which was signed by all the thirteen Judges, reads as follows:—

“The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971 in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred upto this stage.”

78. According to the majority view in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, Article 368 of the Constitution does not enable Parliament to alter the basic structure or framework of the Constitution. The learned counsel for the petitioners relying on the aforesaid decision sought to contend that Articles 31-A, 31-B and 31-C of the Constitution do not afford protection to a law which offends the basic structure or framework of the Constitution that fundamental rights in Part III of the Constitution, and in particular the rights conferred by Articles 14 and 19 constitute the basic structure or essential features of the Constitution and therefore the protective umbrella of Articles 31-A, 31-B and 31-C of the Constitution is not available to a challenge of the Act on the score of Articles 14 and 19 of the Constitution.

79. The learned counsel for the petitioners relied on the preamble to the Constitution and various other provisions of the Constitution to illustrate what constitutes the basic structure or essential features of the Constitution.

80. But we do not think it necessary to go into the broad question as to what constitute the basic structure or essential features of the Constitution. In these Writ Petitions the question that falls for consideration is whether the rights under Articles 14 and 19 of the Constitution constitute basic structure or essential features of the Constitution. None of the counsel however contended that Article 31 constitutes basic structure or essential features of the Constitution.

81. The question for consideration is whether Articles 14 and 19 of the Constitution constitute the basic structure or essential features of the Constitution. Here again, the question as to whether the broad concept of equality constitutes the basic structure or essential features of the Constitution, does not arise for consideration. The point for consideration narrows down to the question, ‘whether Article 14 in relation to the rights to property conferred by Articles 19 and 31 constitutes a basic structure or essential feature of the Constitution?’

82. The learned Counsel for the petitioners state that according to the majority view of the Supreme Court in *Kesavananda Bharati’s* case (AIR 1973 SC 1461) all the fundamental rights including Article 14 constitute the basic structure or essential features; whereas the learned Advocate-General submits that the majority view of the Supreme Court in the said case is that Articles 14 and 19 do not constitute the basic structure or essential features of the Constitution. We have to therefore refer to the view expressed by Their Lordships of the Supreme Court on this aspect of the case.

83. Sikri, Chief Justice held in paragraph 492 (c) as follows:—

“The expression ‘amendment of this constitution’ does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.”

84. Shelat and Grover, JJ., held in paragraph 624 (2) (c) as follows:—

“Even if the amending power includes the power to amend Article 13 (2), a question not decided in *Golak Nath*, the power is not so wide as to include the power to abrogate or take away the fundamental freedoms.”

85. Hegde and Mukherjea, JJ., held in paragraph 759 (3) as follows:

“Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.”

86. Jaganmohan Reddy, J., held in paragraph 1222 (2) as follows:—

“Twenty-fourth Amendment: The word ‘amendment’ in Article 368 does not include repeal. Parliament could amend Article 368 and Article 13 and also all the fundamental rights and though the power of amendment is wide, it is not wide enough to totally abrogate or emasculate or damage any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution. Parliament cannot under Article 368 expand its power of amendment so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements or the basic structure of the Constitution or of destroying the identity of the Constitution, and on the construction placed by me, the Twenty-fourth Amendment is valid, for it has not changed the nature and scope of the amending power as it existed before the Amendment.”

87. According to the view of the six learned Judges, the fundamental rights constitute the basic structure or essential features of the Constitution and they cannot be abrogated or destroyed or emasculated. But according to the other learned Judges, the fundamental rights do not constitute the basic structure or essential features.

88. Ray, J. (as he then was) held in paragraph 1078 as follows:

"The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of this Constitution."

89. Palekar, J., held in paragraph 1328 that there were no limitations on the power to amend fundamental rights and concluded in paragraph 1343 (1) and (2) as follows:—

"The power and the procedure for the amendment of the Constitution were contained in the unamended Article 368. An Amendment of the Constitution in accordance with the procedure prescribed in that Article is not a 'law' within the meaning of Article 13. An amendment of the Constitution abridging or taking away a fundamental right conferred by Part III of the Constitution is not void as contravening the provisions of Article 13 (2). The majority decision in *Golak Nath v. State of Punjab*, (AIR 1967 SC 1643) is with respect, not correct.

(2) There were no implied or inherent limitations on the Amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment."

90. Mathew, J., took the view that all the fundamental rights could be amended by way of addition, variation or repeal. In paragraph 1798 on the question of the power of amendment of fundamental rights, the learned Judge concluded as follows:

"I hold that the decision in *Golak Nath Case* that the Parliament had no power to amend Fundamental Rights in such a way as to take away or abridge them was wrong, that the power to amend under Article 368 as it stood before the 24th Amendment was plenary in character and extended to all the provisions of the Constitution, that the 24th Amendment did not add anything to the content of Article 368 as it stood before the amendment, that it is declaratory in character except as regards the compulsory nature of the assent of the President to a bill for amendment and that the article as amended makes it clear that all

the provisions of the Constitution can be amended by way of addition, variation or repeal. The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organised. That limitation flows from the language of the article itself."

91. Dwivedi, J., also held in paragraph 2008, that:

"the word 'amendment' in Article 368 is broad enough to authorise the varying, repealing or abrogating of each and every provision in the Constitution including Part III, and that there are no inherent and implied limitations on the amending power in Article 368."

92. Beg, J., concurred with the reasons of Ray, J. (as he then was) and Mathew, J. and Dwivedi, J.

93. Chandrachud, J., concluded in paragraph 2156 (3) as follows:—

"The decision of the leading majority and of Hidayatullah, J. (in *Golak Nath's case*) that Parliament had no power to amend the Constitution so as to abrogate or take away Fundamental Rights is incorrect."

94. Khanna, J., summarised his conclusions in paragraph 1550. The conclusions in sub-paragraphs (vi), (vii), (viii), (ix) and (x) are relevant for the purpose of this case and are as follows:

"(vi) The possibility that power of amendment may be abused furnishes no ground for denial of its existence. The best safeguard against abuse of power is public opinion and the good sense of the majority of the members of Parliament. It is also not correct to assume that if Parliament is held entitled to amend Part III of the Constitution, it would automatically and necessarily result in abrogation of all fundamental rights.

(vii) The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

(viii) Right to property does not pertain to basic structure or framework of the Constitution.

(ix) There are no implied or inherent limitations on the power of amendment

apart from those which inhere and are implicit in the word "amendment". The said power can also be not restricted by reference to natural or human rights. Such rights in order to be enforceable in a Court of law must become a part of the statute or the Constitution.

(x) Apart from the part of the Preamble which relates to the basic structure or framework of the Constitution, the Preamble does not restrict the power of amendment."

95. According to the conclusions of their Lordships Ray, J., (as he then was) Palekar, Khanna, Mathew, Beg, Dwivedi and Chandrachud, JJ., fundamental rights are not beyond the amending power of Parliament as they do not constitute the basic structure or essential features of the Constitution. The reasons given by the learned Judges are as follows:

Ray, J. (as he then was): "Fundamental rights are social rights conferred by the Constitution. There is no law above the Constitution. The Constitution does not recognise any type of law as natural law. (Para 953).

"On the one hand there is a school of extreme natural law philosophers who claim that a natural order establishes that private capitalism is good and socialism is bad. On the other hand, the more extreme versions of totalitarian legal philosophy deny the basic value of the human personality as such. Outside these extremes there is a far greater degree of common aspirations. The basic autonomy and dignity of human personality is the moral foundation of the teaching of modern natural law philosophers, like Maritain. It is in this context that our fundamental rights and Directive Principles are to be read as having in the ultimate analysis a common good. The Directive Principles do not constitute a set of subsidiary principles to fundamental rights of individuals. The Directive Principles embody the set of social principles to shape fundamental rights to grant a free scope to the large scale welfare activities of the State. Therefore, it will be wrong to equate fundamental rights as natural, inalienable, primordial rights which are beyond the reach of the amendment of the constitution. It is in this context that this court in (1959) Suppl 1 SCR 528 = (AIR 1959 SC 149) said that the doctrine of natural rights is nothing but a foundation of shifting sand". (Para. 955).

Palekar, J.:— "The further argument that fundamental rights are inalienable natural rights and, therefore, unamendable so as to abridge or take them away does not stand close scrutiny." (Para 1287).

"The so-called natural rights which were discovered by philosophers cen-

turies ago as safeguards against contemporary political and social oppression have in course of time, like the principle of laissez faire in the economic sphere, lost their utility as such in the fast changing world and are recognised in modern political Constitutions only to the extent that organised society is able to respect them. That is why the Constitution has specifically said that the rights are conferred by the people on themselves and are thus, a gift of the Constitution (para. 1288).

"Nor is it correct to describe the fundamental rights, including the right to property as rights "reserved" by the people to themselves. The Constitution does not use the word "reserved". It says that the rights are "conferred" by the people upon themselves, suggesting thereby that they were a gift of the Constitution. The Constitution had, therefore, a right to take them away." (para. 1289).

Khanna, J.:— "What we are concerned with is as to whether on the true construction of Article 368, the Parliament has or has not the power to amend the Constitution so as to take away or abridge fundamental rights. So far as this question is concerned, the answer, in my opinion, should be in the affirmative, as long as the basic structure of the Constitution is retained". (para. 1432).

"Subject to the retention of the basic structure or framework of the Constitution, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights." (para. 1445).

"The word "amendment" in Article 368 must carry the same meaning whether the amendment relates to taking away or abridging fundamental rights in Part III of the Constitution or whether it pertains to some other provisions outside Part III of the Constitution. No serious objection is taken to repeal, addition or alteration of provisions of the Constitution other than those in Part III under the power of amendment conferred by Article 368. The same approach, in my opinion should hold good when we deal with amendment relating to fundamental rights contained in Part III of the Constitution. It would be impermissible to differentiate between scope and width of power of amendment when it deals with fundamental rights and the scope and width of that power when it deals with provisions not concerned with fundamental rights." (para. 1446).

"We may now deal with the concept of natural rights. Such rights are stated to be linked with cherished values like liberty, equality and democracy. It is urged that such rights are inalienable and

cannot be affected by an amendment of the Constitution. I agree with the learned counsel for the petitioners that some of the natural rights embody within themselves cherished values and represent certain ideals for which men have striven through the ages. The natural rights, have, however, been treated to be not of absolute character but such as are subject to certain limitations. Man being a social being, "the exercise of his rights" has been governed by his obligations to the fellow beings and the society, and as such the rights of the individual have been subordinated to the general weal. No one has been allowed to so exercise his rights as to impinge upon the rights of others. Although different streams of thought still persist, the later writers have generally taken the view that natural rights have no proper place outside the constitution and the laws of the state. It is up to the state to incorporate natural rights, or such of them as are deemed essential, and subject to such limitations as are considered appropriate, in the constitution or the laws made by it. But independently of the constitution and the laws of the state, natural rights can have no legal sanction and cannot be enforced. The courts look to the provisions of the Constitution and the statutory law to determine the rights of individuals. The binding force of constitutional and statutory provisions cannot be taken away nor can their amplitude and width be restricted by invoking the concept of natural rights. Further as natural rights have no place in order to be legally enforceable outside the provisions of the Constitution and the statute, and have to be granted by the constitutional or statutory provisions, and to the extent and subject to such limitations as are contained in those provisions, those rights, having been once incorporated in the Constitution or the statute, can be abridged or taken away by amendment of the Constitution or the statute. The rights, as such, cannot be deemed to be supreme or of superior validity to the enactments made by the State, and not subject to the amendatory process." (para. 1467).

"It cannot, therefore, be said that the stress in the impugned amendments to the Constitution upon changing the economic structure by narrowing the gap between the rich and the poor is a recent phenomenon. On the contrary, the above material shows that this has been the objective of the national leaders since before the dawn of independence, and was one of the underlying reasons for the First and Fourth Amendment of the Constitution. The material further indicates that the approach adopted was that there should be no reluctance to abridge or regulate the fundamental right to property

if it was felt necessary to do so for changing the economic structure and to attain the objectives contained in the Directive Principles." (para. 1495).

"So far as the question is concerned as to whether the right to property, can be said to pertain to basic structure or framework of the Constitution, the answer, in my opinion, should plainly be in the negative. Basic structure or framework indicates the broad outlines of the Constitution, while the right to property is a matter of detail. It is apparent from what has been discussed above that the approach of the framers of the Constitution was to subordinate the individual right to property to the social good. Property right has also been changing from time to time." (para. 1496).

Mathew, J.: "That all natural rights are liable to be limited or even taken away for common good is itself a principle recognised by all writers on natural law. "However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others." And when the Parliament restricts or takes away the exercise of the Fundamental Rights by military personnel or the police charged with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not a recognition of the natural rights. It only shows that Fundamental Rights like natural rights are liable to be limited for the common good of the society. John Lockes himself did not understand that natural rights are absolute and nowhere did he say so. In other words, because Parliament can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining peace by law, it does not follow that fundamental Rights, by and large, are not a recognition of the basic human rights or that those rights are not liable to be limited by positive law for common good." (para. 1694).

"To sum up this part of the discussion I think there are rights which inhere in human beings because they are human beings — whether you call them natural rights or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people

to him for personal cultivation was below fifty acres, and where this condition was satisfied, the land-holder would be entitled to terminate the lease in respect of only so much area of the land as was necessary to make the total area equal to fifty acres."

Then the provisions of sub-sections (3), (4) and (5) of Section 9 were set out and the Full Bench proceeded to observe as follows:—

"This section did not contemplate any application being made by the land-holder to the Revenue Officer. The only application to the Revenue Officer provided for by this section was an application by a lessee under sub-section (3). On such an application, the Revenue Officer had to hold an enquiry and thereafter decide the application. The opening words 'if under sub-section (4) the lease of a protected lessee is terminated' in sub-section (5), indicate that the order which the Revenue Officer had to make in case he held that the notice under sub-section (1) of Section 9 was bona fide, was an order terminating the lease of the protected lessee. This is made further clear by sub-section (1) of Section 19, which refers to 'a protected lessee against whom an order for the termination of the lease has been passed under Section 9'. The only order which the Revenue Officer could make under Section 9 is an order on the application made by the lessee under sub-section (3). It is, therefore, clear that if the Revenue Officer, after holding the inquiry contemplated under sub-section (4), came to the conclusion that the notice was valid, he had to make an order for the termination of the lease."

10. It is true that the Full Bench ultimately took the view that the proceeding started on an application under Section 19 (1) of the Berar Regulation of Agricultural Leases Act was a part or continuation of the proceeding under Section 8 or under sub-section (3) of Section 9, for, the lessee's rights could not be said to have been effectively determined until an order for ejectment had been made under Section 19, and that, therefore, an application under Section 19 of the said Act after commencement of the Bombay Tenancy Act, 1958 was an application in a pending proceeding of the kind referred to in clause (a) of sub-section (3) of Section 132 of the Tenancy Act, 1958. That sub-section would, therefore, apply to such an application and it will be deemed to have been instituted under the Tenancy Act and shall be liable to be disposed of in accordance with the provisions of the Tenancy Act. It may be stated that this latter part of the Full Bench decision was not approved of and was actually overruled by the Supreme Court in the case of *Ramchandra v. Tukaram*,

1965 Mah LJ 850 = (AIR 1966 SC 557) but the scheme of the Berar Act 1951 and particularly of Secs. 8, 9 and 19 thereof, as was propounded by the Full Bench in Jayantra's case, was not touched or dissented from by the Supreme Court. In fact before the Supreme Court Counsel, who appeared for the appellant in that case did not touch on the correctness or otherwise of the view which the Full Bench in Jayantra's case had taken on the scheme of the relevant provisions of the Act, but had merely raised a contention that the High Court had not correctly interpreted Section 132 (3) of the Tenancy Act, 1958. In other words, the scheme of the provisions of Sections 8, 9 and 19 of the Berar Act 1951, as propounded by the Full Bench of this Court in Jayantra's case that proceedings taken under Section 8 read with Section 19 and proceedings taken under Section 9 read with Section 19 were part and parcel of one and the same proceedings was neither disapproved nor dissented from by the Supreme Court. It is thus clear that the Supreme Court, only reversed the view of the High Court on the scope of applicability of Section 132 and the provisions of sub-sections (3) and (4) of Section 38 in consequence of the interpretation, which was put upon the provisions of Section 132 of the new Tenancy Act. That being the position, it seems to us clear, both in view of the Full Bench decision in Jayantra's case as well as on a consideration of the scheme of the provisions contained in Sections 8, 9 and 19 of the Berar Act 1951 that the distinction sought to be made by Mr. Kherdekar between two classes of cases, one in which a notice simpliciter under Section 9 (1) has been served by the landlord upon the tenant without any proceedings having been initiated by the tenant under Section 9 (3) and the other in which after service of notice under Section 9 (1) the tenant has taken proceedings to challenge the notice under Section 9 (3) of the said Act is well founded and that in the former class of cases an order under Section 8 (1) (g) would be necessary to effectively terminate a protected tenancy while in the latter class of cases such an order would be unnecessary and we do find considerable force in his contention that the provisions of Section 8 (1) (g) and the provisions of Section 9 of the said Act, which open with a non obstante clause, could be harmoniously construed and given effect to in this manner. In other words, a notice under Section 9 (1) of the Berar Act 1951, by itself, would not be sufficient to effectively terminate the lease of a protected tenant without an order having been obtained under Section 8 (1), (g), but in cases where a notice under Section 9 (1) is followed by an application by the tenant under S. 9 (3) challenging the notice

on the grounds available to him and an appropriate order is passed by the Revenue Officer under Section 9 (4) rejecting the tenant's challenge to the notice, the lease of the protected tenant would be effectively terminated.

11. In this behalf it would be convenient at this stage to refer to a judgment of Mr. Justice Padhye delivered on 20th/21st September, 1966, in the case of *Madhav v. Shripat*, Special Civil Appln. No. 929 of 1965 reported in 1967 Rev. Rul. Note No. (D) 15. In that case the landlord had served the tenant with a notice dated 7-12-1955 under Section 9 (1) of the Berar Act, 1951 terminating the latter's lease with effect from 1-4-1956 on the ground that the landlord required the land bona fide for personal cultivation. The tenant had made an application under Section 9 (3) on 19-12-1955 challenging the bona fide of the notice on the ground that the landlord had more than 50 acres of land in his personal cultivation. The Sub-Divisional Officer rejected the contention of the tenant and held that the notice served by the landlord was bona fide. The order did not specifically state that the lease of the tenant had been terminated and the absence of express words to that effect gave rise to a contention that there was an order terminating the lease of the tenant. It was also contended on behalf of the tenant before the learned Judge that since no order under Section 8 (1) (g) had been obtained by the landlord terminating the tenancy, the landlord was not entitled to possession. Both these contentions were negatived by Mr. Justice Padhye, who took the view that the lease of the protected tenant had been effectively terminated. Reliance was placed upon the Supreme Court judgment in *Ramchandra v. Tukaram* (cit. supra) in support of the contention that an order under Section 8 (1) (g) was a must and unless such an order was passed, the landlord could never have any right to obtain possession. Dealing with this contention Mr. Justice Padhye observed as follows:—

"In that case (*Ramchandra v. Tukaram*), the land-holder had given a notice under Section 9 (1) terminating the lease of the protected lessee on the ground of personal cultivation. The tenant, it appears, did not challenge the bona fide of that notice as required by sub-section (3) of Section 9 and hence he made an application under Section 8 (1) (g) for an order of the Revenue Officer. In that context, it was held by their Lordships that a mere notice under Section 9 (1) is not sufficient, but it must be followed by an order under Section 8 (1) (g). The question whether an order under Section 8 (1) (g) would still be necessary if an order under sub-section (4) of Section 9

on the application under sub-section (3) of Section 9 is already passed was not canvassed before their Lordships. If the provisions of sub-section (4) read with sub-section (5) of Section 9 contemplate an order of termination being passed, then there does not appear to be any necessity of duplicating the proceedings for another order under Section 8 (1) (g). It is only in a case where the lessee does not challenge the bona fides of the notice, then an occasion for obtaining an order under Section 8 (1) (g) can arise. On reading the two provisions together, it appears to me that where an order has been passed under sub-section (4) of Section 9, there is no need of another order under Section 8 (1) (g). If the notice is not challenged by the lessee then only the order under Section 8 (1) (g) is necessary to be obtained."

On the true effect of the order that was passed by the Sub-Divisional Officer on the tenant's application under Section 9 (5), Mr. Justice Padhye observed as follows:—

"The order states that the notice given by the land-holder cannot be said to be ill conceived and he held the notice as a bona fide one and rejected the application filed by the respondent No. 1 lessee. The order passed is in fact one under sub-section (4) of Section 9. If the Revenue Officer comes to the conclusion that the notice is valid bona fide, then an order for the termination of the lease has to be made. The Sub-Divisional Officer did not say in so many words that the lease of the respondent No. 1 is held to be terminated. It would have been better if the learned Sub-Divisional Officer had specifically stated so in the said order. However, mere absence of those words in the order would not make that order one for not terminating the lease of the lessee. On a finding that the notice is valid and bona fide, the result must necessarily follow that the lease stands terminated."

It is thus clear that the view taken by the learned Judge in the above case was that if an order was passed on an application under sub-section (3) of Section 9 in favour of the Land-holder in which the notice was declared to be bona fide, it will be futile for the land-holder to apply to the Revenue Officer seeking a further order that the lease of the protected lessee has been terminated and that the order passed under sub-section (4) of Section 9 in fact has that effect because once the notice is held to be bona fide and the sanction to the notice is given by the Revenue Officer, the notice will take its effect and it will amount to an order terminating the lease. In our view, the aforesaid decision on which reliance has been placed by Mr. Kherdekar clearly supports his contention that in this class

of cases where after service of notice by the landlord upon his tenant under Section 9 (1) proceedings are adopted by the tenant under Section 9 (3) and an appropriate order has been made by the Revenue Officer in such proceedings, if the order happens to be in favour of the landholder, then obviously there is effective termination of the lease of the protected tenant and the order passed by the Revenue Officer under Section 9 (4) would obviate the necessity of obtaining yet another order under Section 8 (1) (g) of the Berar Act 1951.

12. Mr. Gaikwad for the petitioner has, however, heavily relied upon the decision of the Supreme Court in *Ramchandra v. Tukaram*, (cit. supra) where, according to him, after taking general survey of the relevant provisions of Berar Act, 1951, the Supreme Court has expressed its view that even if the landlord desired to obtain possession of the land for bona fide personal cultivation, he had to obtain an order in that behalf under Section 8 (1) (g) of the Berar Act 1951. It is true that in that case the Supreme Court in paragraph 2 of its judgment has observed that it was necessary to make a brief survey of the diverse statutory provisions in their relation to the progress of the dispute, which had a bearing on the question which fell to be determined and after considering the relevant provisions of Section 8 (1) (g) and Section 9 of the Berar Act 1951, the Supreme Court has observed as follows:—

"Even if the landlord desires to obtain possession of the land for bona fide personal cultivation, he had to obtain an order in that behalf under Section 8 (1) (g)."

A little later in the very paragraph this is what the Supreme Court has observed further:

"The landlord had, after serving a notice under Section 9 (1), to obtain an order under Section 8 (1) (g) that possession was required by him bona fide for personal cultivation."

Mr. Gaikwad further pointed out that this decision of the Supreme Court came up for consideration before Mr. Justice Deshmukh in the case of *Baburao v. Shionath*, 1967 Mah LJ 670 where a question was directly posed as to whether the aforesaid observations made by the Supreme Court constituted the ratio of the decision or were obiter dicta or amounted to mere casual observations and applying his mind directly to this contention urged before him, the learned Judge has taken the view that these observations constituted the ratio of the decision and the learned Judge has further expressed the view that even if these observations were regarded as obiter dicta, they would be binding upon the High Court. Mr.

Gaikwad in particular relied upon the following observations made by Mr. Justice Deshmukh in paragraph 22 of his judgment:

"If this is the correct meaning of the Supreme Court judgment, it is obvious that the Supreme Court has negatived by necessary implication the contention that a mere notice under Section 9 (1) has the effect of termination of the tenancy by efflux of time mentioned in that notice. The Division Bench ruling of this Court in *Tarabai v. Bombay Revenue Tribunal*, 1958 Nag LJ 535 = (AIR 1959 Bom 72) lays down that mere notice of termination under Section 9 (1) for the purpose of personal cultivation has the effect of terminating the tenancy and creating a vested right in the landlord. I have already pointed out that this is subjected to only one exception, namely, the result of proceedings under sub-section (3) of Section 9 at the instance of the lessee. This precisely is the stage which is not considered by the Supreme Court as the stage where termination of a tenancy takes place. I am therefore of the opinion that the question directly arose before the Supreme Court for decision about the stage at which the termination of the lease of a protected lessee takes place when notice contemplated by Section 9 (1) is served by the land-holder for the purpose of personal cultivation. The Supreme Court having come to the conclusion that even for such land-holder, an order under Section 8 (1) (g) is necessary for the purpose of creating a vested right in his favour and for the purpose of effecting termination of the tenancy, the Division Bench judgment of this Court in *Tarabai's case* appears to be overruled." (Underlining is ours).

13. Reliance was also placed by Mr. Gaikwad upon yet another Full Bench decision of this Court in the case of *Smt. Joharabi v. Member, Maharashtra Revenue Tribunal*, 1971 Mah LJ 818 where the Full Bench has taken the view that the notice simpliciter under Section 9 (1) of the Berar Act 1951, by itself, does not terminate the lease of the tenant and for the effective termination of the lease a further order under Section 8 (1) (g) is necessary. He pointed out that the question that was referred to the Full Bench was formulated thus:

"Whether a notice under Section 9 (1) of the Berar Regulation of Agricultural Leases Act, 1951 (Act XXIV of 1951) by itself terminates the lease of the tenant or whether further order under Section 8 (1) (g) was necessary for the effective termination of the lease?"

And this question was answered by the Full Bench in this manner:

"In the result, therefore, we answer the first part of the question, namely, 'Whether a notice under sub-section (1) of Section 9 of the Leases Act by itself terminates the lease of a tenant?' in the negative and to the second part 'whether a further order under Section 8 (1) (g) of the Leases Act was necessary for the effective termination of the lease?', the answer is Yes."

In particular, he relied upon the following observations made by the Full Bench which appear at page 832 of the report:—

"We think that the Supreme Court upon a full consideration of the provisions of Sections 8, 9 and 19 of the Leases Act positively came to a conclusion that a mere notice under Section 9 (1) cannot by itself terminate tenancy and that in every case an order under Section 8 (1) (g) is absolutely essential. In taking that view they confirmed the very basis of the decision of the Full Bench of this Court in Jayantraj's case. No doubt Jayantraj's case was found to be incorrectly decided, but upon different grounds.

Upon the view we have taken as to the impact of Supreme Court decision we must hold that the view taken in Ramchandra v. Tukaram and the other cases, which followed it, was impliedly overruled by the Supreme Court. Indeed, that was the view taken by our learned brother Deshmukh, J., in Baburao v. Shionath which was the only case brought to our notice which was decided after the Supreme Court case. We are in respectful agreement with the view taken by our learned brother.

If then the correct view is that notice simpliciter under Section 9 (1) of the Leases Act does not terminate a tenancy and that an order under Section 8 (1) (g) in every case is necessary, then having regard to the facts in this case we do not see how a right could arise in favour of the 'landlord' on 30-12-1958, the date on which the new Tenancy Act came into force."

Relying upon the aforesaid decision and particularly the observations from the Full Bench decision, which we have quoted above, Mr. Gaikwad strenuously urged before us that the Supreme Court decision in Ramchandra v. Tukaram (cit. supra) has been interpreted by Deshmukh, J., in a particular manner and that interpretation as indicated by Deshmukh, J., in Baburao v. Shionath (cit. supra) has been approved by the Full Bench of this Court in Joharabi's case, and he further urged that having regard to what has been observed by the Full Bench in Joharabi's case, it must be held that in every case where notice under Section 9 (1) has been served by the landlord upon the tenant seeking to

terminate the tenant's tenancy for bona fide personal cultivation, an order under Section 8 (1) (g) was absolutely essential to effectively terminate the tenancy of the protected tenant.

14. If the observations of the Full Bench in Joharabi's case, on which reliance has been placed by Mr. Gaikwad, are read out of the context of the facts which obtained in that particular case, the observations apparently support the contention of Mr. Gaikwad. But, in our view, these observations will have to be considered in the context of the facts which obtained in that case. In fact, as we shall presently point out, all these decided cases on which reliance has been placed by Mr. Gaikwad, fell within the first category indicated by Mr. Kherdekar, namely, where a notice under Section 9 (1) had been served by the landlord upon the tenant without any proceedings having been taken by the tenant under Section 9 (3) of the Act and the decisions must be viewed in the light of that position which obtained in each case. It may be pointed out that in Ramchandra v. Tukaram (cit. supra) the facts were that the landlord had served a notice under Section 9 (1) of the Berar Act, 1951 terminating the tenancy of the tenant on the ground that he required the land for personal cultivation. Admittedly, no steps were taken by the tenant to challenge that notice under Sec. 9 (3) and admittedly an application to the Revenue Officer under Sec. 8 (1) (g) for obtaining an order for determining the tenancy was made by the landlord and the necessary order under Section 8 (1) (g) had been obtained and it was held that the effective termination of the tenancy was there as a result of the order passed under Section 8 (1) (g). In the case of Baburao v. Shionath (cit. supra) the facts were that the plaintiffs, as landlords, had served a notice upon the defendant, Ex. P-4 dated 16th December, 1957, under Section 9 (1) of the Berar Act, 1951 seeking to terminate the tenancy of the defendant on the ground of personal cultivation. This notice was not followed by any proceedings adopted by the tenant under Section 9 (3) and the question that was debated at the Bar was whether a notice under Section 9 (1), by itself, effectively brought about the termination of the tenancy of the protected tenant, and Mr. Justice Deshmukh held that such a notice simpliciter under Section 9 (1) could not have the effect of terminating the tenancy of the protected tenant in the absence of an order having been obtained under Section 8 (1) (g) of the Act. In Joharabi's case also the landlady had served a notice upon the tenant on 4-12-1954 under Section 9 (1) of the Berar Act, 1951 seeking to terminate the tenancy on the ground that she required the field for personal cultivation.

Though the tenant had a right to commence proceedings to have the notice declared to be not bona fide under Section 9 (3), he did not take any steps in that behalf. The landlady applied for an order terminating the lease under Section 8 (1) (g) of the Act, but for some reasons that application was rejected and the landlady proceeded to file a suit to recover possession and it was in these circumstances that a question arose as to whether a notice under Section 9 (1) of the Berar Act, 1951 was, by itself, sufficient to terminate the lease, or whether further order under Section 8 (1) (g) was necessary for effective termination of the lease and the Full Bench took the view that a notice simpliciter under Section 9 (1), by itself, did not terminate the lease of a tenant and for effective termination of a lease an order under Section 8 (1) (g) was necessary. It will thus appear clear that in none of these three decisions was the notice served by the landlord under Section 9 (1) of the Act followed by any proceedings being taken by the tenant under Section 9 (3) resulting in any order by the Revenue Officer under Section 9 (4) of the Act. In our view, therefore, whatever is the ratio of the Supreme Court decision and the interpretation thereof in Baburao's case as approved in Joharabi's case the same cannot be applied to those class of cases where the notice under Section 9 (1) is followed by proceedings taken by tenant under Section 9 (3) resulting in an appropriate order being passed by the Revenue Officer under Section 9 (4). We have to consider the question as to whether even in this class of cases a further order under Section 8 (1) (g) is necessary to effectively terminate the lease of a protected tenant, and in our view, an appropriate order passed by the Revenue Officer under Section 9 (4) upon an application made by the tenant under Section 9 (3) challenging the landlords' notice under Section 9 (1), if the order happens to be in favour of the landlord, the same will have to be construed as an order terminating the tenancy and the view taken by Mr. Justice Padhye in the case of Madhav v. Shripat, (Special Civil Appln. No. 929 of 1965) (Bom) appears to us to be the correct view, which must be allowed to hold the field. The particular observations in Joharabi's case on which Mr. Gaikwad has relied will have also to be understood in the context of the facts which obtained in that case. It is true that at more than one place the Full Bench has observed that "a mere notice under Section 9 (1) cannot, by itself, terminate the tenancy and that in every case an order under Section 8 (1) (g) is absolutely essential". The expression "every case" will have to be regarded as meaning every case where a notice simpliciter under Section 9 (1)

has been served by the landlord upon the tenant and merely on the basis of such notice the tenancy is claimed to be effectively terminated. If the expression "every case" is understood in this manner, it will become clear that it is only in these types of cases where a notice under Section 9 (1) simpliciter has been served by the landlord upon his tenant and where no steps under Section 9 (3) have been taken by the tenant, that an order under Section 8 (1) (g) became absolutely essential in order to effectively terminate the tenancy of the protected tenant. This aspect of the matter, in our view, has been clarified by the Full Bench in paragraph 19 of its judgment. If what has been stated by the Full Bench in regard to the contentions urged by the Counsel for the appellants is borne in mind, it will be clear that the Full Bench was fully conscious of the fact that it was not dealing with a case where after service of a notice under Section 9 (1) by the landlord upon the tenant, the tenant had taken steps under Section 9 (3) of the Act to have the notice set aside on ground of want of bona fide. This is what the Full Bench has observed in paragraph 19 of its judgment:

"..... We now turn to the contention advanced by Mr. Kazi in the present case. The contention is that having regard to the provisions of Sections 8 and 9 of the Leases Act there is a clear-cut distinction between the two classes or categories of cases which may arise after the landlord has once served a notice under Section 9 (1) — (1) where a tenant in response to the notice takes action under Section 9 (3), in other words the tenant challenges the notice as not bona fide or offers to give up land other than the one which the landlord asks, and (2) when he does not take any action and simply keeps silent. In the former case undoubtedly the provisions of sub-sections (3) to (9) of Section 9 will apply and the rights of the landlord and the tenant will be determined by the order of the Revenue Officer. With this category of cases we are not concerned in the present case. In the latter case, where the tenant does not apply, it is urged that the tenancy will be automatically terminated and no order would be necessary to be passed by a Revenue Officer. It is urged that the wording of sub-section (1) of Section 9 is plenary"

It will thus appear clear from what we have quoted above that the observations of the Full Bench were intended to apply only to those class of cases that were before it and therefore the expression "every case" on which Mr. Gaikwad laid considerable emphasis will have to be understood in the manner indicated by us. Having regard to the aforesaid discussion, we are clearly of the view that

none of the decisions on which Mr. Gaikwad has relied, contains anything which runs counter to the view which we have taken in this case.

15. We are, therefore, inclined to accept the contention of Mr. Kherdekar that in the instant case since after service of notice under Section 9 (1) by the landlord upon the tenant, the tenant had taken steps to challenge that notice under Section 9 (3) and since these steps taken by the tenant were followed by an appropriate order passed by the Revenue Officer under Section 9 (4), the tenancy of the petitioner had been effectively terminated. It is true that in this case also even if the words to the effect "the tenancy of the petitioner has been terminated" are absent in the Sub-Divisional Officer's order who has merely passed an order upholding the validity of the notice on the ground that it was bona fide and has rejected the application of the tenant under Section 9 (3) of the Berar Act, 1951, but the reasoning which has been adopted by Mr. Justice Padhye, with respect, would be applicable to the facts of this case also and we accordingly hold that the petitioner's tenancy had been effectively determined by reason of the order that was passed by the Sub-Divisional Officer on the tenant's application under Section 9 (3). The view taken by the Revenue Authorities below is, therefore, confirmed and the rule is discharged. Parties to bear their costs.

Rule discharged.

AIR 1975 BOMBAY 278

JOSHI, J.

Vishwas Balu and others, Petitioners
v. Ghasiram Ramratan Jajum and others,
Opponents.

Special Civil Appln. No. 2785 of
1970. D/- 25-7-1974.

(A) Civil P. C. (1908), O. 41, R. 31 —
Non-compliance with the Rule by lower
appellate Court — Effect — Procedure of
High Court — (Constitution of India,
Art. 227).

Where the High Court is sitting in exercise of its power of superintendence and when it is shown that the judgment of the first appellate Court has failed to comply with the legal requirements of O. 41, R. 31, it cannot be sustained by the High Court looking into the facts and arrogating to itself the role of a fact-finding Court. The provisions of Order 41, Rule 31 are mandatory. The judgment of the first appellate Court has to set out points for determination, record the decision thereon and give its own reasons for the said decision. Looking to the plain

language of that rule, it cannot be said that failure to comply with these provisions is a bare irregularity. The Legislature has laid down these rules so that either the second appellate Court or the Court exercising such extraordinary jurisdiction as power of superintendence under Art. 227 of the Constitution should be in a position to find out the track traversed by the appellate Court. It cannot run away from its onerous duties of recording the finding of fact and/or discussing the evidence. (Para 4)

Where, in a suit by the landlord for ejectment under Bombay Rent Act, the trial Judge framed as many as 11 issues of fact and found almost all of them in favour of the landlord, but in appeal against the decree by the tenant, the District Judge considered only one issue and affirmed the decree without recording its decision on the other grounds covered by S. 12 or 13 of the Act, its judgment cannot be said to be a judgment of the first appellate Court at all within the meaning of O. 41, R. 31, and there is no alternative for the High Court in a petition under Art. 227 of the Constitution but to remand the matter, with a direction to the District Judge to hear the appeal on merits and to decide the same according to law by riveting his attention not only on the points of controversy but by scrutinizing the evidence led thereon. AIR 1956 Bom 560, Rel. on. (Paras 4, 6)

Cases Referred: Chronological Paras
AIR 1956 Bom 560 = 58 Bom LR 144 3

M. V. Sali with J. R. Lalit, for Petitioners; Bhimrao N. Naik (for No. 1) and V. V. Karmarker (for No. 2), for Opponents.

ORDER:— The petitioners who are the legal representatives of the original tenant Balkrishna Jagtap, have approached this Court under Article 227 of the Constitution of India impugning the decree made by the learned District Judge, Sholapur, in Civil Appeal No. 380 of 1969 on affirming that of the learned Civil Judge, Junior Division, Barsi, in Regular Civil Suit No. 41 of 1968.

2. The few facts necessary for the disposal of the application could be briefly stated thus: The property in dispute is C. T. S. No. 2514 situate on the Station Road at Barsi in District Sholapur. The original defendant No. 1, since deceased, had taken it on lease for a period of eleven months under a rent note Ex. 53 dated 17th December 1960. The rent agreed upon was Rs. 25 per month. Respondent No. 1 landlord terminated the tenancy of the tenant by a notice dated 2nd August 1967 and claimed possession mainly on the ground of default in payment of rent from March 1966 to July 1967, change in the user of

the premises leased out, erection of permanent structures which were about three in number, and taking a water pipe connection without the landlord's consent, obtained in writing, and unlawful sub-letting. The suit came to be filed on 23rd January, 1968. The short answer made by the defendant-tenant was a stout denial of the various grounds on which possession was claimed, accompanied by a further submission that the landlord had agreed to sell the suit property to him for a consideration of Rs. 4,000 or Rs. 5,000. The terms of agreement were set out on a chit of paper but they were to be reduced on a stamped paper which was purchased on 17th April 1964. Under the terms of the agreement the price was fixed at Rs. 5,000. Rs. 2,000 were paid by way of earnest and the balance was to be paid before the Sub-Registrar. The period prescribed for obtaining the sale-deed was eleven months. However, it contained an important clause that till the sale was completed, the tenant was to go on paying the rent. The stamped paper was purchased in plaintiff's son's name, but before a regular deed could be drawn, defendant No. 1 died and the matter rested there. It is needless to refer to the other defences taken by the tenant. The learned Civil Judge framed as many as eleven issues and found almost all of them in favour of the landlord. On the turning point regarding the agreement of sale, he was inclined to uphold the plea but felt that the tenant had failed to establish his readiness and willingness; therefore, the doctrine of part performance could not run to his rescue. The standard rent came to be fixed at Rs. 25 per month, probably on the concession made by the tenant during the trial. As all the points were answered against the tenant, a decree as prayed for was made. Against this decree the petitioners preferred an appeal, but the learned District Judge in a refreshingly brief judgment found that the tenants cannot successfully take shelter of the doctrine of part performance and for that purpose he mainly relied upon the last clause mentioned in the chit that the tenant was to pay the rent till the execution of the sale-deed and as there was non-payment of rent, in his opinion it could be said that the tenants were not ready and willing to perform their part of the contract. He proceeded to observe further that the tenants had disclaimed the ownership of the plaintiff and therefore the protection under the Rent Act was not available to them. On such considerations he thought that the decree passed by the lower Court was pre-eminently correct and the appeal had no force. Consequently he confirmed

the decree and against this decree the tenants have approached this Court.

3. Mr. Sali for the petitioners has raised a preliminary objection not only to the approach made by the learned District Judge but to the form of his judgment and failure to comply with the requisitions of an appellate judgment mentioned in Order 41, Rule 31 of the Code of Civil Procedure. The next point taken by him was that the landlord had approached the Court in a suit for ejectment founded on various grounds covered by Sections 12 and 13 of the Bombay Rent Act. Evidence was adduced by both the sides in the lower Court and all the points were canvassed at great length, but the learned District Judge had not made even a passing reference either to the evidence or to the correctness of the findings on the various issues or otherwise. The theory of disclaimer, on reading out the relevant portion of the written statement, pointed out Mr. Sali, was introduced by the learned District Judge for the first time without any whisper on the part of the tenants. What the tenants contended was that in view of the agreement of sale in their favour on which they relied, they had a right to retain possession and virtually they were claiming under the landlord and not against him. The question of disclaimer, under such circumstances, cannot arise, but it has been misunderstood by the learned District Judge. While winding up his argument he submitted that even if he were to fail under S. 53-A of the Transfer of Property Act, on the doctrine of part performance it could not be said that it is his only shield of defence. But there are other grounds of attack put forth by way of answer to the points on which possession is claimed and they are not decided by the learned District Judge. The first appellate Court is a final Court on the questions of fact and when it has failed in its duty, the judgment would be patently erroneous on the face of it. In support of such a line of argument he brought to my notice the authority in *Nagayya v. Chayappa*, 58 Bom LR 144 = (AIR 1956 Bom 560). While meeting his argument Mr. Naik for the respondents-landlords tried to persuade this Court that ignoring all aspects, if the landlords were to convince the Court on a single point of default, the decree deserves to be maintained. Although the dispute about standard rent was raised in the written statement, it was abandoned during the course of the trial. The finding of the lower Court that the tenant was in arrears of rent to the tune of Rs. 550 i.e. for a period of more than six months, stands unassailed. The case may be covered by Section 12 (3) (b) of the

Bombay Rent Act, but the tenant has not qualified to the protection thereof and if the landlord can, on the record as it stands, show that these facts are fairly established, there is no necessity to set aside the judgment of the learned District Judge or make an order of remand as pressed into service by Mr. Sali.

4. The arguments advanced by Mr. Naik for the respondent landlord do possess the merit of plausibility and to a certain extent may sound attractive on first impressions. But the question is, when this Court is sitting in exercise of its power of superintendence and when it is shown that the judgment of the first appellate Court has failed to comply with the legal requirements, whether it should be sustained by this Court looking into the facts and arrogating to itself the role of a fact-finding Court. The provisions of Order 41, Rule 31 of the Code of Civil Procedure are mandatory. The judgment of the first appellate Court has to set out points for determination, record the decision thereon and give its own reasons for the said decision. The expression used throughout is 'shall state'. Looking to the plain language of this rule, it cannot be said that failure to comply with these provisions is a mere irregularity. The Legislature has laid down these rules so that either the second appellate Court or the Court exercising such extraordinary jurisdiction should be in a position to find out the track traversed by the appellate Court. It cannot run away from its onerous duties of recording the finding of fact and/or discussing the evidence. Strictly speaking and with due respect to the learned District Judge, as one reads the judgment, it cannot be said to be a judgment of the first appellate Court at all within the meaning of Order 41, Rule 31 of the Code of Civil Procedure; otherwise these imperative provisions would be reduced to empty formalities. There may be cases where in a given set of circumstances the Court may ignore a point here and there but if there is an application of mind to the issues involved, then certainly such a judgment could be sustained. However, as I read the judgment of the learned District Judge, nowhere he has ventured to consider the various grounds covered by either Section 12 or 13 of the Bombay Rent Act. The landlord relied upon numerous grounds for getting the relief of possession and none of these grounds have been given even a semblance of a touch. Therefore, the objection taken by Mr. Sali, I think, is sound and must prevail.

5. This takes me on to the pertinent observations made by this Court in Nagayya's case (AIR 1956 Bom 560) referred to above. It was also a petition

under Article 227 of the Constitution of India where the High Court was called upon to exercise its superintending powers. No doubt the matter before their Lordships arose out of certain proceedings under the Bombay Tenancy Act. The learned Mamlatdar was called upon to decide whether the lands were required by the landlord for bona fide personal cultivation and he recorded his own finding of fact. This finding of fact was not examined nor considered, nor was its correctness tested in any manner or determined by the Assistant Collector in appeal which was filed before him by the tenant. The Assistant Collector adopted a short-cut ignoring his duties as a final fact-finding Tribunal and disposed of the appeal in favour of the tenant. His decision was reversed by the Tribunal. This resulted in the restoration of the Mamlatdar's order. On discussing the relevant provisions of the Bombay Tenancy Act, the functions attributed to the Mamlatdar as well as to the learned Assistant Collector and the ambit of the Revenue Tribunal, it was pointed out that it was incumbent upon the Assistant Collector to examine the finding of facts and to record his own conclusions with reference to the evidence placed by the parties. Under these circumstances, the matter was remanded to the Assistant Collector for a finding on the important questions of fact involved in the said petition. These principles are applicable mutatis mutandis to the case before me. As a matter of fact the learned District Judge has missed the target and his reasoning seems to run at tangent. As I am not deciding the matter finally, assuming that the tenant had failed to establish his defence of the doctrine of part performance, he should have given his own finding on the various issues involved which go to the root of the litigation and the equities if any, either in favour of the landlord or the tenant. In the short-cut adopted by him, there is no alternative but to remand the matter.

6. While winding up his argument Mr. Naik for the respondent submitted that the present civil application be kept pending and the learned District Judge be directed to rehear the arguments and to record his finding by formulating the points for determination as required by Order 41, Rule 31 of the Code of Civil Procedure and to certify the said finding. I would have been inclined to adopt such a procedure if the learned District Judge had missed one or two points, but in the short-cut adopted by him, this is a case of a miss in the mine. Under these singular circumstances, I have no other alternative but to remand the matter with a direction to the learned District Judge to hear the appeal on merits and to decide

the same according to law by riveting his attention not only on the points of controversy introduced but by scrutinizing the evidence led thereon.

7. Before I conclude I must appreciate the difficulty put forth by Mr. Naik who said that the matter is pretty old and certain time limit be put, otherwise this already protracted litigation will have a further chequered career with the result of giving a long rope to the tenant and no relief to the landlord in good time. As I peruse the record, there seems to be considerable force in this submission. Therefore, I am disposed to direct the learned District Judge not only to expedite the appeal, but to dispose it of within four months from the receipt of the record and proceedings. Under these peculiar circumstances there would be no order as to costs.

8. In the result, the application is allowed. The rule is made absolute. The matter is remanded to the District Court for rehearing the appeal on merits according to law in the light of the observations made above.

Application allowed.

AIR 1975 BOMBAY 281

(AT NAGPUR)

CHANDURKAR AND
DHARMADHIKARI, JJ.

Ramchandra Maroti and others, Petitioners v. The Collector (Land Acquisition Officer for the Nagpur Improvement Trust), Nagpur and others, Respondents.

Spl. Civil Appn. No. 422 of 1970 with Spl. C. As. Nos. 494 of 1970 and 515 of 1968, D/- 15-3-1974.

(A) Constitution of India, Arts. 31, 19, 226 — Nagpur Improvement Trust Act (36 of 1936), Ss. 27, 31, 39, 41, 45, 59 — Eastern Industrial Area Street Scheme — Acquisition of land for — Constitutional validity — Writ petition against sanction of State Government — Maintainability — (i) Nagpur Improvement Trust Act (36 of 1936), Ss. 27, 31, 39, 41, 45, 59; (ii) Town Improvement).

On 16-3-1963 the Nagpur Improvement Trust acting through its Board of Trustees passed a resolution under Section 31 of the Act at a special meeting for framing the scheme, namely, the Eastern Industrial Area Street Scheme. The object of the scheme was to provide plots for commercial and industrial purposes as also plots for residential purposes. The lands of the writ petitioners were comprised in the said scheme. After due publication of notice under S. 39, a notice of

proposed acquisition under S. 41 of the Act was also issued and was duly served upon the petitioners. No objection was taken by the petitioners to the proposed scheme. The said scheme was duly sanctioned on 4-3-1967 by the State Government under S. 45 of the Act. After the sanction of the said scheme, proceedings for the acquisition of the land of the petitioners were taken before the Land Acquisition Officer. The petitioners participated in the said proceedings and ultimately an award dated 31-12-1969 was passed by the Land Acquisition Officer. Reference against the said award was still pending. In the writ petition the petitioners challenged the acquisition of their lands on the ground that their lands were not liable to be acquired compulsorily under the provisions of the Act for the said scheme. The petitioners also challenged the acquisition of their lands being violative of their fundamental rights under Articles 31 and 19 (1) (f) and (g) of the Constitution.

Held (1) that since the scheme had been framed by the Trust for the purposes of the Act, namely for making a provision for the improvement and expansion of the city, therefore it could not be said that the Trust had no authority to frame the scheme or acquire the lands of the petitioners for the purposes of execution of the scheme itself. The provision for providing building sites as made by the Trust in the scheme was not for merely earning an income but for meeting the demands of the people for residential purposes. (Para 9)

(2) that the acquisition of the lands of the petitioners along with those of others was necessary for execution of the aforesaid scheme which was framed for achieving the public purpose as contemplated by the Act. True that some land as reserved for the residential purposes, would be disposed of as per S. 76 of the Act. The said disposal was not only permitted by the specific provision of the Act itself, but the said disposal of the land was also in the public interest. Purpose and object of the scheme and the Act pointed. AIR 1968 SC 1053, Distinguished; AIR 1920 PC 51; AIR 1965 SC 1839; AIR 1966 SC 1788; AIR 1967 SC 87; AIR 1972 SC 2683 and AIR 1952 All 346, Followed. (Paras 10, 13)

(3) that the mere offer to the petitioners by the Trust for accepting 3000 sq. ft. plot for the acquisition of every acre of their land did not by itself lead to the conclusion that any of the area of the petitioners' land was not required for the execution of the scheme as such, when the offer was made to them for minimising the burden on the public exchequer regarding payment of compensa-

tion and the plots under the offer were fully developed plots to be allotted to them for the execution and in pursuance of the scheme. (Para 14)

(4) that the execution of the scheme could not be left to a private individual and had to be carried out under the control and supervision of the trust itself. Even assuming that the petitioners were prepared to carry on the development of their area individually so far as their lands were concerned, still it could not be said that the said lands were not necessary for the execution of the scheme. The petitioners could not be allowed to reap the benefits of enhanced value of land arising out of the execution of the scheme, thereby depriving the general public as well as the trust of the said benefit, arising out of improvement scheme framed by the trust in the interest of general public and for public good. They could not be allowed to make a private gain out of such public schemes. If such a course was allowed, it would defeat the very purpose of the Act and the schemes framed thereunder. (Para 15)

(5) that the scheme framed by the Trust was perfectly within their power and the proceedings started by the Trust for the acquisition of the petitioner's land were also duly authorised by the Act itself. By such schemes it was the general public which was benefited in every way and therefore the acquisition of the petitioners' lands was obviously for public purpose. The challenge of the petitioners based on Articles 31 and 19 (1) (f) of the Constitution of India must fail. AIR 1971 SC 2164, Rel. on. (Paras 16, 17)

(6) that by framing the scheme, the Trust was not taking away the right of the petitioners to practise any profession or to carry on any trade or business. When the provisions of the Act or a scheme clearly indicated that they were reasonable and were designed to serve the interest of the general public, namely, to execute schemes in a planned manner for the improvement of the city, then they did not in any way violate the provisions of the Article 19 (1) (f) and (g) of the Constitution. The scheme was in the larger interest of general public and was, therefore saved by clauses (5) and (6) of Article 19 of the Constitution. (Para 19)

(7) that the sanction accorded by the Government was after applying its mind to the scheme and after considering the scheme as well as the relevant documents sent to the Government with the application for obtaining sanction to the scheme itself. Moreover it was not open for High Court to examine this question in view of the provisions of S. 45 (2) of the Act when there was no allegation in the writ

petition that the sanction granted by the Government was fraud on statute itself or that it was issued in colourable exercise of the power. AIR 1970 SC 984, Followed. (Paras 21, 25, 26)

(B) Constitution of India, Art. 14 — Nagpur Improvement Trust Act (36 of 1936), S. 68 — Application for abandonment of writ petitioners' land — Allegation that some land belonging to A was abandoned by the Trust was found to be incorrect — Notwithstanding agreement and resolution of Trust sanctioning lay-out in respect of 12 acres of A's land, later on A's entire property was notified for acquisition — Rejection of petitioners' application for abandonment could not be said to be discriminatory. (Town Improvement). (Para 21)

(C) Nagpur Improvement Trust Act (36 of 1936), S. 68 — Application for abandonment under — No plea that applicant's land was unnecessary for execution of the scheme itself — Applicant not making out a case of abandonment — On facts and circumstances of the case, applicant held not entitled to any hearing before his application was rejected by the Trust. AIR 1973 SC 696 and AIR 1972 SC 865, Followed — (Town Improvement). (Paras 30, 31, 35)

(D) Nagpur Improvement Trust Act (36 of 1936), Ss. 31, 26, 2 (a-1) — Scope — Trust can frame scheme for providing building sites for purposes of industries. (Town Improvement).

The provisions of S. 31 of the Act will have to be read together with other provisions of Chapter IV of the Act. The said Chapter will have to be harmoniously construed and if all the provisions of the said Chapter and the Act are read together even to a scheme framed under S. 31 of the Act the provisions of Section 26 will apply. S. 26 of the Act is a general provision and makes a provision for the acquisition of the property which is necessary for or affected by the execution of the scheme itself. The construction of a shed or structure for the purposes of a factory or industry will definitely amount to construction of a building within the meaning of the Act and is covered by the definition of the term "building" as defined by S. 2 (a-1) of the Act. Therefore it is open for the Trust to frame a scheme for providing building sites for the purposes of industries also. (Para 33)

Cases Referred: Chronological Paras

AIR 1973 SC 696 = 1973 SCD 141	35
AIR 1972 SC 865 = (1972) 2 SCA 53	35
AIR 1972 SC 2683 = 1972 SCD 1128	11, 35
AIR 1971 SC 2164 = (1971) 3 SCR 762	17, 19
AIR 1970 SC 984	25

AIR 1970 Punj & Har 361 = 1970 Rev LR 325 24
 (1969) Spl. Civil Appln. No. 281 of 1969 (Bom.) 21
 AIR 1969 Mad 305 = (1968) 2 Mad LJ 273 26
 AIR 1968 SC 1053 = (1963) 3 SCR 489 10
 AIR 1968 Manipur 45 24
 AIR 1967 SC 87 = (1966) Supp SCR 27 12
 AIR 1966 SC 1788 = (1966) 3 SCR 885 11, 13

AIR 1965 SC 646 = 1966 SCD 184 23
 AIR 1965 SC 1839 = (1965) 3 SCR 364 11
 AIR 1963 SC 151 = (1963) 2 SCR 774 11, 25

AIR 1962 SC 764 = (1962) Supp (2) SCR 149 23

AIR 1960 SC 1203 = (1961) 1 SCR 128 11
 AIR 1952 All 346 = ILR (1952) 1 All 97 13
 AIR 1920 PC 51 = 47 Ind App 45 11, 15
 204 Mass 607 11

In Spl. Civil Appln. No. 422 of 1970.

S. V. Natu, for Petitioners: M. M. Qazi, A. G. P. (for Nos. 1 and 3) and Y. R. Dandige and M. P. Badar (for No. 2), for Respondents.

In Spl. Civil Appln. No. 494 of 1970.

S. V. Natu and Khamborkar, for Petitioners; M. M. Qazi, A. G. P. (for Nos. 1 and 3); Y. R. Dandige and M. P. Badar (for No. 2), for Respondents.

Spl. Civil Appln. No. 515 of 1968.

S. V. Natu, for Petitioners; M. M. Qazi A. G. P. (for Nos. 1 and 2), Y. R. Dandige and Badar (for No. 3), for Respondents.

DHARMADHIKARI, J.:— As all these writ petitions relate to the lands comprised in one and the same Scheme, namely, Eastern Industrial Area Street Scheme, and were argued together, they are being disposed of by this common judgment. The petitioners in Special Civil Application No. 422 of 1970 are owners of Khasra Nos. 61, 68, 69 and 70, admeasuring about 39.77 acres of land of mouza Chikhli situated within the territorial limits of the Corporation of City of Nagpur. It is the contention of the petitioners that the income from these lands is the only source of their livelihood.

2. Respondent No. 2, the Nagpur Improvement Trust, framed a Scheme known as Eastern Industrial Area Street Scheme, referred to hereinafter as the Scheme. Initially it seems that such a scheme was framed in the year 1947. A notice under Section 39 of the Nagpur Improvement Trust Act, referred to hereinafter as the Act, was also published and objections were invited. According to the petitioners, they had raised objections to the said Scheme in the year 1948. However, it seems from the record that the said scheme was dropped and thereafter on 16th March 1963 the Nagpur Improvement Trust acting through its Board

of Trustees passed a resolution at a special meeting for framing the scheme, namely, the Eastern Industrial Area Street Scheme. This scheme was framed for meeting increasing demand for developed plots, particularly for small and medium factories and industries and it also envisaged development of residential plots for persons and workmen connected with the factories. The scheme was also framed because there has been large demands for industrial and residential plots particularly on account of the proximity of railway line in this area. It was also noticed by the Nagpur Improvement Trust that there were various layouts within the boundary of this scheme and the houses were constructed at random, and therefore, it was necessary to re-lay certain inhabited pockets. In execution of the scheme a provision was made for sites for industrial and commercial purposes creating alternate sites for settling the existing structure owners. There was also a demand for residential plots for allotment to evictees, low income group and middle income group people and for meeting this demand a provision was also made in the said scheme. Thus the object of the scheme was to provide plots for commercial and industrial purposes as also plots for residential purposes.

3. After passing of the resolution by the Board of Trustees of the Nagpur Improvement Trust, a notice was published under Section 39 of the Act. A notice of proposed acquisition under Section 41 of the Act was also issued and was duly served upon the petitioners. No objection was taken by the petitioners to the proposed scheme, though it seems that some objections were raised by other land owners. The said scheme was thereafter duly sanctioned by the State Government under Section 45 of the Act. After the sanction of the said scheme, proceedings for the acquisition of the land of the petitioners were taken before the Land Acquisition Officer and a notice under Section 9 (3) of the Land Acquisition Act was issued to the petitioners. The petitioners participated in the said proceedings and ultimately an award dated 31-12-1969 was passed by the Land Acquisition Officer. We are informed that the petitioners have sought a reference under Section 18 of the Land Acquisition Act, as they have not accepted the Award passed by the Land Acquisition Officer and the said reference is still pending.

4. In the present petition the petitioners have challenged the acquisition of their lands on the ground that their lands are not liable to be acquired compulsorily under the provisions of the Act for the said scheme. The petitioners have also

challenged the acquisition of their lands being violative of their fundamental rights under Articles 31 and 19 (1) (f) and (g) of the Constitution of India. According to the petitioners, there is no power under the Act to compulsorily acquire the lands of the petitioners for the purposes for which they are being acquired by the Nagpur Improvement Trust. The petitioners have also filed an application under Section 68 of the Act for abandonment of their area from the acquisition. Such an application was filed by the petitioners in relation to Khasra Nos. 61, 68 and 70 only. It seems from the record that in the said application no reference was made to Khasra No. 69 as such. This application of the petitioners was also rejected by the Nagpur Improvement Trust and this rejection of their application is also challenged by the petitioners on the ground that the order passed by the Nagpur Improvement Trust rejecting their application is discriminatory and is, therefore, violative of the petitioners' fundamental right under Article 14 of the Constitution of India. It is the case of the petitioners that the land of one Abdullabhai has been abandoned by the Improvement Trust, whereas the Improvement Trust has rejected their application for abandonment of their lands and thus has given a discriminatory treatment to the petitioners.

5. It is also the contention of the petitioners in this writ petition that framing of the scheme and acquisition of their lands by the Nagpur Improvement Trust is in colourable exercise of its powers not vested in the Trust as such. The petitioners have further contended that the exercise of the power by the Improvement Trust is not only mala fide, but in substance it also amounts to colourable exercise of their power because the Improvement Trust has no power to acquire the lands for the purposes enumerated in the scheme. The petitioners have also challenged the sanction granted by the State Government to the scheme under Section 45 of the Act on the ground that the State Government has sanctioned the scheme without application of mind, and therefore, the exercise of the said power by the State Government amounts to bona fide misuse of the power. The petitioners have also challenged the award passed by the Land Acquisition Officer on the ground that the Land Acquisition Officer has committed an error in not granting them interest on the amount of compensation according to the provisions of the Act. But it is not necessary to decide this challenge in this writ petition in view of the fact that the petitioners have already sought a reference under

Section 18 of the Land Acquisition Act in this behalf and the said reference is still pending.

6. Shri Natu, the learned counsel for the petitioners, has taken us through the relevant provisions of the Nagpur Improvement Trust Act. It is well known that Nagpur, which in its origin, was a medieval town expanded gradually by the absorption of number of villages containing irregular groups. The city has grown up without any planning with the result that different amenities therein were found wholly to be inadequate for already enlarged and still expanding population. It was also found that the roads, sanitary and drainage system was hopelessly inadequate to cope up with the requirements of already overgrown population. There has been a great influx of people from nearabout villages to the city for the purposes of residence and employment. An industrial development was taking place in and around the city which in its turn was attracting the people. There was no room for the expansion of public amenities like hospitals, educational institutions, public gardens and parks etc. In view of these circumstances the necessity for taking systematic measures for improvement and expansion of the city had been since long apparent. Therefore, for the proper and planned improvement and expansion of the City of Nagpur, the Nagpur Improvement Trust Act was enacted by the Legislature. The preamble to the Act makes it very clear that the said Act was enacted by the Legislature for making provision for the improvement and expansion of the town of Nagpur in the manner provided by the Act itself. The duty for carrying out the necessary provisions of the Act, including framing of the scheme and its execution, was vested in a Board called the Nagpur Improvement Trust. Section 4 of the Act then provides for the constitution of the Trust which includes a Chairman, a Chairman of the Standing Committee of the Corporation, the Chief Executive Officer of the Municipal Corporation, one Councillor of the Corporation and four persons appointed under subsection (2) of Section 4 of the Act of whom not less than two shall be non-officials residing within the limits of the area to which the Act applies and one member of the Legislative Assembly. Chapter IV of the Act thereafter provides for improvement schemes. An improvement scheme may provide for all or any of the matters specified in Section 26 of the Act. Thereafter Section 27 lays down the types of improvement schemes and further states that an improvement scheme shall be one of the following types or may combine any two or more of such

types, or of any special features thereof. that is to say,—

- (a) a general improvement scheme;
- (b) a re-building scheme;
- (c) a re-housing scheme;
- (d) a street scheme;
- (e) a deferred street scheme;
- (f) a development scheme;
- (g) a housing accommodation scheme;
- (h) a future expansion or improvement scheme;

(i) a drainage or drainage including sewage disposal scheme.

The present scheme has been framed by the Nagpur Improvement Trust under Section 31 of the Act and is known as the Eastern Industrial Area Street Scheme. The said scheme was duly sanctioned by the Government vide Government Resolution dated 4-3-1967.

7. It is contended by Shri Natu, the learned counsel for the petitioners, that under the scheme the lands covered by area of Khasra Nos. 68 and 70 are shown as earmarked for light industry, whereas the major part of the area of Khasra Nos. 61 and 69 is earmarked as residential and remaining portions of these Khasra Nos. are earmarked for shops, parks etc. According to Shri Natu, the acquisition of the land of the petitioners, which is earmarked for residential purposes, is not authorised by the provisions of the Act. It was also contended by him that a part of this land will be used by the Nagpur Improvement Trust for the purposes of earning income out of disposal of the plots and it is not open for the Improvement Trust to acquire the land compulsorily for such a purpose. As the said acquisition is not authorised by the provisions of the Act, the acquisition of the petitioners' land for the purposes of residential plots is violative of the petitioners' fundamental right under Arts. 31 and 19 (1) (f) of the Constitution of India. According to Shri Natu, even if the Nagpur Improvement Trust required certain area of the petitioners for the purposes of providing building sites or for residential purposes, the petitioners were prepared to carry out the said purposes at their own costs according to the terms and conditions of the Act as well as the Regulations framed thereunder. He further contended that the petitioners were prepared to carry out the said purposes as per the terms and conditions to be laid down by the Nagpur Improvement Trust itself and if the petitioners had volunteered to do so, then in that case it was not open for the Nagpur Improvement Trust to compulsorily acquire the property of the petitioners for the said purpose. Thus, in substance the whole argument of Shri Natu so far as his chal-

lenge under Articles 31 and 19 (1) (f) is concerned is based on the ground that the Nagpur Improvement Trust has no authority to acquire the land compulsorily under the Nagpur Improvement Trust Act for providing the plots for residential purpose or for disposal of the plots for the said purpose.

8. Section 26 of the Act provides for framing of improvement schemes for all or any of the matters enumerated therein, Section 26 (a) reads as under :

"26 (a) the acquisition by purchase, exchange, or otherwise of any property necessary for or affected by the execution of the scheme."

The present scheme has been framed by the Nagpur Improvement Trust under Section 31 of the Act. Section 31 of the Act reads as under :

"31 (1) Whenever the Trust is of the opinion that, for the purpose of—

- (a) providing building sites, or
- (b) remedying defective ventilation,

or

(c) creating new or improving existing means of communication and facilities for traffic, or

(d) affording better facilities for a conservancy and drainage it is expedient to lay out new streets or alter existing streets (including bridges, causeways and culverts) the Trust may pass a resolution to that effect, and shall then proceed to frame a street scheme for such area as it may think fit.

(2) A street scheme may, within the limits of the area comprised in the scheme, provide for—

(a) the acquisition of any land which will, in the opinion of the Trust, be necessary for its execution;

(b) the re-laying out of all or any of the lands so acquired, including the construction and reconstruction of buildings by the Trust or by any other person and the laying-out, construction, and alteration of streets and thoroughfares;

(c) the draining, water-supply, and lighting of streets and thoroughfares so laid out, constructed or altered;

(d) the raising, lowering, or reclamation of any land vested in, or to be acquired by, the Trust for the purposes of the scheme;

(e) the formation of open spaces for the better ventilation of the area comprised in the scheme;

(f) the acquisition of any land adjoining any street, thoroughfare, or open space to be formed under the scheme." As already stated hereinbefore, the present scheme was framed by the Nagpur Improvement Trust for the various purposes, including meeting large demands for industrial and residential plots. Ac-

cording to Shri Natu, the plots reserved for the residential purposes from Khasra Nos. 61 and 69 are not necessary for the purpose of execution of the scheme as such. He has further relied upon Annexure F whereby an offer was made to the owners of the fields by the Improvement Trust for accepting 3000 sq. ft. plot for acquisition of every acre of land, included in Eastern Industrial Area Street Scheme. Such an offer was made by the Improvement Trust for grant of a plot in lieu of the compensation to which the petitioners were entitled under the provisions of the Act. Therefore, according to Shri Natu, in any case an area of 2.75 acres was not required for the scheme, because otherwise the Improvement Trust would not have parted with it or made an offer of it to the petitioners as has been done vide Annexure F dated 19-2-1970. He has also drawn our attention to para 4 of the return filed on behalf of the Improvement Trust wherein it was admitted by the Improvement Trust that the scheme also envisages the provision for income to the Trust by sale of plots. On the basis of this admission it is contended by Shri Natu that, therefore, in any case this land is not necessary for the execution of the scheme framed by the Trust and in substance the Improvement Trust is acquiring the said land for earning income by sale of the land belonging to the petitioners and it is not open to the Trust to acquire the land for this purpose. It is not possible for us to accept these contentions of Shri Natu.

9. The scheme framed by the Nagpur Improvement Trust known as the Eastern Industrial Area Street Scheme was framed for making adequate provision for the improvement and expansion of the town. The purpose for which the scheme has been framed by the Nagpur Improvement Trust has been duly enumerated in the scheme itself. The scheme also makes a provision for providing of building sites to evictees of the scheme, low income group people, middle income group people etc., as well as for industrial and commercial purposes. Section 31 of the Act empowers the Improvement Trust to frame such a scheme and thereafter Section 59 of the Act lays down that the Trust may, with the previous sanction of the State Government, acquire land under the provisions of the Land Acquisition Act, 1894, as modified by the provisions of this Act, for carrying out any of the purposes of this Act. Once it is held that the scheme has been framed by the Nagpur Improvement Trust for the purposes of the Act, namely, for making a provision for the improvement and expansion of the city, then, in our opinion, it cannot be said that the Improvement Trust had no authority to

frame the scheme or acquire the lands of the petitioners for the purposes of execution of the scheme itself. It is not correct to say that a provision for providing building sites has been made by the Trust in the scheme for merely earning an income. A provision for building sites has been made even for the residential purposes in the scheme to meet the demands of the people in this behalf. It is no doubt true that the Trust will be disposing of certain plots by auction or otherwise as provided by Section 76 of the Act. Section 76 of the Act reads as under :

"76. Subject to any rules made by the State Government under this Act, the Trust may retain or may let on hire, lease, exchange or otherwise dispose of, any land vested in or acquired by it under this Act."

It is pertinent to note in the present case that even after the publication of the notice under Section 39 of the Act the petitioners had not raised any objection to the scheme as such. Even in the present writ petition the scheme as a whole has not been challenged. The only challenge made in this petition is restricted to the land of the petitioners and the compulsory acquisition of their land. At no stage even a demand was made by the petitioners to the Improvement Trust that they are prepared to carry out the layout etc. of the land required for the residential purposes on the terms and conditions to be laid down by the Trust. Such a claim is made by the petitioners for the first time in the present writ petition only. Thus the present petition has been filed by some of the land owners whose lands are being acquired by the Trust for executing the scheme as a whole framed by the Trust under Section 31 of the Act.

10. Shri Natu in support of his contentions has relied upon a decision of the Supreme Court in State of Madhya Pradesh v. Ranojirao Shinde (AIR 1968 SC 1053). In the said case the provisions of Madhya Pradesh Abolition of Cash Grants Act were challenged on the ground that they violate the rights of the respondents in the said case under Articles 19 (1) (f) and 31 of the Constitution of India. The said provisions were mainly challenged on the ground that the abolition of the cash grants would augment the resources of the State but that cannot be considered as a public purpose under Article 31 (2) of the Constitution of India and in that context it was observed by the Supreme Court that by providing for the payment of some nominal compensation to the persons whose rights are acquired, as the acquisition in question in substance would only augment the resources of the State, and therefore, it

is obvious that the public purpose contemplated by Articles 31 (2) and 19 (1) (f) would not include enrichment of the coffers of the State. The Act which empowers the State to appropriate some one else's property for itself solely with a view to augment the resources of the State cannot be considered as a reasonable restriction in the interest of the general public. In our opinion, the observations made in the said decision have no application to the facts and circumstances of the present case. In the present case the land of the petitioners is being acquired with land of other persons for the purposes of an improvement scheme, which is obviously framed for achieving the public purpose contemplated by the Act. The lands are being acquired which are necessary for the purposes of executing the said scheme. It is no doubt true that some land, which is reserved for the residential purposes, will be disposed of as per the provisions of Section 76 of the Act itself. The said disposal is not only permitted by the specific provision of the Act itself, but the said disposal of the land is also in the public interest.

11. In *Trustees for the Improvement of Calcutta v. Chandra Kant Ghosh* (AIR 1920 PC 51) while construing somewhat analogous provisions of Calcutta Improvement Act and the phraseology used in Section 42 of the said Act, which is analogous to the provisions of Section 26 (a) of the Nagpur Improvement Trust Act, it was observed by the Privy Council as under:—

"The result is that in the opinion of their Lordships none of the suggested limitations to the usual and normal meaning of the word 'affected' in Section 42 are admissible, and that there is no reason, either in the general purpose of the Act or the special context, that the word should not be construed in its ordinary sense, and that, as so construed, Section 42 authorises the acquisition of the land of the respondent, which was inserted in the scheme because, in the opinion of the Board, it would be enhanced in value by its execution....."

In this case the respondent would be entitled to the value of his land assessed on the same principles as the value of the land actually required for the execution of the widened street and the effect would be not to deprive him of the value of his property, but only that he would not obtain the additional value due to the proximity of his land to the improvement scheme.

It was further argued on behalf of the respondents that, although the land of the respondent might be acquired by agreement, it was not subject to compulsory acquisition. Section 69, under the head "compulsory acquisition", empowers

the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act. It was said that to take land for the purpose of recoupment is not to take it in order to carry out any of the purposes of the Act, but only to provide a means whereby such purposes can be carried out. It is difficult to understand the distinction which is suggested. If the Board are authorised to acquire land affected in value by the execution of the scheme in order to provide funds in case of the public burden the acquisition of such land is directly in the purposes of the Act, and the powers of compulsory acquisition are clearly applicable thereto. Section 81 of the Act confers on the Board wide powers for holding or disposal of any land vested in them or acquired by them under the Act amply sufficient for dealing with any land acquired under Section 42 and not required for the actual execution of the street scheme."

Similar view is taken by the Supreme Court in *Sheikh Gulfan v. Samat Kumar* (AIR 1965 SC 1839), though in different context.

What is the nature of such a scheme has also been considered by the Supreme Court in *Arnold Rodricks v. State of Maharashtra* (AIR 1966 SC 1788). In the said case the provisions of Bombay Commissioners of Divisions Act and the notification under amending Land Acquisition Act were challenged. The said notification was also challenged on the ground that it was issued in colourable exercise of the power and was not for the public purpose. It was contended in the said case that the notifications were issued to subserve not a public purpose but some private purpose, and the State Government was not entitled to acquire property from A and give it to B. In this context it was observed by the Supreme Court as under:—

"(20) It was urged before us that the State Government was not entitled to acquire property from A and given it to B. Reliance was placed on the decision of the Supreme Judicial Court of Massachusetts (204 Mass 607). But as pointed out by this Court, public purpose varies with the times and the prevailing conditions in localities, and in some towns like Bombay the conditions are such that it is imperative that the State should do all it can to increase the availability of residential and industrial sites. It is true that these residential and industrial sites will be ultimately allotted to members of the public and they would get individual benefit, but it is in the interest of the

general community that these members of the public should be able to have sites to put up residential houses and sites to put up factories. The main idea in issuing the impugned notifications was not to think of the private comfort or advantage of the members of the public, but the general public good. At any rate, as pointed out in 1961-1 SCR 128 = (AIR 1960 SC 1203), a very large section of the community is concerned and its welfare is a matter of public concern. In our view the welfare of a large proportion of persons living in Bombay is a matter of public concern and the notifications served to enhance the welfare of this section of the community and this is public purpose. In conclusion we hold that the notifications are valid and cannot be impugned on the ground that they were not issued for any public purpose.

(21) Mr. Pereira then urged that the notifications were colourable. We are not able to appreciate how the notifications are serving any collateral object. He said that he used the word "colourable" in the sense used by this Court in AIR 1963 SC 151. Mudholkar J. observed as follows:

"If the purpose for which the land is being acquired by the State is within the legislative competence of the State the declaration of the Government will be final subject, however, to one exception. That exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party. The power committed to the Government by the Act is a limited power in the sense that it can be exercised only where there is a public purpose, leaving aside for a moment the purpose of a company. If it appears that what the Government is satisfied about is not a public but a private purpose or no purpose at all the acquisition of the Government would be colourable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity. Subject to this exception the declaration of the Government will be final."

(22) No material has been placed before us that the exercise of the power by the Government is colourable in this sense. The Government has the power to issue the notifications for a public purpose, and, as we have already held that the notifications were issued for a public purpose, there is no question of any colourable exercise of the power."

(underlining is ours)

Even in the minority judgment, while concurring with the views taken by the majority it was observed:

"(33) The attack of the petitioners is on the second part of the addition in 1953 which provides for "subsequent disposal thereof in whole or in part by lease, assignment, or sale, with the object of securing further development." It is urged that all these words mean is that after the development envisaged in the first part of the addition the State or the local authority would be free to dispose of the land acquired in whole or in part by lease, assignment or sale, apparently to private persons. This, it is said, means that the State or the local authority would acquire land in the first instance and develop it in the manner already indicated and thereafter make profit by leasing, assigning or selling it to private individuals or bodies. It is also said that the object of securing further development which is the reason for sale or lease etc. is a very vague expression and there is nothing to show what this further development comprises of.....

(35) Take the case where land is acquired for the purpose of development of certain areas for residential purposes. The State or the local authority levels the land where necessary, makes a layout, provides roads, drainage, electric lines and such other amenities as may be available whereafter houses have to be built. The State or the local authority may build these houses itself, but there is no reason why if the purpose is development of certain land as a residential area, the State or the local authority may not lease, assign or even sell the lands laid out and already developed in order that further development of building houses may be achieved. In such a case it will always be open to the State Government or the local authority to provide, and we have no doubt that it will always so provide, that the persons to whom the land is leased, assigned or sold carry out the further object of building houses. There is also no reason why the State or the local authority should not provide for the terms on which residential buildings would be made, the specifications of such buildings, and the time within which they should be made. There is also no reason why the terms should not provide that if the further object of development is not carried out within a reasonable time, the land would revert to the State or the local authority to be used for the purpose for which it was acquired. We have no doubt that the State or the local authority would see that such terms are imposed on those to whom lands are leased, assigned or sold with the object of further development by constructing houses where the scheme is for residential purposes. We have also no doubt that in imposing terms, the State or the local authority will see that the

purpose for which the lease, assignment or sale is made is carried out within a reasonable time, failing which the land will revert to the State or the local authority. These matters are in our opinion implicit in the words "with the object of securing further development", and we have no reason to think that the State or the local authority would just dispose of the land so acquired by lease or assignment or sale without caring to see that further development which was the basis of acquisition takes place."

A similar view has been taken by the Supreme Court in a subsequent decision in *Smt. Venkatamma v. City Improvement Trust Board, Mysore* (AIR 1972 SC 2683). After referring to the provisions of City of Mysore Improvement Act, the Supreme Court observed as under:

"The next argument is that the land cannot be acquired for shopping sites. It seems to us that the Board is competent to acquire land for shopping sites. Such a power is comprehended in Section 15 (1) (b) and Section 15 (2) (d). According to Section 15 (1) (b) the improvement scheme may provide for the construction of buildings. Shops are buildings. So land may be acquired for building shops. According to Section 15 (2) (d) the scheme may provide for the establishment or construction of markets. It appears to us that the construction of shops is in effect the construction of a market. So the acquisition of land for shopping sites is permissible under the Act.

The last argument is that the land for shopping sites is not being acquired for a public purpose because the scheme is that the shopping sites would be let out to private individuals who will erect shops thereon. It is said that it amounts to the acquisition of the land of A for the purpose of giving it to B, and that is not permissible under our Constitution

Any purpose which directly benefits the public or a section of the public is a public purpose. This is not denied. It does not require much argument to show that the shops would cater for the needs of the persons living in the locality. But for the shops proposed to be built, the residents of the locality would have to go to distant parts of the city for shopping. So the building of shops in the locality would add to the comfort and convenience of the persons living there. Accordingly the land is being acquired for a public purpose."

Then a reference was made to the decision in *Arnold Rodricks v. State of Maharashtra* (cit. supra) and to the view taken by the majority as well as the minority judgments and in this context it was observed:

"In *Arnold Rodricks v. State of Maharashtra*, (1966) 3 SCR 885 = (AIR 1966 SC 1788) land was acquired for "development and utilisation of industrial and residential areas". The majority as well as the minority judgments held that the land was acquired for a public purpose. The argument that the land was being acquired from A for the purpose of giving it to B was not accepted. Speaking for the majority Sikri J. (now Chief Justice) said: "It is true that these residential and industrial sites will be ultimately allotted to members of the public and they would get individual benefit, but it is in the interest of the general community that these members of the public should be able to have sites to put up residential houses and sites to put up factories. The main idea in issuing the impugned notifications was not to think of the private comfort or advantage of the members of the public but the general public good." Wanchoo J. in his separate judgment expressed himself more emphatically. He said that there was no reason why the State or the local authority should not have the power to see that further development takes place even through private agencies by lease, assignment or sale of such land. So long as the object is development and the land is made fit for the purpose for which it is acquired, there is no reason why the State should not be permitted to see that further development of the land takes place in the direction for which the land is acquired and even though that may be through private agencies....." Indeed, development partly with the aid of private agencies has generally been adopted by various statutes dealing with the improvement of cities in this country. So this argument also cannot be accepted."

(Underlining is ours)

12. In *Dalchand v. Delhi Improvement Trust* (AIR 1967 SC 87) the provisions of United Provinces Town Improvement Act came for consideration before the Supreme Court. In the said case the provisions of supplementary scheme contemplating acquisition of land for effectuating an object of the original scheme was challenged on the ground that it is a device to acquire land to be disposed of for private gain of an industrialist. After referring to the provisions of the United Provinces Town Improvement Act it was observed by the Supreme Court as under:—

"Resort to the provisions of the Act for acquiring land with a view to hand it over to an industrial concern for private gain may not fall within the terms

of the Act. But in the circumstances already set out a scheme framed which contemplates acquisition of land for effectuating the object of the original scheme is not open to challenge on the ground that it is a device to acquire land to be disposed of for private gain of an industrialist. The original and the supplementary schemes must be regarded as one composite scheme conceived in the interests of industrial development and relief of congestion of inducing a flow of population from the congested area. The object of the supplementary scheme was to effectuate the purpose of the original scheme and failure to frame that scheme may seriously have affected the utility of the original scheme."

There is no warrant for the contention raised by the appellants that the land was not to be developed by the Trust, but was to be acquired and handed over to the Company. It is clear from the scheme that the general supervision and control over the execution of the supplementary scheme as over the original scheme was retained by the Trust and the Company was to develop the land subject to control under the Town Planning Scheme.

The argument that in a town expansion scheme under Section 32 read with Section 24 (h) of the Act, there is no power to acquire land compulsorily, is futile. Section 23 (a) in terms authorises acquisition by purchase, exchange, or otherwise of any property necessary for or affected by the execution of the scheme. That provision may be incorporated in any of the improvement schemes of the types mentioned in Section 24. Again Section 32 clearly implies that in a town expansion scheme such a power would be reserved, for the Trust is statutorily declared liable to pay compensation when permission to alter any building or wall on the land in the area is denied, if the Trust does not proceed to acquire such land within one year from the date of such refusal. By Section 55 a general power to purchase or lease by agreement any land which the Trust is authorised to acquire is granted and by Section 56 power to acquire land under the Land Acquisition Act, 1894, is expressly conferred. It is true that under the provisions relating to other classes of schemes, for instance, Section 26 (2) (f), Section 28 (2) (a), Section 29 (3) an express provision with regard to acquisition of land is made, and there is no such express provision in Section 32. But that by itself is not sufficient to justify an inference that the provisions of Section 23 (a) relating to acquisition of land necessary for or affected by the execution of the scheme may not be conferred in sanctioning a

town expansion scheme. If the view contended for be correct, Section 23 (a) will not have application to any scheme. We are unable to see any reason why Section 56 which authorises the Trust to acquire land is to be restricted only to those cases in which in the case of a specific scheme an express provision conferring power of acquisition apart from Section 23 (a) is conferred."

13. In Lucknow Improvement Trust v. Mohd. Sadiq (AIR 1952 All 346) a similar challenge was raised before the Allahabad High Court. The scheme framed under U. P. Town Improvement Act was challenged on the ground that ultimate object of the scheme was to increase the income of the Trust and on this ground the trial Court had declared the scheme itself as ultra vires. After referring to the provisions of U. P. Town Improvement Act it was observed by the Allahabad High Court as under:

"It is only natural to expect that when public money is spent by the Trust, the Trust will take care to incur as little wasteful and unproductive expenditure as possible and will try to make as much income out of the investment as can legitimately be made. Under Section 23 (g), U. P. Town Improvement Act, the Trust is authorised to make an improvement which may provide for the sale, letting or exchange of any property comprised in the scheme."

The provisions of Section 23 (g) of U. P. Town Improvement Act are similar to the provisions of Section 26 (h) of the Nagpur Improvement Trust Act. Thereafter a reference was made by the Allahabad High Court to the provisions of Section 65 of U. P. Town Improvement Act, which are analogous to Section 76 of the Nagpur Improvement Trust Act and then it was further observed by the Allahabad High Court as under:

"There is thus no doubt that the Trust possesses the power to retain or let out on hire, lease, sell, exchange or otherwise dispose of any land vested in or acquired by it under the Act. The means of acquiring further income under the scheme are, therefore, perfectly legitimate."

In our opinion the principles of law laid down in the aforesaid decisions will aptly apply to the present enactment as well as the Scheme. From the bare reading of the present scheme, it is quite clear that the main object and the purpose of the scheme is to frame an improvement scheme for the purposes specified therein. The land is not acquired by the Improvement Trust for the purposes of making gain simpliciter by sale of the property. After execution of the improvement scheme the plots are sold by the Trust to the

various persons who are in need of them. The provision is made in the scheme for the residential plots in the interest of general public and it is the general public which is benefited by the scheme. The Nagpur Improvement Trust Act is a special enactment providing for a constitution of a Trust and framing of schemes for improvement and expansion of the city. It also makes a provision regarding expenditure which could be incurred by the Trust. The present scheme though framed under Section 31 of the Act is in substance a combined scheme as contemplated by Section 27 of the Nagpur Improvement Trust Act. The plots for residential purpose are also reserved by the Trust for carrying out the purposes of the Act. The disposal of the plots by the Trust is, therefore, in pursuance of the provisions of the Act and the scheme framed thereunder. As observed by the Supreme Court in *Arnold Rodricks v. State of Maharashtra* (AIR 1966 SC 1788) (cit supra) the main idea in framing the present scheme was not to think of private comfort or advantage of the members of the public, but the general public good. The plots for buildings will be disposed of by Nagpur Improvement Trust by sale etc. after they are fully developed. This disposal of the land by the Nagpur Improvement Trust is also with an intention to see that further development of the land and construction of buildings thereon will take place in the direction for which the land is acquired. In this view of the matter, in our opinion, the contention raised by the petitioners that their land is not required for the purposes of the execution of the scheme is not correct.

14. It is no doubt true that by Annexure F an offer was made to the petitioners by the Trust for accepting 3000 sq. ft. plot for the acquisition of every acre of their land. But this offer was made to them so as to minimise the burden on the public exchequer regarding payment of the compensation of the land. The plots which were offered to the petitioners are fully developed plots to be allotted to them for the execution of and in pursuance of the scheme itself. Therefore, from this mere offer it cannot be said that any of the area of the petitioners' land was not required for the execution of the scheme as such.

15. In the very nature of things when the scheme is framed making a provision of improvement or expansion of the town, the execution of it cannot be left to a private individual and has to be carried out under the control and supervision of the Trust itself. Even if it is assumed that the petitioners were prepared to carry on the development of their

area individually so far as their lands are concerned, still it cannot be said that the said lands are not necessary for the execution of the scheme. The very offer made by the petitioners clearly indicates that the land is required for the execution of the scheme, though they want to carry on the execution of the scheme voluntarily so far as their land is concerned. As already indicated such an offer was not made by the petitioners at any time prior to the filing of the petition. Even otherwise it is doubtful as to whether such an offer could be accepted on an individual basis leaving the matter of development to the vagaries of the individual when an expansion scheme is to be executed as a whole. An individual will carry out the development of his own area only thereby doing practically the patchwork which may not be beneficial for the simultaneous execution of the scheme as a whole. The petitioners' lands are comprised in and are duly covered by the scheme. The said lands are not only necessary for the execution of the scheme but are also 'affected' by the scheme as observed by the Privy Council in *Trustees for the Improvement of Calcutta v. Chandra Kant Ghosh* (AIR 1920 PC 51). (Cit. supra). The lands of the petitioners which are comprised in the scheme will be definitely benefited in every way by the execution of the scheme and would be enhanced in the value by its execution. The petitioners will be getting due compensation for their lands as per provisions of law at the market value of the land. But in our opinion they cannot be allowed to reap the additional fruits or benefits arising out of the execution of the scheme, thereby depriving the general public as well as the Nagpur Improvement Trust of the said benefit, arising out of improvement scheme framed by the Trust in the interest of general public and for public good. They cannot be allowed to make a private gain out of such public schemes. If such a course is allowed, it will defeat the very purpose of the Act and the schemes framed thereunder.

16. After reading the scheme as a whole it is quite clear that the present scheme has been framed by the Trust in exercise of their power vested in them under the Act and the acquisition of the lands of the petitioners is also for the purpose of the execution of the said scheme. Therefore, in our opinion, the acquisition of the petitioners' lands for the purpose of the Street Scheme is fully authorised by the provisions of the Act. Section 59 of the Act itself empowers the Trust to acquire the land for carrying out any of the purposes of the Act. Framing of the schemes under Chapter IV of the Act is in exer-

cise of the power conferred upon the Trust under the Act for carrying out the purpose of the Act itself. In this view of the matter, in our opinion, the present scheme framed by the Trust is perfectly within their power and the proceedings started by the Trust for the acquisition of the petitioners' land are also duly authorised by the Act itself. By such schemes it is the general public which is benefited in every way and therefore the acquisition of the petitioners' lands is obviously for public purpose. Once this finding is recorded, in our opinion, the challenge of the petitioners based on Articles 31 and 19 (1) (f) of the Constitution of India must fail.

17. In *Bachan Singh v. State of Punjab*, (AIR 1971 SC 2164) while deciding such a challenge to the provisions of Punjab Development of Damaged Areas Act, the Supreme Court observed as under:

"The provisions of the Act it may be noticed clearly indicate that they are reasonable and are designed to serve the interest of the general public namely to execute schemes in a planned manner for the improvement of the damaged areas of the city of Amritsar. They do not in any way violate the provisions of Art. 19 (1) (f) and (g). This Court has in no uncertain terms laid down the test for ascertaining reasonableness of the restrictions on the rights guaranteed under Article 19 to be determined by a reference to the nature of the right said to have been infringed, the purpose of the restrictions sought to be imposed, the urgency of the evil and the necessity to rectify or remedy it all of which has to be balanced with the social welfare or social purpose sought to be achieved. The right of the individual has therefore to be sublimated to the larger interest of the general public. Applying this test it will be seen that persons who are affected by the scheme are given an opportunity to file their objections which have to be given due consideration by the Trust before finalising the scheme..... The fundamental rights to acquire, hold or dispose of property or to carry on any occupation, trade or business guaranteed under Article 19 (1) (f) and (g) is subject to the restrictions contained in Clauses (5) and (6) of the said Article. The Act in our view complies substantially if not abundantly with the restrictions imposed on the exercise of the said fundamental rights."

These observations aptly apply to the case before us. Therefore, in our opinion, it has not been shown to us that the petitioners' property is being compulsorily acquired without an authority of law and the acquisition is not for a pub-

lic purpose. On the contrary, it is clear to us that the acquisition of the petitioners' land for the Street Scheme is for a public purpose, and is, in public interest, and the same is fully authorised by the provisions of the Nagpur Improvement Trust Act read with the provisions of the Land Acquisition Act, 1894.

18. It was then contended by Mr. Natu that this compulsory acquisition of the petitioners' field property amounts to depriving them of their fundamental right to practice a profession, trade or business of agriculture. It is the contention of Shri Natu that the cultivation of this agricultural field is the only source of the petitioners' livelihood and because of this acquisition this very right to practice their profession or to carry on their trade or business in agriculture is being taken away. He further contended that the said scheme is also not saved by sub-clause (5) of Article 19 of the Constitution of India as the scheme framed is not in the interest of general public. It is not possible for us to accept this contention of Shri Natu.

19. By the framing of the scheme, the Improvement Trust is not taking away the right of the petitioners to practice any profession or to carry on any trade or business. As a matter of fact, the scheme has nothing to do with any such right of the petitioners to practice any profession, trade or business. Even if it is assumed that the consequence of such acquisition of the land could be that their right to cultivation of the said fields is being taken away in our opinion, to such a case the provisions of Article 19 (1) (g) will not apply. It could at the most be said to be an accidental result of the acquisition of the land of the petitioners for the public purpose, namely, for the execution of improvement scheme framed by the Improvement Trust under the Act. Even otherwise, as observed by the Supreme Court in *Bachan Singh's* case (AIR 1971 SC 2164) (cit. supra), when the provisions of the Act or a scheme clearly indicate that they are reasonable and are designed to serve the interest of the general public, namely, to execute schemes in a planned manner for the improvement of the city, then they do not in any way violate the provisions of Article 19 (1) (f) and (g) of the Constitution of India. The present scheme is in the larger interest of general public and is, therefore, in our opinion, saved by clauses (5) and (6) of Article 19 of the Constitution of India.

20. Thereafter it was contended by Shri Natu that the rejection of the petitioners' application by the Improvement Trust for abandoning their land is

discriminatory and is, therefore, violative of their fundamental right guaranteed under Article 14 of the Constitution of India. In the petition it is contended by the petitioners that the Improvement Trust has abandoned some land belonging to one Abdullahbai, though it was comprised in the scheme vide agreement dated 2-1-1967.

21. The contention raised by the petitioners in this behalf is itself not correct. In reply to this allegation made in the petition, the Trust in its return, has made the whole position clear. The said Abdullahbai had applied on 8-8-1962, that is, prior to the sanction of the scheme itself by the Government, for sanctioning a lay-out of his property. The Trust had passed a resolution sanctioning a lay-out in respect of 12 acres of land only and an agreement was drawn accordingly on 2-1-1967. However, it is contended by the Trust that later on Abdullahbai's entire property namely Khasra Nos. 3/1, 4, 5 and 6, was notified for acquisition under Section 45 of the Act and the acquisition proceedings in that behalf had already been started. Therefore, it is not correct to say that the lands belonging to Abdullahbai are not being acquired by the Trust. Against the order passed by the Land Acquisition Officer proceedings with the acquisition proceedings relating to the lands owned by Abdullahbai, the said landholder has filed a writ petition before this Court, bearing Special Civil Appln. No. 281 of 1969 (Bom.). With the consent of the parties we had sent for the records of the said writ petition and have perused them. From the record of the said case it is quite clear that the Trust is proceeding with the acquisition of entire land belonging to Abdullahbai. In this view of the matter, in our opinion, there is no substance in this contention raised by the petitioners that any discriminatory treatment has been given to them by the Trust.

22. Shri Natu has challenged the sanction accorded by the State Government being bona fide abuse of the power on the part of the Government. According to Shri Natu, the State Government has granted sanction to the scheme mechanically without applying its mind to the scheme itself or the objections raised by the various persons. After preparation and publication of the scheme a notice is published in the Gazette under Section 39 of the Act and a notice of the proposed acquisition is also served upon individual land owner under Section 41 of the Act itself. A draft scheme is also sent to the Municipal Corporation under Section 40 of the Act. Thereafter, after considering the objections raised in this behalf and hearing all the persons mak-

ing any such objections the Trust has to apply to the State Government for sanction of the scheme. Such an application for sanction is to be forwarded to the Government under Section 43 of the Act and the said application is to be accompanied by—

(a) a description of, and full particulars relating to, the scheme, and complete plans and estimates of the cost of executing the scheme;

(b) a description of the street, square, park, open space or other land, or any part thereof, which is the property of the Government and managed by the Central Government or the State Government required for the scheme;

(c) a statement of the reasons for any modifications made in the scheme as originally framed;

(d) a statement of objections, if any received under Section 39;

(e) any representation received under Section 40;

(f) a list of the names of all persons, if any, who have dissented under clause (b) of sub-section (2) of Section 41, from the proposed acquisition of their land or from the proposed recovery of a betterment contribution, and a statement of the reasons given for such dissent; and

(g) a statement of the arrangements made or proposed by the Trust for the re-housing of persons likely to be displaced by the execution of the scheme, for whose re-housing provision is required.

Such an application was made by the Trust vide Annexure 5 with the return as per their memo dated 27-11-1964. With this application various documents were sent to the Government and thereafter the Government has sanctioned the said scheme vide Government resolution dated 4-3-1967. Together with the notification sanctioning the scheme, the Government had also made certain suggestions to the Trust. These suggestions were in fact made by the Director, Town Planning, Maharashtra State, Poona and were incorporated in the Government resolution dated 4-3-1967. The said resolution has been made available to us by the counsel for the Trust. If all these documents are read together, in our opinion, it cannot be said that the Government has not applied its mind to the scheme as such and has granted the sanction to the scheme mechanically without any application of mind. The petitioners have drawn an inference of non-application of mind on the part of the Government from the mere fact that the Government did not even think it necessary to return the scheme for reconsideration as required by Section 44 (1) of the Act.

This is the only reason given by the petitioners as to why they feel that the Government has not applied its mind to the scheme as such. From the material placed before us we are satisfied that the sanction accorded by the Government is after applying its mind to the scheme and after considering the scheme as well as the relevant documents sent to the Government with the application for obtaining sanction to the scheme itself. Moreover it is not open for this Court to examine this question in view of the provisions of Section 45 (2) of the Act. Section 45 (2) of the Act reads as under :

"45 (2) The publication of a notification under sub-section (1) in respect of any scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned."

23. However, it is contended by Shri Natu that in spite of the said provision it is open for the Court to scrutinise the whole matter and come to a conclusion that the scheme was not properly sanctioned. In support of this proposition Shri Natu has relied upon two decisions of the Supreme Court, namely *R. L. Arora v. The State of Uttar Pradesh* (AIR 1962 SC 764) and *State of West Bengal v. P. N. Talukdar* (AIR 1965 SC 646). According to Shri Natu, the said presumption will not mean that the Court was precluded from enquiring as to whether the land, which is being acquired, is in fact needed for a public purpose or not. In *State of West Bengal v. P. N. Talukdar* (cit. supra) it was observed by the Supreme Court that the Court is not precluded from enquiring whether the notification that the land was needed for the public purpose was made in fraud of the Act, namely, against the proviso to Section 6 (1) which required that such a notification could not be made unless part or whole of the compensation came out of public revenues or some fund managed or controlled by a local authority.

24. Shri Natu has also relied upon a decision of Manipur Judicial Commissioner's Court in *Heisnam v. Union Territory, Manipur*, (AIR 1968 Manipur 45) and *Raja Ram v. State of Punjab* (AIR 1970 Punj and Har 361).

25. It is no doubt true that in the said decisions a view is taken that a Court can go behind the notification itself if it is issued in the colourable exercise of the power or was a fraud on the Statute itself. Such an allegation has not been made in this petition, when the sanction issued by the Government is being challenged. On the contrary in *Ratilal v. State of Gujarat* (AIR 1970 SC 984), while construing the presumption

under Section 6 (3) of the Land Acquisition Act, the Supreme Court observed :

"Section 6 (3) of the Land Acquisition Act provides that a declaration under Section 6 shall be conclusive evidence that the land proposed to be acquired is needed for a public purpose. Therefore this Court cannot go into the question whether the need was genuine or not unless we are satisfied that the action taken by the Government was a fraudulent one. We are also unable to concede to the proposition that the need of a section of the public cannot be considered as a public purpose. Ordinarily, the Government is the best authority to determine whether the purpose in question is a public purpose or not and further the declaration made by it under Section 6 is a conclusive evidence of the fact that the land in question is needed for a public purpose—see *Smt. Somawanti v. State of Punjab*, (1963) 2 SCR 774 = (AIR 1963 SC 151). That decision lays down that conclusiveness in Section 6 (3) must necessarily attach not merely to a 'need' but also to the question whether the purpose was a public purpose....."

We are unable to accept the contention of the learned counsel for the appellant that the Government did not apply its mind before issuing the notification under Section 6. Before issuing that notification, there was an enquiry under Section 5-A. The Government had issued that notification after examining the report submitted by the concerned officer. There is no material on record from which we can reasonably come to the conclusion that the Government had acted blindly in issuing that notification."

In our opinion the principles of Law laid down by the Supreme Court in this decision will aptly apply to the present case in view of the fact that sanction granted by the Government is not being challenged before us on the grounds of fraud or that it was issued in colourable exercise of the power. Further in the present case after perusing the application filed by the Trust dated 27-11-1964 submitting the scheme for sanction and after perusing the accompaniments forwarded with the said application the sanction was accorded by the Government and that too with certain suggestions. In this view of the matter, it is not possible for us to accept the contention of Shri Natu that the sanction was given by the Government to the present scheme without any application of mind, or it amounted to a bona fide abuse of the power on the part of the Government.

26. However a reference was made by Shri Natu to a decision of the Madras High Court in *Godrej & Boyce Mfg. Co. Pvt. Ltd. v. Special Tahsildar Land Ac-*

quisition Industrial Estates (AIR 1969 Mad 305). In the said decision the action of the Government was challenged on the ground that it amounted to a bona fide misuse of the power as the decision of the Government that the lands which were in possession of the petitioners and which were sought to be acquired by the Government were far in excess of the petitioners' requirement. It was found by the Madras High Court that the said assumption on the part of the Government was unreasonable in the context of the petitioners' proposed magnitude of business activities, and therefore, the Madras High Court held that though the Government acted bona fide in exercise of its power by virtue of wrong assumption the action of the Government amounted to bona fide misuse of the power. As already found by us, in the present case the sanction was accorded by the Government after applying its mind to the application submitted by the Trust and the accompaniments enclosed therewith and thereafter the said scheme was sanctioned by the Government with certain suggestions. It has not been shown to us that while exercising this power the Government has abused its power either bona fide or mala fide, nor such an inference could be drawn from the facts and circumstances of the present case as disclosed by the record produced before us. In this view of the matter, in our opinion, there is no substance in this contention of the petitioners also.

27. These were the only contentions argued before us in Special Civil Application No. 422 of 1970. In the view which we have taken, therefore, Special Civil Application No. 422 of 1970 fails and is dismissed.

28. In Special Civil Application No. 494 of 1970 in addition to the other contentions raised, the petitioner has contended that the application for abandoning the land filed by petitioner under Section 68 of the Act has been rejected by the Trust without giving any opportunity of being heard. The original petitioner in the said case, Baru Bai, owned Khasra No. 94, area 27.36 acres at mouza Chikhali, taluq and district Nagpur and the said land owned by her was also the subject-matter of the acquisition by the Trust for the execution of their scheme, known as Eastern Industrial Area Street Scheme. It is not necessary to refer to the other contentions raised in the petition as the said contentions are already dealt with by us while dealing with the writ petition bearing Special Civil Application No. 422 of 1970.

29. The only additional contention which is required to be decided in this writ petition is regarding the peti-

tioner's claim in the matter of rejection of her application under Section 68 of the Act. The application filed by the petitioner for abandoning her land under Section 68 of the Act was based on the ground that the land should be abandoned as she is also carrying on a private industry. This was the only claim made by the petitioner in her application for abandonment of the land under Section 68 of the Act.

30. No plea was raised by the petitioner in the said application that the field owned by her was unnecessary for the execution of the scheme itself. The application filed by the petitioner under Section 68 of the Act was not filed with the writ petition. However, the said application in original was made available to us by the counsel for the Trust. The claim made in the said application by the original petitioner Baru Bai was based on the ground that as she is also carrying on a private industry, her land should be abandoned. As the abandonment of the land from acquisition was not claimed by the original petitioner on the ground that it was subsequently discovered that her land is unnecessary for the execution of the scheme in our opinion, no consideration of the said application was called for. Even in the present petition it has not been demonstrated as to how it was subsequently discovered that the land owned by the petitioner is unnecessary for the execution of the scheme. In the petition the petitioner has also challenged the action of the Trust rejecting her application for abandonment of the field on the ground that the said order passed by the Trust is mala fide, or is discriminatory as the Trust has abandoned the land belonging to one Abdullabhai. As already observed in the decision in Special Civil Application No. 422 of 1970, the land belonging to Abdullabhai has not been abandoned by the Trust as such. On the contrary the said land is being acquired by the Trust for the purpose of execution of the present scheme itself. In support of the plea raised by the petitioner that the action of the Trust is either mala fide or discriminatory no data has been placed before us in support of the said challenge. In this view of the matter, in our opinion, the petitioner-landlord was not entitled to any hearing before the said application was decided by the Trust under Section 68 of the Act, having regard to the facts and circumstances of the present case.

31. We are not deciding the general question in the present petitions as to whether it is necessary to give an opportunity of being heard to an applicant before passing any order on an application under Section 68 of the Act. In our

opinion, having regard to the facts and circumstances of the present case, as the petitioner has not made out any case for abandonment of any portion of his land, it was not necessary for the Trust to give any hearing to the applicant before rejecting the application.

32. It was then contended by Shri Natu that the scheme framed by the Trust is ultra vires of their powers under Section 31 of the Act itself. According to Shri Natu, the present scheme has been framed by the Trust under Section 31 of the Act and Section 31 of the Act makes no provision for acquiring any land for the purposes of construction of factories or light industries. He further contended that Section 31 (2) does not provide that it is open for the Trust to acquire the land affected by the scheme itself. According to Shri Natu, in a Street Scheme no provision could be made for acquisition of a land for the purposes of industries or for acquiring the land which is affected by the execution of the scheme itself. It is not possible for us to accept this contention of Shri Natu.

33. In our opinion, the provisions of Section 31 of the Act will have to be read together with other provisions of Chapter IV of the Act. The said Chapter will have to be harmoniously construed and if all the provisions of the said Chapter and the Act are read together, in our opinion, even to a scheme framed under Section 31 of the Act the provisions of Section 26 will apply. Section 26 of the Act is a general provision and makes a provision for the acquisition of the property which is necessary for or affected by the execution of the scheme itself. The land of the petitioner which is being acquired for the execution of the scheme is necessary for the execution of the scheme itself or in any case is affected by the execution of the scheme. Therefore, in our opinion, the acquisition of the land belonging to the petitioner was in accordance with the provisions of the Act and was fully authorised. Section 27 of the Act lays down the types of improvement schemes and further permits the trust to frame a scheme which might be a combination of any two or more of such types of schemes. Section 31 specifically provides for framing of a scheme which might include a provision for building sites. The term "building" has been defined by the Act meaning thereby a house, hut, shed or other structures for whatever purpose and of whatever material constructed and every part thereof, whether used as a human habitation or not, and includes well, latrine, drainage work, fixed platform, varandah, plinth, doorstep, compound wall, fencing and the like, and any work connected there-

with. The construction of a shed or structure for the purposes of a factory or industry will definitely amount to construction of a building within the meaning of the Act and in our opinion, is covered by the definition of the said term as defined by Section 2 (a-1) of the Act. Therefore, in our view, it is open for the Trust to frame a scheme for providing building sites for the purposes of industries also. Framing of a scheme to provide for an accommodation for the purposes of industries and factories is a part and parcel of the improvement scheme contemplated by Chapter IV of the Nagpur Improvement Trust Act for the improvement and expansion of the town. Such a scheme will meet the general needs of the population in this behalf and will also provide for other public amenities and the sites therefor. In this view of the matter it is not possible for us to accept this contention of Shri Natu.

34. Therefore, in the view which we have taken Special Civil Application No. 494 of 1970 also fails and is dismissed.

35. The petitioner in Special Civil Application No. 515 of 1970 is an owner of Khasra Nos. 62/1 and 64, which are also included in the scheme known as Eastern Industrial Area Street Scheme. The petitioner Punjaram had also filed an application under Section 68 of the Act on the ground that the land belonging to him is not required for the execution of the scheme, and therefore, is liable to be abandoned. The petitioner in this behalf has filed two applications dated 29-12-1967 and 6-3-1968. In these applications the petitioner has contended that his field property or any part thereof does not come within the Trust scheme. In the second application it was stated by him that it was learnt by him that his house or some part of it is not required for the execution of the Trust scheme and if so it be abandoned. From the bare reading of the application it is quite clear that apart from making a bare statement no specific case was made out by the petitioner for abandonment of his property, nor it was shown that it was subsequently discovered that his property is unnecessary for the execution of the scheme itself. Having regard to the averments made in the applications, in our opinion, therefore, it was not necessary for the Trust to give any hearing to the petitioner before deciding the said applications. The only contention raised in the present petition on behalf of the petitioner was that the order passed by the Trust rejecting his applications for abandonment of the property was illegal as no hearing was given to him before passing of the said order. As ob-

served by the Supreme Court in Nagpur Improvement Trust v. Ganesh Kulkarni, 1973 Mah LJ Notes 25 = (AIR 1973 SC 696) before an applicant can make an application under Section 68 (1) of the Act, it must be proved that the acquisition of the land comprised in the Improvement Scheme has been subsequently discovered to be unnecessary for the execution of the scheme itself. This aspect of the matter was also considered by the Supreme Court in Narain Dass v. The Improvement Trust Amritsar, (AIR 1972 SC 865). While dealing with somewhat identical provisions of the Punjab Town Improvement Act, in the said decision it was observed by the Supreme Court as under:

"The basic question which, in our opinion, initially requires consideration is the nature of the right which the appellants claim to vest in them by virtue of Section 56 of the Act. This Section occurs in Chapter VI of the Act. That Chapter deals with 'Acquisition, Tribunals and applications of the Act to other authorities.' Section 56 with which this Chapter begins, provides for 'Abandonment of acquisition in consideration of special payment' and it reads:

.....

It is obvious that this section contemplates a locality comprised in a scheme under the Act pursuant to which the Government has sanctioned the acquisition of land, which land is subsequently discovered to be unnecessary after the sanction of the acquisition that its owner or any person having an interest therein is entitled to make an application to the Trust requesting for the abandonment of its acquisition in consideration of payment by him of a sum to be fixed by the Trust in that behalf. In other words, it is when this initial condition is satisfied that the occasion for making an application for abandonment arises. The further requirement of this section is that the application for abandonment must reach the Trust before the time fixed by the Collector under Section 9 of the Land Acquisition Act, 1894 for making claims in reference to the land. When all these conditions are complied with then the Trust is bound to admit the application so made if the applicant either owns the lands in question or is a mortgagee or a lessee thereof with an unexpired lease period of seven years. When, however, such an application is made by some other persons having an interest in the land, the Trust may admit it in its discretion. It is noteworthy that unless the acquisition of land is discovered to be unnecessary for the execution of the scheme this section does not operate and there is no question of the Trust possess-

ing any power to except lands from the scheme under this section. The existence of an orchard on such land which is not necessary for the execution of the scheme would be a wholly irrelevant consideration. In the present case there is no finding that the acquisition of the appellants' land has been discovered to be unnecessary for the execution of the scheme. Therefore, the appellants had no locus standi to invoke Section 56."

As no case was made out by the petitioner for entertaining his applications under Section 68 itself, without deciding the wider question, in our opinion, having regard to the facts and circumstances of the present case it was not obligatory on the part of the Trust to give any hearing to the petitioner before his applications were rejected. This was the only point argued in this writ petition.

36. In the result, therefore, Special Civil Application No. 515 of 1968 fails and is dismissed.

37. However, in the circumstances of the cases there will be no order as to costs in all these writ petitions.

Petitions dismissed.

AIR 1975 BOMBAY 297

(AT NAGPUR)

PADHYE, J.

Ramesh Shankar Wankhede, Applicant v. The State of Maharashtra, Opponents.

Civil Revn. Appln. No. 160 of 1972, D/- 10-1-1975.*

(A) Limitation Act (1963), Ss. 5, 29 (2) — Delay in filing application for reference under S. 18 (Maha.), Land Acquisition Act — Extension of period under S. 5 — (Land Acquisition Act (1894), S. 18 (Maharashtra).)

By virtue of S. 29 (2), the provisions of S. 5 can be availed of by the applicant for condonation of the delay in filing the application under S. 18 of the Land Acquisition Act (as amended in Maharashtra) for reference. (Para 4)

From S. 18 (3) (Maharashtra) it would appear that even though the Collector or the Land Acquisition Officer while dealing with the matter of the compensation may not be a Court governed by the provisions of the Code of Civil Procedure, yet when he is dealing with the application for reference under Section 18, he deals with that application as a 'Court' govern-

*(Against order of R. S. Rathod, Spl. Land Acquisition Officer, Akola, D/- 1-6-1971.)

ed by the provisions of Civil P. C. subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure. The provisions of section 5 of the Limitation Act, 1963 would therefore apply to the applications for reference. AIR 1932 All 597 and AIR 1959 All 576 (FB), Disting.; ILR (1965) Bom 831 and AIR 1972 Punj & Har 36 (FB) and AIR 1969 SC 1335 and AIR 1970 SC 209 and (1967) 69 Bom LR 598, Ref. (Para 4) Cases Referred: Chronological Paras

AIR 1972 Punj & Har 36 = 74 Pun LR 408 (FB)	3
AIR 1970 SC 209 = 1970 Lab IC 269	3
AIR 1969 SC 1335 = 1969 Lab IC 1538 3	
(1967) 69 Bom LR 598 = 22 STC 104	4
ILR (1965) Bom 831 = 1967 Mah LJ 149	3
AIR 1964 SC 752 = (1964) 3 SCR 709	4
AIR 1959 All 576 = 1959 All LJ 375 (FB)	1
AIR 1953 SC 98 = 1953 SCR 351	4
AIR 1932 All 597 = 1932 All LJ 752	1

S. N. Kherdekar, for Applicant; V. V. Naik, Hon. Asstt. to A. G. P., for Opponents.

ORDER:— This revision application has been filed against the order of the Special Land Acquisition Officer rejecting the application for reference to the Court under Section 18 of the Land Acquisition Act. The award in respect of which reference was to be made was passed on 29-3-1971 and communicated to the land owner on the same day. The application for reference under Section 18 of the Land Acquisition Act was made on 19-5-1971. The application was to be made within 6 weeks of the passing of the order. Thus the application was barred by limitation by 9 days. The applicant, therefore, made an application for condonation of delay in filing the said application on the ground that he was prevented by a sufficient cause from not preferring the application during the prescribed time. The Land Acquisition Officer rejected the application on the ground that the time for filing the application could not be extended for any reason whatsoever i.e. according to Land Acquisition Officer, he had no power to condone the delay under Section 5 or any other provision of the Limitation Act, though he has not said so specifically in the order. He relied on two decisions of the Allahabad High Court. One was 1932 All LJ 752 = (AIR 1932 All 597) and the other was AIR 1959 All 576 (FB). The applicant has filed this revision application against the said order.

2. The question involved in this case is whether by virtue of the provisions of Section 29 (2) of the Limitation Act, 1963 the provisions of Section 5 of the Limitation Act can be availed of by

the applicant for condonation of delay in filing the application. Undoubtedly the Land Acquisition Act, under which the application was made, is a special law. Section 29 (2) says:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

By virtue of this provision Section 5 of the Limitation Act is made applicable to the applications under a special law. The Land Acquisition Act does not expressly exclude the application of Sections 4 to 24 of the Limitation Act.

3. Section 5 of the Limitation Act reads thus:

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

Section 5, therefore, applies to all the applications except those under O. XXI of the Code of Civil Procedure. Ordinarily, therefore, the provisions of Section 5 ought to apply to an application made under Section 18 of the Land Acquisition Act. It is, however, contended on behalf of the non-applicants that the provisions of Section 5 can be invoked only where the application is made to the Court and the Collector or the Land Acquisition Officer dealing with an application for reference under Section 18 of the Land Acquisition Act is not a Court and, therefore, the provisions of Section 5 will not apply to such an application under Section 18 of the Land Acquisition Act. The learned counsel for the State-non-applicant relied on certain decisions in support of his contention. He relied on Gram Panchayat, Murthal v. The Land Acquisition Collector, AIR 1972 Punj and Har 36 (FB). This was a case of an application under Section 18 of the Land Acquisition Act and the question was whether the provisions of sub-section (2) of Section 12 of the Limitation Act were applicable to those proceedings. It was held there that the provisions of Section 12 (2) were not applicable to those proceedings. The

Punjab High Court also referred to a decision of this Court in *Khashaba Daji Shinde v. M. V. Hinge*, ILR (1965) Bom 831, in which also it was held that the provisions of Section 12 (2) of the Limitation Act do not apply to the applications under Section 18 of the Land Acquisition Act. The decisions, however, are distinguishable on the terms of Section 12 (2) of the Limitation Act. Under Section 12 (2) of the Limitation Act, the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed is liable to be excluded in computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment. The provisions of sub-section (2) of Section 12 are, therefore, limited only to these categories mentioned in the said sub-section and not to all kinds of applications as is the case in Section 5 of the Limitation Act. Only three kinds of applications are specified in sub-section (2) of Section 12 and they are an application for leave to appeal, an application for revision and an application for review of a judgment and it is because of this that it was held in these two cases that the provisions of sub-section (2) of Section 12 cannot be availed of in the proceedings started on an application under Section 18 of the Land Acquisition Act, because an application under Section 18 for reference to the Land Acquisition Officer is neither an application for leave to appeal or an application for revision or an application for review of a judgment. These decisions, therefore, are of no assistance in holding that the provisions of Section 5 of the Limitation Act are not applicable to an application for reference under Section 18 of the Land Acquisition Act. Another decision which was cited is *Town Municipal Council v. Presiding Officer, Labour Court*, AIR 1969 SC 1335. The question there was whether the limitation provided by Article 137 of the Limitation Act of 1963 would govern the proceedings under Section 33-C (2) of the Industrial Disputes Act. The Supreme Court observed that the provisions of Article 137 of the Limitation Act, 1963 or of Article 181 of the Limitation Act of 1908 govern applications under the Code of Civil Procedure only and it clearly implied that the applications must be presented to the Court governed by the Code of Civil Procedure. It was observed that the application governed by Article 137 or 181 of the Limitation Act must be to courts to be governed by the Articles in this division of the schedule and they further observed that the scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies

other than courts, such as a quasi-judicial tribunal, or even an executive authority and they further held that an Industrial Tribunal or a Labour Court dealing with applications or references under the Act (Industrial Disputes Act) are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. It is urged on the authority of this decision that like the Industrial Tribunals or the Labour Courts the Land Acquisition Officer is also not a Court and, therefore, no provisions of the Limitation Act would be applicable to such proceedings. The Supreme Court followed this decision in subsequent case of *Nityanand M. Joshi v. The Life Insurance Corporation of India*, AIR 1970 SC 209. In this case also it has been held that Article 137 only contemplates the applications to Courts and in the third Division of the Schedule to the Limitation Act, 1963, all the other applications mentioned in the various articles are applications filed in a court. They further observed that again under Section 5 it is only a court which is enabled to admit an application after the prescribed period had expired if the court is satisfied that the applicant had sufficient cause for not preferring the application and the scheme of the Indian Limitation Act was that it only dealt with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.

4. The learned counsel for the applicant referred to a decision of this Court in *M/s. Vasanji Ghela & Co. v. State of Maharashtra*, (1967) 69 Bom LR 598, in which the question involved was whether by virtue of the provisions of Section 29 (2) of the Limitation Act, 1963, the provisions of Section 5 were applicable to the application for reference made under Section 23 of the Bombay Sales Tax Act, 1946. It appears that the decision proceeds on the basis that the Sales Tax Tribunal, while dealing with an application for reference made under Section 23 was a Court and on that basis it was held that Section 5 of the Limitation Act could be availed of in that proceeding. It does not appear that specific question was raised in this case whether the Sales Tax Tribunal while dealing with an application for reference under Section 23 of the Bombay Sales Tax Act was a Court as contemplated by Section 5 of the Limitation Act. In the earlier Supreme Court decisions i.e. AIR 1953 SC 98 and AIR 1964 SC 752, view was taken that all the articles in the Third Division to the Schedule including Article 181 of the Limitation Act of 1908 govern applications under the Code of Civil Procedure only and it clearly implied that the

applications may be presented to a Court governed by the Code of Civil Procedure. By virtue of the amendments now made in the Act of 1963, they only enlarge the scope of the Third Division of the Schedule so as to include some applications presented to the Court governed by the Code of Criminal Procedure. But they do not enlarge the scope so as to include also an Industrial Tribunal or a Labour Court dealing with an application or reference under the Act as they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. On this view it would prima facie appear that just as an Industrial Tribunal or a Labour Court is not a Court as it is not governed by the Code of Civil Procedure or the Code of Criminal Procedure, the Land Acquisition Officer or the Collector is also not a Court as it is not governed by the Code of Civil Procedure or the Code of Criminal Procedure. It would be true that the Collector or the Land Acquisition Officer who is empowered to act as a Collector in the Land Acquisition proceedings would not ordinarily be Court governed by the provisions of Code of Civil Procedure when he proceeds to determine the compensation for the land to be acquired. However, the amendment which has been made to Section 18 of the Land Acquisition Act by Maharashtra Act No. 38 of 1964 by incorporating therein sub-section (3) would, in my view, make a considerable difference. Section 18 (1) provides that

"18. (1) Any person interested who has not accepted the award or the amendment thereof may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among persons interested."

Sub-section (2) of Section 18 of the Land Acquisition Act requires that application shall state the grounds on which objection to the award or the amendment is taken. It further provides for the period of limitation for making an application for reference to the Court. Sub-section (3) of Section 18 of the Land Acquisition Act reads thus:

"(3) Any order made by the Collector on an application under this section shall be subject to revision by the High Court, as if the Collector were a Court subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure, 1908."

From this provision it would appear that even though the Collector or the Land Acquisition Officer while dealing with the matter of the compensation may not be a Court governed by the provisions of the Code of Civil Procedure, yet by virtue of this provision when he is dealing with the application for reference under Section 18, he deals with that application as a Court governed by the provisions of the Code of Civil Procedure and that is why an application for revision to the High Court has been provided against the order made by the Collector on such an application. When dealing with an application for reference under Section 18 of the Land Acquisition Act, the Land Acquisition Officer is considered to be a Court subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure. If he is considered a Court under sub-section (3) of Section 18 then in that case the provisions of Section 5 of the Limitation Act, 1963 would apply to the applications for reference. On this view the provisions of Section 5 of the Limitation Act, 1963 were applicable to the application made by the applicant for reference and the Collector or the Land Acquisition Officer had to consider the application under Section 5 for condonation of delay in filing the application. The Special Land Acquisition Officer, on the view it took about the non-applicability of the provisions of Section 5 of the Limitation Act, did not enter into the question whether any sufficient cause has been made out by the applicant for condonation of the delay in filing the said application. Since I hold that Section 5 of the Limitation Act is applicable to such a proceeding, it will have to be investigated as to whether the applicant has made out sufficient cause for filing the application beyond the period of limitation.

5. Accordingly I set aside the order of the Special Land Acquisition Officer and remand the case to him for an enquiry as to whether there was sufficient cause for the applicant to file an application beyond the period of limitation and whether he is entitled to condonation of the delay in filing the application. The Lower Court will give a reasonable opportunity to the parties to be heard on this question and thereafter decide the matter in accordance with law. The revision application is, therefore, allowed with costs.

Application allowed.

AIR 1975 BOMBAY 301

(AT NAGPUR)

CHANDURKAR, J.

Smt. Bhagirathibai and another, Appellants v. Lalchand Balaram and others, Respondents.

Second Appeal No. 237 of 1965, D/- 20-12-1974.*

(A) Succession Act (1925), S. 119 — Vested interest — Will creating limited interest in favour of testator's widow B and vested interest in favour of his nephew, C — C predeceasing B — Vested interest held would pass to heirs of C.

Will made by A on 19-2-1948 provided that after the death of testator A his widow B should enjoy the income from the suit property and she was expressly prohibited from alienating the suit property in any way. The further recitals in the will were that after B's death, the movable and immovable property mentioned in the will should be taken possession of by C, a minor son of A's brother. The will thus provided that C alone should enjoy the property as absolute owner and that nobody else had any right whatsoever in respect of that property. A died on 10-2-1949 and C died on 14-8-1952. B was alive, and D another son of A's brother brought a suit for a declaration that on the death of testator A, the legatee C acquired a vested right or interest in the suit property under the will and further that D had acquired that right as a legal representative of C. The only defence of B and her adopted son was that D had not stepped into the shoes of his elder brother C.

Held (1) that the provisions of S. 119 would be attracted and the case squarely fell under illustration (iii) to S. 119. Though B continued to be in possession of the property, she had no ownership rights in the property but a limited interest. On the death of the testator, a vested interest was created in favour of C. The ownership vested in him though possession was deferred. The rights of ownership did not vest in B and a residuary bequest was made in favour of C at the death of the testator, though he would get possession only after the death of B.

(Para 3)

(2) that when a reference was made that C alone was to enjoy the property, the intention of the testator was to create an absolute ownership in favour of C to the exclusion of all others. The testator did not anticipate that C would predecease B. The effect of the death of C

during the lifetime of B would, therefore, have to be decided with reference to the statutory provision in S. 119. The vested interest would pass to the heirs of C by virtue of the statutory provisions and those provisions were not set at naught by the creation of an interest exclusively in favour of C. Hence, D was entitled to claim as heir of C. (1898) ILR 22 Bom 409 and AIR 1940 All 347, Followed. (Paras 4, 7)

Cases Referred: Chronological Paras
 AIR 1951 SC 103 = 1950 SCR 949 4
 AIR 1940 All 347 = 1940 All LJ 340 6
 (1913) 41 Ind App 51 (PC) 4
 (1898) ILR 22 Bom 409 5

N. K. Kherdekar, for Appellants; L. Mohta, for Respondent No. 1.

JUDGMENT:— The only question which arises in this second appeal by the defendants is whether as a result of a will made by deceased Gangaram, husband of the defendant No. 1, one Rupchand who was his nephew had acquired a vested interest as contemplated by Section 119 of the Indian Succession Act. Admittedly, Gangaram had a brother by name Balaram. Balaram had three sons—Rodmal, Rupchand and Lalchand. Rodmal died in 1941, and defendant No. 3 Godavaribai is his widow. Gangaram himself died on 10-2-1949, and Rupchand died on 14-8-1952. Defendant No. 3 Godavaribai is said to be in possession of some of the suit property and defendant No. 5 is the daughter of Godavaribai. Now, the will provided that after the death of testator Gangaram his widow Bhagirathibai should enjoy the income from the suit property and she was expressly prohibited from alienating the suit property in any way. The further recitals in the will were that after the death of Bhagirathibai, the movable and immovable property mentioned in the will should be taken possession of by Rupchand son of Balaram, who is also described as the eldest son of Balaram, his brother. Rupchand was then a minor and his age is shown as 17 years and his guardian is shown as the testator himself, under the will. The will thus provided that Rupchand alone should enjoy the property as absolute owner and that nobody else had any right whatsoever in respect of that property. Now, the present plaintiff Lalchand is Rupchand's brother, and the immediate occasion for the suit appeared to be an adoption of Ramesh as a son by Bhagirathibai. Since Rupchand died on 14-8-1952 and Bhagirathibai was alive and Lalchand apprehended that he would be deprived of the suit property as an heir of Rupchand, he brought a suit for a declaration that on the death of testator Gangaram on 10-2-1949, the legatee Rupchand acquired a vested right or interest in the

* (Against order of A. V. Patkar, Extra Asst. J., Akola in Civil Appeal No. 20 of 1964.)

suit property under the will dated 19-2-1948 and further that the plaintiff had now acquired that right as a legal representative of Rupchand. This suit was contested by the defendants Nos. 1 and 2 alone. The only defence was that the plaintiff had not stepped into the shoes of his elder brother Rupchand.

2. On a construction of the will and on the provisions of Section 119 of the Indian Succession Act, the trial Court held that Rupchand had acquired a vested interest and that the plaintiff would succeed to that interest after the death of Bhagirathibai. A declaration was accordingly made in favour of the plaintiff. An appeal filed by Bhagirathibai and Ramesh against the judgment of the trial Court was dismissed by the Extra Assistant Judge Akola, who also held that Rupchand got a vested interest in the property on the death of testator Gangaram and this vested interest passed to the heirs of Rupchand since he had died without having received the legacy.

3. In this second appeal filed by Bhagirathibai and her adopted son, it is contended by Mr. N. K. Kherdekar that the interest of Rupchand was to have vested in him only after Bhagirathibai's death, and since Rupchand predeceased Bhagirathibai, there was no occasion for any interest to vest in Rupchand, with the result that there was nothing which could be transmitted to the legal representatives of Rupchand. It is also urged that on a proper construction of the will, it was clear that the testator intended that no person other than Rupchand was to enjoy the property of the testator and, therefore, the present plaintiff could not claim any property contrary to the directions in the will. The decision of this appeal turns mainly on the question whether the recitals in the will created a vested interest in favour of Rupchand. There is no ambiguity about the recitals in the will which show that initially Bhagirathibai was to enjoy the property during her lifetime with no power to alienate the property and the property was to pass after her death to Rupchand for all time to come and he was alone to enjoy the property. Now, on these recitals which are unambiguous, it is apparent that the provisions of Section 119 of the Indian Succession Act will be attracted and the case squarely falls under illustration (iii) to Section 119. The material part of Section 119 of the Indian Succession Act provides:

"Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on

the testator's death, and shall pass to the legatee's representative if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest."

Illustration (iii) reads as follows:

"A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B."

Now, here the right to receive the property was postponed to the death of Bhagirathibai. A limited interest was created in favour of Bhagirathibai. She was not given absolute rights of ownership. There was a prohibition against alienation, and though she continued to be in possession of the property, she had no ownership rights in the property. On the death of the testator, a vested interest was created in favour of Rupchand. The ownership vested in him though possession was deferred. It is significant to note that Section 119 refers to a person not being entitled to immediate possession. It speaks, therefore, of immediate possession and not of ownership. In the instant case, if the rights of ownership did not vest in Bhagirathibai and a residuary bequest was made in favour of the death of the testator, though he would get possession only after the death of Bhagirathibai (sic).

4. It is no doubt true that so far as the construction of the will is concerned, as pointed out by the Supreme Court in *Gnambal Ammal v. Raju Ayyar*, AIR 1951 SC 103, "the intention of the testator has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised." The following passage from the judgment of the Privy Council in *Venkata Narasimha Appa Row v. Parthasarathy Appa Row*, (1913) 41 Ind App 51 at p. 70 (PC) was then reproduced:

"The Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure 'The Court is entitled to put itself into the testator's armchair'."

It was pointed out in that case by the Privy Council that all this was solely as an aid to arrive at a right construction of the will and to ascertain the meaning of its language when used by a particular

testator in that document. It was further pointed out that as soon as the construction was settled, the duty of the Court was to carry out the intentions as expressed, and none other. Now, while referring to Rupchand, it was no doubt mentioned in the will by the testator that he alone was to enjoy the property and nobody else. It is on this recital that it is contended that though Lalchand was alive at the time when the will was made, every other person including Lalchand was excluded from the bequest and, therefore, allowing the present plaintiff now to inherit the property as an heir of Rupchand after the death of Bhagirathibai would be frustrating the intention of the testator. It appears that when a reference was made that Rupchand alone was to enjoy the property, the intention of the testator was to create an absolute ownership in favour of Rupchand to the exclusion of all others. The testator did not anticipate that Rupchand would predecease Bhagirathibai. The effect of the death of Rupchand during the lifetime of Bhagirathibai would, therefore, have to be decided with reference to the statutory provision in Section 119 of the Indian Succession Act. The vested interest would pass to the heirs of Rupchand by virtue of the statutory provisions and those provisions were not set at naught by the creation of an interest exclusively in favour of Rupchand. Nothing is provided in the will as to what would happen if Rupchand predeceased Bhagirathibai, and that was where Section 119 of the Indian Succession Act and the law of inheritance applicable to the testator would step in and the vested interest would become transmissible to the heirs.

5. The view which I have taken is supported by a Division Bench decision of this Court in *Lallu v. Jagmohan*, (1898) ILR 22 Bom 409. In that case, one Jamnadas who died in 1876 left a will stating that after his death his wife Suraj would be owner of the property and in case of wife's death, his daughter Mahalaxmi would be the owner after her death, and the question was what was the nature of the interest which Mahalaxmi took. It was held that Suraj, the widow took only a life estate in the property with remainder to Mahalaxmi after her death, and the bequest to Mahalaxmi was not contingent on her surviving Suraj but that she took a vested remainder which upon her death passed to her heirs.

6. In *Mohan Lal v. Gopal Lal*, AIR 1940 All 347 the facts were that the testator bequeathed his property to his daughter and her son with the condition that the daughter should have life interest and be the first owner throughout her lifetime and after her death her son

should be the owner of the property. The legatees were not to have any powers of transfer. Both the legatees were alive at the time of the death of the testator, but the son predeceased his mother. It was held that the estate given to the daughter was a life estate and that vested interest in the son existed during her life estate and the son's ownership began with the death of the testator and consequently his heirs were entitled to inherit after his mother's death.

7. It would not be possible to accept the argument of Mr. Kherdekar that Rupchand's interest itself was to come into being for the first time after the death of Bhagirathibai. The point of time when the interest would come into being would depend on whether the interest created by the will would be a vested interest or not. If, as I have found, a vested interest was created, it would begin to operate from the time of the death of deceased Rupchand. There is, therefore, no substance in the contention that the plaintiff was not entitled to claim as an heir of Rupchand. There is, therefore, no substance in this appeal. The appeal, therefore, fails and is dismissed, but there will be no order as to costs.

Appeal dismissed.

AIR 1975 BOMBAY 303

DESHMUKH AND LENTIN, JJ.

Sohindersingh Gyanchand Kuckreja, Petitioner v. Kadu Babu Laxman and others, Opponents.

Spl. Civil Appls. Nos. 2594 and 2595 of 1974, D/- 20-11-1974.*

(A) *Maharashtra Municipalities Act (40 of 1965), Ss. 16 (1) (h), 2 (32) (a), 115 and 150 — Joint owners — Petitioner as joint owner paying only portion of arrears of property tax which represented his share in the property — Still he is in arrears and thus disqualified to contest election.*

Where the property is owned by more than one person, the group of persons would be jointly and severally liable to pay the Municipal taxes. When taxes are, therefore, due they are due from every one of them. All being jointly liable, the payment of any portion by any one of them may reduce the total liability; but does not in law bring about a situation where one of the owners paying a part of tax makes that person not liable to pay tax to the Municipality. (Para 10)

*(To set aside order of Joint Judge, Poona in M. A. Nos. 160 and 162 of 1974, D/- 5-11-1974.)

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Where the tax is recoverable jointly and severally each one of these joint owners is always in arrears until the entire sum claimed under the appeal is paid. There is therefore no doubt that the petitioner being the joint owner of the property cannot plead that he is not in arrears as the owner of the property simply because by an internal arrangement between the owners he has paid a portion of the arrears which, according to him, represents his share in the right, title and interest of the property. The reference to person in Section 16 would always include not only an individual but also any company or association or body of individuals whether incorporated or not as defined by clause (35) of Section 3 of the Bombay General Clauses Act, 1904. Whether the ownership is of a partnership or a group of individuals each of this group constitutes 'person' as defined by the Bombay General Clauses Act, 1904 and that would be the relevant meaning to be taken into consideration while construing the provisions of Section 16. In this view of the matter, the petitioner has been rightly held to be in arrears and thus disqualified under Section 16 (1) (h) of the said Act. AIR 1957 Andh Pra 658, Relied on. (Para 11)

Cases Referred: Chronological Paras
AIR 1957 Andh Pra 658 = 1956 Andh WR 1026 12

N. B. Shetye with D. K. Ghaisas, for Petitioner in both the Petns.; C. R. Dalvi, for Opponent No. 1 in both the Petitions.

DESHMUKH, J.:— Both these writ petitions are being summarily dismissed. However, as they involve a point of law of some interest, notice before admission was issued to respondent No. 1 as well as respondent No. 11, the Municipal Council. We have heard the learned counsel for the petitioner as well as respondent No. 1, but had not the benefit of any submissions on behalf of the Municipal Council, as it had not appeared.

2. The facts are not in dispute. The petitioner who is a common petitioner in both these petitions, is a resident of Lonavala and had filed nomination papers in Ward Nos. 19 and 21 for the impending Municipal elections. Respondents Nos. 1 to 9 in both the petitions were the other candidates contesting the election respectively in Ward Nos. 19 and 21. When the nomination papers were being scrutinised, a common objection was raised to the candidature of the petitioner in respect of both the Wards. The objection was that the petitioner is a joint owner of some house properties in Lonavala, some of which are owned by Kukreja Brothers, a partnership firm, and some are owned by the petitioner along

with his brothers by way of joint owners. In respect of all properties, bills as required by Section 150 of the Maharashtra Municipalities Act, 1965 were served upon the firm or the group of persons owning the property. In this manner the petitioner had in a law a bill served on him regarding the arrears.

3. After service of such bill the petitioner did pay some amounts but not the entire amount of the bills. Admittedly he paid only $\frac{1}{4}$ th amount of the bill where he is one of the four partners in Kukreja brothers and $\frac{1}{3}$ rd amount where he is owning $\frac{1}{3}$ rd interest along with the two other co-owners. It is also an admitted proposition that the rest of the balance of the tax remained unpaid. The petitioner has alleged that though the bills were year after year made in the name of Kukreja brothers, he always paid $\frac{1}{4}$ th or $\frac{1}{3}$ rd portion thereof for which the Municipality always issued him a receipt.

4. On the strength of these facts which are not in dispute the petitioner says that he is not in arrears and is not disqualified from becoming an elected Councillor under the provisions of Section 16 (1) (h) of the Maharashtra Municipalities Act 1965. However, the Returning Officer upheld the objection of respondent No. 1 in respect of both the Wards and held that the petitioner is a joint owner of the properties along with others and therefore must be deemed to be in arrears because the payment of taxes of his own share is at best a matter of adjusting accounts between the partners. but so far as the Municipality is concerned, the petitioner continues to be in arrears and thus disqualified from being elected as a Councillor.

5. Against this order rejecting the nomination paper of the petitioner in Ward Nos. 19 and 21, the petitioner filed an appeal as provided by Rule 15 of the Maharashtra Municipalities Election Rules 1966. Both the appeals filed by him, being Misc. Appeals Nos. 160 and 162 of 1974, were heard by the Joint Judge, Poona. The learned Joint Judge came to the conclusion that the order of the Returning Officer was correct in view of the provisions of the said Act. The petitioner being a joint owner of property and still being in arrears admittedly in respect of property jointly owned by him, he would fall within the description of the person in arrears and thus is disqualified. Being aggrieved by this order, the petitioner has filed two separate writ petitions. Since they involve no disputes of facts, and the point of law is common, we are passing this common order in both.

6. The short question that arises for our consideration is whether the petitioner on the admitted facts answers the

at Alipore, Ext. 07 (a), restraining the other Shebait from interfering with the possession of the 3 members of the Committee, the Naskars had to take the leases from the committee consisting of 3 members only. The first lease, Ext. R is dated 3rd May, 1946. This is prior to the dates on which the orders of injunction were passed in the two suits at Sealdah and Alipore respectively. Secondly, if the committee was not a valid committee which could grant the leases the order of injunction could not confer upon it the authority to grant the leases. In his evidence Chintaharan at first tried to deny any knowledge of any letter being written by any of the Shebait with regard to the proposed lease but in answer to Q. 463 he was constrained to admit that a letter had been received by Naskars from Kanailal Mitra, one of the Shebait, informing them that no general meeting was held and no resolution had been passed sanctioning the proposed lease. No further enquiry was made about the correctness of the statements made in the said letter, nor was the said letter replied to until after about a month when the lease had already been executed. This would be evident from Chintaharan's evidence and Ext. SS. From the entire evidence it appears that no independent enquiry was made. No inspection of documents was made, books of accounts were not referred to and relying only upon the verbal statements of the Shebait and copies of the resolution the Naskars entered into transaction and obtained the leases. Such enquiry, in our opinion, cannot be called bona fide enquiry about the existence of legal necessity where a person was dealing with properties belonging to a debutter estate (See AIR 1935 Cal 94; (1911) 15 Cal WN 793; (1880) 8 Ind App 8 (PC)).

15. Next point urged on behalf of the appellant is that the Official Receiver is not competent to file the suit. It was contended that the right to sue in respect of the deity's property is vested in the Shebait, and therefore none other than the Shebait is competent to sue for setting aside the alienation of the deity's property without legal necessity. Reliance was placed on Maharaja Jagadindra Nath Roy v. Rani Hemanta Kumari, (1904) 31 Ind App 203 (PC) and V. R. Reddy v. K. S. Reddy, AIR 1967 SC 436. In the case of Maharaja Jagadindra Nath Roy the suit was not by the idol represented by the Shebait but by the Shebait himself who claimed to recover the possession of the suit property as belonging to the deity. The courts below held that the title to the property was in the plaintiff but the High Court held the suit was barred by limitation on the ground that the plaintiff did not claim proprietary interest in himself with respect to the lands in suit but as shebait of the idol, and qua shebait was not entitled under Section 7 of the Limitation Act to any extension of the period of limitation by virtue of his minority. This decree was reversed by the Judicial Com-

mittee and it was held that as the plaintiff was a minor at the time when the cause of action arose, he was entitled to claim extension under Section 7 of the Limitation Act. In the case before the Supreme Court the question was whether the Commissioner appointed under the Madras Hindu Religious and Charitable Endowments Act had any authority to represent the deity in proceeding before the District Judge under Section 85 of the Act, and whether the compromise entered into by him on behalf of the deity would be binding upon the deity. It was held that the possession and management of the property with the right to sue in respect thereof are, in the normal course, vested in the Shebait. It was further held that where, however, the Shebait is negligent or where the Shebait himself is the guilty party against whom the deity needs relief it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of the trust properties. Reliance was placed in *Kalimata Debi v. Nagendranath*, 44 Cal LJ 522 = (AIR 1927 Cal 244). In our opinion the aforesaid cases relied upon on behalf of the appellant do not go to the length of saying that under no circumstances a person other than a Shebait can institute a suit to set aside an alienation of deity's property. The deity is the owner of the debutter property. All the Shebait can jointly file the suit for the protection of the property. In a case where there is dispute between the Shebait some of the Shebait can even file a suit on behalf of the deity. A worshipper or a person interested in the deity may also, under certain circumstances, file a suit. The court may also appoint a next friend and authorise him to file a suit on behalf of the deity (See AIR 1967 SC 436). In the present case the suit has been filed by the Official Receiver after obtaining permission from the Court. The Receiver has no independent cause of action in him. Under the provisions of Order 40, Rule 1, Code of Civil Procedure a Receiver is competent to enforce the cause of action of somebody else. He sues in a representative character. General law gives certain rights either to the deity or to the Shebait or to both. Order 40 gives the entirety of that right to the Official Receiver. The Official Receiver represents the deity as well as the collective rights of the Shebait to sue. When the Receiver is enforcing the cause of action of the owner itself the person against whom relief is being claimed is alone a necessary party. The right of action of the deity and the right of action of all the Shebait are represented by the Receiver. The suit in which the Receiver has been appointed is an administration suit and the circumstances are such that the administration of the debutter estate has devolved upon the court. In these circumstances the court may pass any order for proper representation of the deity. The appointment of the Receiver is in the suit and upon notice to all the parties. There

is a direction on the Receiver to ascertain the wishes of the Shebait regarding the leases in dispute. The wishes of the Shebait were ascertained by the Receiver in a meeting. He thereafter, obtained a formal order empowering him to file a suit. In these circumstances it must be held that the Receiver is competent to file the suit and the suit is maintainable at his instance. It was argued on behalf of the appellant that the two other suits filed by Ashalata Majumdar, one of the Shebait, namely, suit No. 4868 of 1950 in which the lease in favour of Hem Chandra Naskar and Jogendra Nath Naskar on 13th December, 1947 has been challenged and suit No. 4575 of 1950 in which it was alleged that the estate is being mismanaged and a prayer has been made for steps to be taken for setting aside all the leases in favour of the Naskars, are pending. It was contended that in view of the pendency of these two suits where prayers have been for the same reliefs the present suit by the Official Receiver is not maintainable. It was further contended that the permission to sue was obtained by the Receiver on an ex parte application without notice to all the Shebait. It was submitted that from Exhibit A4 it appears that the Receiver called a meeting in his office and wanted to know how many Shebait were willing to file a suit and how many Shebait were against it, and in view of the majority having agreed to file a suit the suit was filed by the Official Receiver. It was contended that so long as some shebait were willing to file a suit the court had no jurisdiction to make an order authorising the Official Receiver to file the suit. We are unable to accept this contention of the appellant. After the appointment of the Receiver the management of the debutter estate is in the hands of the court and as such the court has power to grant permission to the Receiver to file a suit for the protection of the deity's interest and for preservation of the deity's property. The right of the deity to be represented by a next friend where neither Shebait nor worshippers have come forward has been considered in the cases reported in AIR 1947 Cal 213; AIR 1955 Cal 624; AIR 1960 Cal 741 and also in Hindu Law of Religious and Charitable Trusts by Dr. Mukherjee, where the learned author after discussing various cases, has, at page 212 observed as follows:—

“The rules of procedure after all are only means to serve the ends of justice, and if the appointment of a next friend by the court is calculated to safeguard the interest of the deity, there could be no real objection to the procedure suggested by Mr. Justice Pal in *Tarit Bhusan's case*.”

Earlier at page 209 the learned author has stated as follows:

“In such cases where the deity wanted relief against the Shebait himself, it cannot possibly be expected that the Shebait would represent the deity in the suit. If the deity

has any right of suit at all, it must be exercised through some other person as next friend. Mr. Justice Pal's opinion seems to be that no person other than the Shebait can legally or effectively represent the deity unless he has been specially appointed by the court.”

It has been held in the case of *Sm. Sushama Roy v. Atul Krishna Roy*, AIR 1955 Cal 624 that the normal rule is that the court can pass an ex parte order appointing a next friend. But there is nothing to prevent the court from ascertaining the wishes of the general body of the Shebait. The present case is not one where the suit has been filed by a next friend with the leave of the court. Representation by the Receiver in the present case is more complete than in the case of appointment of a next friend by the court. The order granting leave to the Receiver to file the suit is not an order which affects the rights of the appellant in any way and as such the appellant cannot make any grievance on that account.

16. Another argument which was advanced on behalf of the appellant is that in the absence of all the Shebait the present suit is not maintainable. It was contended that all the Shebait were interested in the debutter property and they were entitled to have their say in the matter. But because they were not made parties in the suit they have been denied the opportunity to make their submission before the court. In support of this contention Mr. Banerjee relied upon the abovementioned decision in *Sm. Sushama Roy v. Atul Krishan Roy*, AIR 1955 Cal 624 and *Pramatha Nath v. Pradyumna Kumar*, 52 Ind App 245 = (AIR 1925 PC 139). It was contended that if all the Shebait are made parties to the suit it is expected that at least some of them would file written statements stating clearly whether there is legal necessity or not. In this case only 3 of the Shebait have been made parties. Therefore, the other Shebait never got a chance to tell the court whether there was any legal necessity or not, or whether the leases are for the benefit of the estate or not. It was further contended that even after the appointment of the Receiver the residuary powers of the Shebait were still with them and therefore it was necessary for the Shebait to be made parties to the suit, and in their absence the suit could not proceed. The two cases relied on by Mr. Banerjee in support of his contention do not lay down that in a suit such as the present one all the Shebait are to be implicated as parties to the suit.

17. In the decision reported in AIR 1955 Cal 624 it was held that ordinarily the interests of the deity require that nobody other than a shebait be allowed to institute a suit in the name of the deity without a previous order of the court appointing him to represent the deity. But where the Shebait of a deity have precluded themselves by their conduct from bringing a suit to protect the interests of the deity, a person interested in the

proper sheba puja of the deity may institute a suit on behalf of the deity, only after he makes an application to the court appointing him as the next friend of the deity. In *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*, 52 Ind App 245 = (AIR 1925 PC 139) the Judicial Committee held that the right of worship of an idol cannot be made object of partition. The joint owners of such a right are entitled to perform their worship by turns. The Judicial Committee observed that an argument which would reduce a family idol to the position of a mere movable chattel is one which cannot be supported and that there is no ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognized. This case, in our opinion, do not lend any support to the argument that a suit filed for the benefit of the idol and for the protection of its property is not maintainable unless all the Shebaites are made parties thereto. The other point urged with regard to the maintainability of the suit is that the deities have been made parties defendants to the suit. It was argued that even if the suit is for the benefit of the deity it must figure as the plaintiff and not as a defendant. It was contended that unless this was done the suit is not maintainable. We are unable to accept this argument advanced on behalf of the appellant. Here no relief is being claimed against the deity. On the contrary it is expressly stated that this suit has been instituted for the benefit of the deity. The category in which a party to a suit is described, namely, the plaintiff or defendant, does not determine the question as to whether any adverse interest is being claimed against it. In the present suit the Receiver is not claiming any adverse interest to that of the deity. Therefore when the deity is implicated as a defendant it normally means that it is a party to the proceeding so that the adjudication may be made in its presence. In AIR 1965 SC 1812 it has been held that a decree may be passed in favour of the defendant. It has been pointed out in several cases that in a suit filed by the Shebaites or between the Shebaites a deity is a proper party if its interest is likely to be affected by the decision. The Courts have accordingly on many occasions directed the deity to be made a party to the suit. Obviously in such cases the deities have to be added as a party defendant. (See AIR 1952 Cal 763; (1972) 76 Cal WN 1016; 52 Ind App 245 = AIR 1925 PC 139 and 41 Cal WN 728 = (AIR 1937 Cal 338)) The contention urged on behalf of the appellant that the suit as framed is not maintainable is accordingly overruled.

18. The last point raised in this appeal on behalf of the appellant is with regard

to mesne profits. It has been submitted that in prayer H in the plaint of suit No. 1654 of 1952 and in prayer G of the plaint in Extraordinary Suit No. 6 of 1957 the plaintiff prayed for an enquiry into damages suffered by the defendant deity by reason of the execution of the leases challenged in those suits. It was contended that in view of the prayers made in the plaint and in view of the provisions of Order 20, Rule 12, Code of Civil Procedure the learned Judge ought to have directed an enquiry for ascertaining mesne profits. A criticism was made of the judgment of the learned Judge awarding mesne profits on the ground that he awarded mesne profits because the books of accounts were not produced by the appellant. It was contended that at that stage the appellant was not required to produce his books of accounts because the prayer made in the plaint was for an enquiry into damages. It was further contended that the learned Judge himself could not accept the evidence of Dharendra Nath Sarbadhikary, an assessor of Calcutta Corporation, and he was of the opinion that the letting value of the land stated by him was relatively high. We find that there is a good deal of force in this contention urged on behalf of the appellant. The plaintiff himself prayed for an enquiry into damages suffered by the defendant deity by reason of the execution of the said leases and a decree for the same found so due against the defendants. In view of this prayer made in the plaint the appellant had no opportunity to place all materials before the Court to show the actual amount realised by him from the property and also the actual payment made by him and also expenses incurred for improvement of the demised land by him. The learned Judge has also observed in the judgment that there is no dependable evidence as to the actual amount realised by the Naskar defendants from the tenants. He has also found that the plaintiff's evidence about the letting value of the land is relatively high and that the evidence of Sri Sarbadhikary is not acceptable as clinching evidence of lettable value of the demised lands. In the end the learned Judge has increased the rent reserved in the leases by 50 per cent by a rough and ready method. Under Section 2 (12) of the Code of Civil Procedure 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession. The learned Judge in the trial Court appears to have overlooked this aspect of the matter in passing a decree for mesne profits. In our view this approach to the question by the learned Judge has no basis in law and this part of the judgment and decree cannot, therefore, be sustained.

19. We accordingly allow this appeal in part and set aside the judgment and decree

of the trial court with regard to mesne profits and in its place we pass a preliminary decree for mesne profits in favour of the plaintiff. The rest of the judgment and decree are affirmed.

20. The Extraordinary Suit No. 6 of 1957 is remitted back to the trial court of passing an appropriate order with regard to the plaintiff's prayer for enquiry into damages or mesne profits.

21. The appellant must pay three-fourths of the taxed costs of this appeal to the plaintiff-respondent No. 1.

22. In addition to what we have said, on the prayer of the learned advocate for the appellant we stay the operation of the judgment and decree relating to cancellation of the leases in question for a period of three months from this date. The stay is only limited to that part of the judgment and decree. All other interim orders passed in the appeal are vacated.

23. Liberty is given to the parties to make an appropriate application for further direction. We make it clear that there will be no stay in so far as the enquiry relating to mesne profits is concerned.

A. N. SEN, J. :— I agree.

Appeal partly allowed.

AIR 1975 CALCUTTA 404

K. J. SEN GUPTA AND

M. N. ROY, JJ.

Nirmala Bala Ghosh and others, Appellants v. Balai Chand Ghosh and others, Respondents.

First Appeal Nos. 491 and 492 of 1962, D/- 5-6-1975.

(A) Civil P. C. (1968), O. 6, R. 17 — Amendment of plaint — Discretion of Court — Substantial justice — (Specific Relief Act (1877), S. 42, Proviso).

The power to get the plaint amended is subject to the discretion of the Judge and cannot be claimed as a matter of right, or in all circumstances, but in case the addition of a new prayer does not convert the suit to another or a different or inconsistent character — the prayer for amendment may be allowed; the court, having been satisfied as to the claim of the plaintiff but being not in a position to pass a decree on the technical bar of Section 42 of the Specific Relief Act, should give an opportunity to the plaintiff to amend the plaint. Case law discussed. (Para 28)

The question of amendment of plaint depends upon the facts of individual case. The circumstances under which the prayer for amendment of the plaint is to be allowed cannot exhaustively be enumerated. But the said principle has always been applied to do substantial justice and not to punish the plaintiff on a technical ground. But that power of the court is not an unfettered one.

(Para 26)

In a suit the plaintiff sought a declaration that he was the real owner of the property in suit. In addition to this, he also prayed for a decree for permanently restraining the defendants jointly and severally from realising the rents and profit from the suit property and disposing of the properties in suit and/or dealing with or encumbering the same. Subsequently after framing of issues the latter prayer was deleted on his application and the suit was decreed. During appeal the plaintiff sought to amend the plaint by addition of the prayer for khas possession and injunction.

Held, that the action of the plaintiff in deleting the relief was not mala fide and the amendment of the plaint to incorporate the prayer should be allowed. (Para 21)

Even if the plaintiff be found to have been dispossessed just prior to or immediately after the institution of the suit or at any time during the pendency of the suit, the plaintiff in order to get an effective decree, must make a prayer for recovery of possession. The plaintiffs' such prayer if not otherwise barred, should be considered as a reasonable and appropriate one. (Para 21)

Cases Referred : Chronological Paras

AIR 1974 Cal 283	15
AIR 1972 SC 2685 = (1973) 2 SCC 60	15, 25
AIR 1967 SC 96 = (1966) 1 SCR 796	26
AIR 1961 SC 808 = (1962) 1 SCR 67	11
AIR 1961 Punj 102 = 62 Pun LR 490	13, 24
AIR 1961 Punj 278 = 62 Pun LR 924	24
AIR 1961 Punj 281	24
AIR 1960 SC 335 = (1960) 2 SCR 253	22
AIR 1960 Bom 463 = 61 Bom LR 1316	12
AIR 1958 All 850	20
AIR 1955 Assam 177 = ILR (1955) 7 Assam 53	12
AIR 1942 Cal 394 = 46 Cal WN 355	19, 24
AIR 1925 Cal 233 = 81 Ind Cas 2	24
AIR 1921 PC 50 = 47 Ind App 255	23
(1910) 14 Cal WN 576 = 5 Ind Cas 531	16
(1903) 5 Bom LR 195	12
(1902) ILR 25 Mad 504	13

R. C. Deb and Madhusudan Banerjee (in F. A. No. 491 of 1962), Saktinath Mukherjee and Rathina Bhattacharya (in F. A. No. 492 of 1962), for Appellants; A. N. Mitra and Ramesh Chandra Sen (for No. 1), for Respondents in both the Appeals.

SEN GUPTA, J. :— The application for amendment of the plaint filed by Balai Chand Ghosh plaintiff-respondent No. 1 is before us for consideration. The said prayer has strenuously been contested by the defendants-appellants.

2. To understand the point in question a short history of the case may be stated :—

The applicant Balai Chand filed Title Suit No. 68 of 1956 in the 8th Court of Subordinate Judge at Alipore for declaration that he is the owner of the property in suit, set out in schedules A to H of the plaint and that

ostensible owners thereof were his benamdars. The said suit was re-numbered as Title Suit No. 2 of 1961 of the 4th Extra Court of the Addl. Dist. Judge at Alipore. That was the suit by Balai Chand against his sons and daughters-in-law. It is sufficient for the purpose of consideration of this question to state that the properties described in the schedule were stated to have been acquired by the plaintiff in the name of the defendants on different dates. The plaintiff alleged that the defendants conspired together to disown him as the real owner of those properties under the colour of ostensible title which they had to respective properties, claiming the same to be real. On the said allegation all the dependents were joined in the same suit and the cause of action was stated to have arisen on the 10th July, 1954 when the plaintiff was first obstructed from realising rent from the suit property.

3. The plaintiff asserted his possession in the property in question. The defendants, on the other hand, asserted that they were real owners of the property and the same were in their possession.

4. In addition to the prayer "a" in which a declaration that the plaintiff was the real owner of the property in suit, the prayer "b" was also added in which the plaintiff prayed for a decree for permanently restraining the defendants jointly and severally from realising the rents, issues and profit from the suit property and disposing of the properties in suit and/or dealing with or encumbering the same.

5. Two sets of written statements were filed—one by Ramesh and his wife Sandhya defendant Nos. 4 and 8 respectively and another by defendant No. 1, wife and 2, 3 and 5 sons of the plaintiff and 6 and 7 the wives of defendant Nos. 2 and 3. The objections in the written statement were, however, almost in the same tune. All the defendants pleaded, *inter alia*, that the suit as framed was not maintainable and that the plaintiff being out of possession from the suit property should have paid court-fees on the market value of the same. On the pleading of the parties eight issues were framed. Of them two are relevant for the purpose of our consideration, they are issue No. 1 which was to this effect:

Is the suit maintainable in law in its present form?

and (6): Is the suit barred under Section 42 of the Specific Relief Act?

After the issues were framed the plaintiff, by his application dated 12-4-1957 made a prayer for deletion of the prayer (b) as made by him in the plaint. The said prayer was allowed on 30th April, 1957.

6. The suit was decreed on 31st March, 1962. The plaintiff was declared to be the real owner of the properties described in the schedules A to H of the plaint. While disposing of the issue No. 6 the trial court observed in paragraph 285 of its judgment that:

"On behalf of the defendants, it was sought to be contended that a suit for mere declaration would not be maintainable if the plaintiff was out of possession. I have already found that the possession of the defendants was on behalf of the plaintiff till August, 1954 and that the plaintiff instituted this suit within two years from the date of his alleged dis-possession."

Against the judgment and decree passed by the trial court defendant Nos. 1, 2, 5 and 6 preferred F. A. No. 491 of 1962 and defendant Nos. 4 and 8 preferred F. A. No. 492 of 1962.

7. We have already indicated the finding of the trial court on issue No. 6. The said finding may indicate that the plaintiff was in possession in the suit land upto August, 1954 and therefore, when the suit was filed on October 20, 1956 he was out of possession from the same. The said finding, of course, has not been accepted by the plaintiff before us but to avoid any future difficulty such an application for amendment of the plaint has been filed.

8. We now proceed to consider the contention of the respective parties before we come to our conclusion.

9. Mr. P. N. Mitter, learned Advocate submitted that on the materials on record and on the facts proved there may not be any necessity for amending the plaint. Our attention has been drawn to the finding on the issue in which the bar of Section 42 of the Specific Relief Act has been raised. But in the same breath it has been argued that by way of abundant caution this application for amendment has been filed.

10. Both Mr. R. C. Deb, learned Counsel for the appellants in F. A. No. 491 of 1962 and Mr. Saktinath Mukherjee, learned Advocate for the appellants in F. A. No. 492 of 1962 submitted that the prayer for amendment of the plaint should be refused. Mr. Mukherjee's first contention is that the facts as pleaded in the plaint did not contemplate a case for recovery of possession: that the majority of the properties being in the possession of the tenants—further relief as contemplated in the proviso to Sec. 42 of the Specific Relief Act (Old Act) (hereinafter referred to as the Act) ought to have been a prayer for permanent injunction and not a prayer for recovery of possession; the prayer for recovery of possession in the facts of the case is unnecessary as such it should be rejected.

11. In support of the said contention, series of decisions have been cited. In a suit where injunction in addition to declaration of certain rights is prayed for the suit may not be held to be barred by the proviso to Section 42 of the Act. Our attention has been drawn to the decision in the case of C. Mohammad Yunus v. Syed Unnissa, reported in AIR 1961 SC 808. Their Lordships held that a suit for declaration with consequential relief for injunction is not a suit for declara-

tion simpliciter : it is a suit for declaration and for further relief. In that suit the management of certain institution vested in the Trustees. The plaintiffs filed the suit for a declaration that they were entitled to enjoy the properties described in the schedule annexed to the plaint and to manage the 'Durgh', perform the 'Urs' festival and receive all incomes, endowments and perquisites thereof once in every eight years since 1934 according to their turn. They also claimed an injunction restraining the defendant from interfering with their rights in that behalf. The objection of bar of Section 42 of the Act, was repelled by their Lordships by holding : that in the facts of that case, the prayer for injunction was the further relief prayed for and as such the suit was maintainable. On the strength of that decision, Mr. Mukherjee submits that as pleaded by the plaintiff, the majority of the properties are in possession of the tenants and as such the plaintiff very rightly prayed for injunction in para (b) of the prayer in the plaint; that is the appropriate relief which the plaintiff might get; the plaintiff therefore has deleted that prayer at his risk. In that view of the matter, the prayer for khas possession of the properties is uncalled for. The said argument even if acceptable may not be available to the plaintiff in respect of properties described in schedules A and H of the plaint which are admittedly not tenanted properties. We may also note here that the above decision of the Supreme Court is an authority of the proposition that, whether further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case.

12. This is a suit in which majority of the properties in suit are in occupation of tenants. It has been contended that the defendants not being in a position to deliver possession of disputed lands to plaintiff, he need not pray for khas possession; prayer for injunction restraining the defendants to create obstruction for plaintiff's realisation of rents, is sufficient compliance of the proviso to Section 42 of the Act. The said proposition is sought to be established by a decision in the case of Giribala Chowdhury v. Ushangini Debi reported in AIR 1955 Assam 177. Sarjoo Prosad, C. J. agreeing with the decision of Ram Labhaya, J. came to such a decision. The said contention of Mr. Mukherjee is sought to be further strengthened by a decision in the case of Yamunabai v. Ram Maharaj Shreedhar Maharaj Pandit, reported in AIR 1960 Bom 463 wherein their Lordships Shah and Patel, JJ. referred with approval to the decision of the division Bench of that High Court in the case of Farasram Ratanram v. Bhimbhai Kirpam, reported in (1903) 5 Bom LR 195 holding :

"Where defendants are in constructive possession through tenants and plaintiff desires to have constructive possession only, the utmost that the plaintiff can ask for, or ob-

tain, against the defendants is a declaration of rights, binding the defendants, coupled with an injunction preventing them from interfering with such rights. The plaintiff is not bound to ask for actual physical possession from the tenants, and that there is no rule of law to compel a man to seek for all the relief that he is entitled to or might obtain if he desired it."

13. The above decision does not lay down any principle that the plaintiff in such a circumstance can pray for declaration of his right and title in the property and for injunction only and that he is precluded in claiming khas possession. Mr. Mukherjee has next contended that the conduct of the plaintiff is such that he was already aware of the defect in the framing of the suit, it was specifically alleged that the plaintiff was not in the possession of the suit property as such without payment of proper court-fees, the suit was not maintainable, not only that a specific issue that the suit was hit by Section 42 of the Act, was raised and in spite of that, no step for recovery of possession, after amendment of the plaint was taken, rather he, in order to avoid payment of court-fees, deleted the original prayer in (b) for injunction. From the said facts it is contended that the plaintiff deliberately omitted to amend the plaint with full knowledge as to the defect in the plaint; this omission not being an omission by mistake or wrong advice, should not be condoned, particularly when a valuable right has already accrued to the defendants. The said contention is sought to be supported by the decision in the case of Suryanarayanamurti v. Tamanna, reported in (1902) ILR 25 Mad 504. In the facts of that case, claim for partition was considered to be further relief available to the plaintiff; non-inclusion of that claim was considered to be a bar for the maintainability of the suit under Section 42 of the Act. The plaintiff wanted to remove that defect by amending the plaint. Their Lordships refused that prayer as the objection as to the non-maintainability of the suit under Section 42 of the Act was taken from the very beginning and plaintiff notwithstanding, persisted in continuing the suit as framed. Another case between Mani Singh Hasram Singh v. Sher Singh Shibhu, reported in AIR 1961 Punj 102 has been cited in support of the contention that delay deliberately made in amending the plaint, forfeits the plaintiff's right, if any, to amend the same. That is a decision of Bishan Narayan and I. D. Dua, JJ. Their Lordships while holding the suit barred under Section 42 if the Act observed :

"It is no doubt open to the court in its wide discretion to permit amendment of plaint in a proper case after considering all the facts and circumstances of the case but a party cannot claim, as of right the indulgence for amendment of the plaint more particularly when this prayer is made in the second appeal."

14. Mr. Mitter has, on the other hand, referred to the provisions of Order 6, Rule 17

of the Code of Civil Procedure and has contended that it provides for amendment of the pleadings for the purpose of determining the real question in controversy between the parties; there cannot be any yardstick of facts and circumstances where such relief can be granted. Our attention has been drawn to the decision in another case where Mr. Justice Dua, himself granted liberty to the plaintiff in the appellate stage to amend the plaint.

15. We shall presently discuss about the Russa Road Property. The plaintiff claimed to be in possession of the same except a room which is being possessed by one of the defendants. The claim of the defendants on the other hand is that the said property was the subject-matter of dispute between some of the defendants, wherein the plaintiff was not a party. That was in suit No. 99 of 1955 of the Original Side of this Court. The property in question was in the possession of the official receiver — the plaintiff moved the court to get possession of the property from the official receiver but failed, but got leave to take steps against the receiver for possession of the property. The plaintiff thereafter filed T. S. No. 39 of 1964 in the City Civil Court for getting possession of the said property. That suit was dismissed. But in spite of that, the plaintiff got possession of that property from the official receiver amicably. In this connection our attention has been drawn to the application filed by the defendant Suresh for the appointment of a receiver in respect of that property in this court wherein he admitted plaintiff's possession in the entire premises except in one room. Mr. Mukherjee submits even if plaintiff be found to be in possession of the part of the disputed property, that will not save the bar under Section 42 of the Act. Such a point was raised in the case of Ram Saran v. Smt. Ganga Debi, reported in AIR 1972 SC 2685. Their Lordships held that though the defendant was in possession of a portion of the property and the rest being in possession of the plaintiff, the suit was hit under Section 42 of the Act. The said case does not touch the point whether the plaintiff is entitled to amend the plaint. That is also the view expressed by A. C. Gupta and S. C. Deb, JJ. in the case of Shri Radha Gobinda Jew v. Sm. Kewala Devi, reported in AIR 1974 Cal 283.

16. The contention of the plaintiff is that in order to avoid such a situation in future, a prayer for amendment has been made. So the moot question is whether the said prayer should be allowed at this stage. The submission of the defendants is that in the facts of the case, injunction should be considered as further relief which might be available to the plaintiff. Mr. Mitter, on the other hand, contends that prayer for khas possession is all comprehensive relief and, if it is prayed and allowed by the court, bar, if any, as to the maintainability of the suit may be removed. Mr. Mitter's further contention is that injunction in the facts of the case might

be one of the further reliefs, but it cannot be said to be the only relief. In this context our attention has been drawn to the fact that item Nos. A and H of the properties are admittedly not in the possession of the tenants and as such question of constructive possession at least in respect of those two items of the properties do not arise at all. Mr. Mitter has next tried to show the reason why the original prayer (b) regarding injunction was deleted. In the instant case the plaintiff sued for declaration that the properties were acquired by him in the benami of the defendants and that he is the rightful owner of the same asserting therein that they are in possession of his tenants; in such a case no further relief may be prayed for, in view of the fact that the tenants' possession may be construed to be the possession of the rightful owner. In order to support the said views our attention has been drawn to the decision of Satish Chunder Bhattacharya v. Satya Churn Majumdar, reported in (1910) 14 Cal WN 576. That is a case

Where the plaintiff sued for declaration of title to certain lands alleging that the same were in possession of his tenants, but that the defendant had thrown a cloud on his title by recovering rent decrees against some of the tenants.

17. Their Lordships held "that the plaintiff could not in this suit ask for any further relief than a mere declaration of title, and was proceeding in the right manner in suing for declaration of title only."

18. That decision might have led the plaintiff to think that in the facts of this case, prayer for declaration of his title in the property might have been sufficient; consequent to that, the prayer for deletion of the prayer (b) was made, we also find that in the background of this case, the said action on the part of the plaintiff for deletion of that prayer cannot be said to be mala fide.

19. Mr. Mitter has frankly admitted that an utter confusion has been created by the observation of the trial Judge in paragraph 285 of the judgment. The part of that observation may be quoted here:

"Issue No. 6:— On behalf of the defendants, it was sought to be contended that a suit for mere declaration would not be maintainable if the plaintiff was out of possession. I have already found that the possession of the defendants was on behalf of the plaintiff till August 1954 and the plaintiff instituted this suit within two years from the date of his alleged dispossession The plaintiff's contention is that the above observation of the court is not justified on the materials on record, still when such an observation has been made, the plaintiff thinks it proper to make a prayer for the amendment of the plaint. Such a situation did not exist when the suit was filed. Such event has occurred in course of the proceeding of the suit, as such the plaintiff should be

allowed to amend the plaint. A similar question was raised in the case of *Sm. Annapurna Dasi v. Sarat Chandra Bhattacharjee*, reported in 46 Cal WN 355 = (AIR 1942 Cal 394). Their Lordships (Akram and Pal, JJ.) held that court should take note of subsequent events and should allow the plaintiff to amend the plaint in order to mould the decree according to the circumstances. According to Mr. Mitter, that decision lends support to the plaintiff's prayer for amendment of the plaint, though belated one.

20. We may recall the submission of Mr. Mukherjee that in the facts of this case, the further relief of the plaintiff was only the prayer for injunction. In this connection the contention of the respective parties is that the plaintiff realised rents from the tenants and defendants also asserted such a realisation of rents. On behalf of the plaintiff it is submitted that in case it is found by the court that the defendants or any one of them had realised rents of some premises in suit, by asserting his own right, his remedy lies for recovery of possession, such a question was raised in the case of *Narain Ram v. Chandi Prasad*, reported in AIR 1958 All 850. It has been held therein

"that the landlord whose title is questioned by any one else than a tenant, had a right to declaration under Section 42 of the Specific Relief Act and if any one entered and obtained the profits of the land and took the rent which were due to him, he was entitled as against that person, not only to obtain a decree declaring his title against that other but putting himself into possession."

21. We have gone through the pleadings. In paragraph 18 of the plaint, the plaintiff mentioned the date when the cause of action arose. The said date is 10th July, 1954 when the plaintiff was first obstructed from realising rent from the suit properties. The suit was filed on 22nd August, 1956. That is a statement which may suggest plaintiffs' dispossession from the suit properties in the matter of realisation of rent. This statement of the plaintiff gets more clarification in his averments made by him in his application for the appointment of receiver dated 29-9-1956 wherein in paragraph 6 he categorically stated that the defendants had been resisting him in the realisation of rents and were realising the same themselves and appropriating to their own use, which they had no right to do. The same is also the admission made in paragraph 8 of that application. Even if the plaintiff be found to have been dispossessed just prior to or immediately after the institution of the suit or at any time during the pendency of the suit, the plaintiff in order to get an effective decree, must make a prayer for recovery of possession. For the reasons stated the plaintiffs' such prayer if not otherwise barred, should be considered as a reasonable and appropriate one.

22. Next question is whether after so many years of the institution of the suit, the

plaintiff should be given an opportunity to amend the plaint. It is well established rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. The said views have been expressed in the decision reported in AIR 1960 SC 335, (*Mst. Rukhmabai v. Laxminarayan*).

23. In a suit, the plaintiff cannot as a matter of right, claim to amend the plaint, rather the power of a Court to amend the plaint in a suit should not as a rule be exercised, where the effect is to take away from the defendant a legal right which has accrued to him by lapse of time, but there are cases in which that consideration is outweighed by the special circumstances of the case. When the relief after the proposed amendment is based on the same cause of action, the Court should not reject the same, however, belated the said prayer is made, in order to do substantial justice. The said views have been expressed in the case of *Charan Das v. Amir Khan* reported in 47 Ind App 255 = (AIR 1921 PC 50). Their Lordships of the Judicial Committee approved the order of the Judicial Commissioner who passed the said order when the plaintiff's right to claim possession on pre-emption was already barred. That lends support to our finding that if the relief after amendment is based on the same cause of action, the same may be allowed, even if that relief is already barred.

24. It has been argued from the Bar that when the plaintiff brings a suit for declaration only, the Court, if it is of the view that the plaintiff but for the bar under Section 42 of the Act, is otherwise entitled to get such a remedy, should not dismiss the suit straightway but he should be given an opportunity to amend his plaint; in case of non-compliance with the said direction of the court, the suit should be dismissed. That view has also been expressed in the case of *Bhagat Singh v. Satnam Transport Co. Ltd.*, reported in AIR 1961 Punj 278. That is a case, facts of which are almost similar. The plaintiff filed the suit for declaration with consequential relief by way of injunction. In the trial court, the plaintiff deleted the prayer, for injunction and the suit was subsequently found to be barred under Section 42 of the Act. In the court of appeal, the plaintiff was directed to amend the plaint to incorporate the prayer already deleted to save the suit against the bar under Section 42 of the Act. That was done on the principles indicated above. We have however noticed that such a prayer for amendment of the plaint has sometimes been refused in the court of the second appeal. Mr. Mukherjee cited that decision reported in AIR 1961 Punj 102 (supra) to support his contention that it is no part of the duty of the court to allow the plaintiff to amend the plaint where it is found that but for the bar under Section 42 of the Act, the suit would have been otherwise decreed. Mr. Justice Dua was one of the Judges who delivered that

Judgment. It is however, noted that in the facts of that case Dua, J. refused the prayer for amendment of the plaint; subsequently however, his Lordship agreed with the view that in such a case the court should not dismiss the suit but should give the plaintiff an opportunity to amend the plaint so as to include a prayer for consequential relief. That will appear from the decision in the case of *Union of India v. Pearl Hosiery Mills*, reported in AIR 1961 Punj 281. That decision is based on the similar views expressed in our courts as reported in AIR 1925 Cal 233; AIR 1942 Cal 394.

25. Mr. Mukherjee has also contended that the view expressed in the above mentioned case that the court in such a case has a duty to allow the plaintiff to amend the plaint, is not an invariable proposition of law. In support of that contention he has cited the decision in AIR 1972 SC 2685 (supra) wherein their Lordships found on the fact of that case that the suit was not maintainable as proviso to Section 42 of the Act, was a bar. Such a point was not raised before their Lordships; the courts below found that the plaintiff's suit was barred by limitation as well. That was the reason for which no purpose might have been served, by allowing the plaintiff to amend the plaint by adding a prayer for consequential relief. That decision does not support the contention of Mr. Mukherjee; as such it fails.

26. The question of amendment of plaint depends upon the facts of individual case. As already noted, the circumstances under which the said prayer for amendment of the plaint is to be allowed cannot exhaustively be enumerated. But the said principle has always been applied to do substantial justice and not to punish the plaintiff on a technical ground. But that power of the court is not an unfettered one. We may refer to the decision in the case of *A. K. Gupta and Sons Ltd. v. Damodar Valley Corporation*, reported in AIR 1967 SC 96, wherein their Lordships have enumerated the circumstances wherein such a right permitting the amendment of the pleadings should be exercised. It has been held:

"In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred. Where however the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts the amendment is to be allowed even after expiry of the statutory period of limitation."

27. The above principle is based upon the desire to do justice and not to punish any party for his mistake. Accordingly, their Lordships held:

"The principal reasons that have led to the rule last mentioned are first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistake."

28. We are, therefore, of the views that the power to get the plaint amended is subject to the discretion of the Judge and cannot be claimed as a matter of right, or in all circumstances, but in case the addition of a new prayer does not convert the suit to another of a different or inconsistent character — the prayer for amendment may be allowed; the courts, having been satisfied as to the claim of the plaintiff but being not in a position to pass a decree on the technical bar of Section 42 of the Act, should give an opportunity to the plaintiff to amend the plaint.

29. In the facts of this case the plaintiff has very rightly prayed for amendment of the plaint and in our views the said prayer should be granted. That will save the court from taking such a step, if considered necessary at the very late stage, after hearing the arguments of the parties.

30. For the reasons stated the prayer for amendment of the plaint be allowed on condition of plaintiffs' paying 20 G. Ms. to each set of the appellants in F. A. Nos. 491 and 492 of 1962 within a fortnight through their learned Advocates on record. In case of non-payment of the said sum to the appellants as directed, the prayer for amendment will stand rejected.

31. In case of compliance of this order, the records will be sent to the trial court who will amend the plaint in terms of the prayer (b) in paragraph 14 of the petition for amendment which will form part of the plaint. In consequence, whereof on the prayer of the plaintiff, paragraph 19 of the plaint and the cause title of the same may also suitably be amended. The plaintiff may be permitted to put in the valuation statement showing how the properties have been valued for the purpose of payment of court-fees. The defendants thereafter will be given a chance to file the additional written statement, if they so desire.

32. The court will next frame an issue as to whether the valuation put and the court-fees paid are sufficient. The parties will thereafter be given an opportunity to adduce necessary evidence for the determination of that issue only. In case, the plaintiff is required to pay further court-fees, he will be given an opportunity to put in the same.

33. After taking steps as indicated above, the trial court will return the evidence to this court together with its findings on that issue, and the reasons thereof. The suit is already very old. So we direct the trial court to dispose of this matter as early as possible, as the business of that court permits.

34. Let this appeal be treated as part heard and it will be heard in accordance with law on its merit after getting the report from the trial court as indicated above.

35. In the circumstances of this case we do not pass any order for the payment of costs, for the hearing of this application.

M. N. ROY, J.:— I agree.

Order accordingly

AIR 1975 CALCUTTA 410

SALIL KUMAR DATTA, J.

Siba Prasad Jash, Petitioner v. Kali Prasad Kundu, Opposite Party.

C. R. Nos. 3961-65 of 1974, D/- 23-4-1975.

(A) Presidency Small Cause Courts Act (1882), S. 38 — Application for new trial — Full Bench of Small Cause Court directing deposit of decretal amount and institution fees — Security of immovable property outside jurisdiction of the Court by way of deposit can be accepted.

Held, no prohibition is found in the Act against acceptance by a Court of security of immovable property situated outside its jurisdiction nor is there any mandatory provision requiring it to accept the security only of properties situated within the jurisdiction of the Court. (Para 3)

Saktinath Mukherjee and Satya Narayan Das, for Petitioner; Dilip Kumar Banerjee, for Opposite Party.

ORDER:— These Rules arise out of several decrees passed by the Court of Small Causes, Calcutta. It appears that the petitioner filed before the Full Bench of the said Court an application under Section 38 of the Presidency Small Cause Courts Act, 1882 for a new trial of Suit No. 3448 of 1970 which was decreed by the Second Bench of the said Court. Similar applications were filed in respect of four other suits between the same parties which were decreed by the said Court. The said applications were admitted by the Full Bench of the Court and the defendant was directed to deposit the entire decretal amount of the suits and respective half institution fees etc. for the amount of relief sought for within specified date. It appears that thereafter the lawyer for the defendant filed one set of petitions in the said suits for allowing him to furnish security for the decretal dues. The Court allowed the prayer as a special case and directed the defendant to furnish security to the extent of the decretal dues of the suit to the satisfaction of the Registrar of the said Court and to deposit half institution fees. It appears that thereafter the defendant filed another set of applications praying for an order that immovable property within the jurisdiction of Calcutta Corporation, but outside the jurisdiction of the Court be accepted as security. By order dated July 11, 1974, these petitions were rejected and

the defendant was given time to furnish security of properties situated within the jurisdiction of the said Court or to deposit the entire decretal amount and half institution fee within two weeks. In default the applications under Section 38 were to stand dismissed. The applications were put up on July 25, 1974 and, as the orders were not complied with, the applications under Section 38 was rejected for non-compliance of Court's order.

2. Mr. Saktinath Mukherjee, appearing for the defendant petitioner, submitted that the court acted with material irregularity and in excess of jurisdiction in dismissing the applications for furnishing security of properties situate outside the jurisdiction of the Court of Small Causes, Calcutta. It was contended that the Court should have allowed the applications and accepted the security of immovable properties offered which were situated within the Corporation of Calcutta, but outside the jurisdiction of the said Court.

3. On a perusal of the relevant provisions, I find no prohibition against acceptance by the Court of security of immovable property situated outside the jurisdiction of that Court when the Court decides to accept security, nor there is any mandatory provision requiring it to accept the security only of properties situated within the jurisdiction of the said Court. On the contrary, I find that there are provisions under Section 31 for transfer of the decree for execution against immovable properties of the judgment-debtor outside the jurisdiction of that Court. Accordingly, in my opinion the Court was wrong in not accepting the security of immovable properties offered by the petitioner only for the reason that such property was situated outside the jurisdiction of that Court.

4. As identical orders were passed on the same dates in respect of the applications in the said suits being applications under S. 38. Suits Nos. 3446 of 1970, 1997 of 1971, 3459 of 1970, 20 of 1971 and 3467 of 1970; this judgment will govern the orders passed on those applications under Section 38 of the Act in the said suits and challenged in these rules.

5. For these reasons, the impugned orders are set aside and the Rules are made absolute. All the matters are sent back to the Full Bench of the Court of Small Causes, Calcutta for considering the applications of the defendant offering security of immovable property outside the jurisdiction of the said Court, and proceeding with the same in accordance with law.

6. There will be no order as to costs.
Rules made absolute.

AIR 1975 CALCUTTA 411
DEB AND DIPAK KUMAR SEN, JJ.

Shaw Wallace & Co. Ltd., Appellant v. Bholanath Mandanlal Sherawala and others, Respondents.

A. F. O. O. No. 235 of 1971, D/- 8-4-1975.

(A) Civil P. C. (1908), S. 10 — Expression “matter in issue” in S. 10 — Meaning of — Whether matter in issue is directly and substantially same in both suits — Test indicated.

The expression, “the matter in issue” in Section 10 has reference to the entire subject-matter in controversy between the parties and a mere identity of some of the issues in both the suits is not sufficient to attract Section 10 and unless the decision of the suit operates as res judicata in the other suit it cannot be said that the matter in issue is directly and substantially the same in both the suits, that is to say, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same. AIR 1917 Cal 248, Rel. on; AIR 1957 Cal 727 and AIR 1972 Cal 128, Expl. in the light of AIR 1917 Cal 248. (Para 13)

(B) C. P. C. (1908), S. 10 — A appointing B as dealer to sell goods at Ferrukhabad under dealership-agreement — B alleging that dealership agreement was cancelled by mutual agreement filing suit at Ferrukhabad against A to recover amount arising out of subsequent transactions — Suit by A at Calcutta against B for damages for wrongful repudiation of dealership agreement by B with additional claim arising out of new transactions pleaded by B in Ferrukhabad suit — Matter in issue in both suits held was not same — Calcutta suit could not be stayed under S. 10. AIR 1917 Cal 248, Rel. on.

(Paras 2, 3, 4, 14, 15, 16, 19)

Cases Referred :	Chronological	Paras
AIR 1972 Cal 128		8, 11
AIR 1957 Cal 727 = 61 Cal WN 559		6, 10
AIR 1917 Cal 248 = 24 Cal LJ 514		12

Somenath Chatterjee with Aninda Mitter and Mrs. Indrani Chatterjee, for Appellant; B. K. Bachawat with S. C. Ukil, for Respondents.

DEB, J.:— This is an appeal from an order dated November 9, 1970, staying the suit filed in this Court under Section 10 of the Code of Civil Procedure in view of an earlier suit filed by the respondents against the appellant in the Court of Civil Judge, Ferrukhabad, being Civil Suit No. 61 of 1969.

2. The respondent firm was appointed by the appellant as its dealer to sell certain goods in the district of Ferrukhabad. The respondents' case in the Ferrukhabad suit is that the said dealership agreement was cancelled by mutual agreement and thereafter certain transactions were entered into between the parties and in respect of those post contract transactions the respondents became en-

titled to certain sums of money from the appellant, which sums the respondent is seeking to recover in that suit.

3. The defence of the appellant in that suit is that, though some new arrangements were entered into between the parties, the respondents are not entitled to receive any money from the appellant. It has also been denied in that written statement that the dealership agreement was terminated by mutual consent as alleged by the respondents in that plaint. It has further been pleaded by the appellant in that suit that the respondents have wrongfully repudiated the said dealership agreement and the said wrongful repudiation was accepted by the appellant.

4. During the pendency of the Ferrukhabad suit, the appellant has filed this suit No. 3661 of 1969 in this Court claiming damages for wrongful repudiation of the dealership agreement by the respondents and the acceptance of such wrongful repudiation by the appellant resulting in the damages suffered by the appellant with an additional claim arising out of the new arrangements pleaded by the respondents in the Ferrukhabad suit.

5. In these circumstances, the respondents have made the application under Section 10 of the Code and it was allowed by the learned Judge, who has, inter alia, said as follows:

“The main issue in both the suits are common, namely, what the terms of the contract of dealership between the parties are and who has committed the breach of the said dealership agreement, and though apart from that issue the subject-matters in both the suits are different, and yet the result in both the suits will depend mainly on the decision of the issue as to who committed default of the dealership contract between the parties.”

6. In staying the suit the learned Judge followed a decision of the Division Bench of this Court in the case of Shorab Merwanji Modi v. Mansata Film Distributors reported in AIR 1957 Cal 727 to which reference will be made later on.

7. In support of this appeal it has been contended by Mr. Somenath Chatterjee, the learned counsel for the appellant, that the field of controversy in both the suits are entirely different, because the Ferrukhabad suit is founded upon a new arrangement entered into between the parties after the dealership agreement came to an end; whereas the Calcutta suit is based on the breach of contract.

8. The contention of Mr. Bachawat, the learned counsel for the respondents, on the other hand, is that the field of controversy between the parties is substantially the same in both the suits. He has argued that it does not matter whether Ferrukhabad suit is on the new arrangement or Calcutta suit is on the dealership agreement, in view of the decision of Chakravartii, C. J. in the case already cited. He has also drawn our attention to another Division Bench decision of this Court in the case of Arun General Indus-

tries Ltd. v. Rishabh Manufacturers Pvt. Ltd., reported in AIR 1972 Cal 128, in support of his contention that if the principal issue in both the suits is the same, it must be held that the matters in issue in both the suits are primarily and substantially the same.

9. We have already stated the nature of pleadings in the Ferrukhabad suit. In the Calcutta suit the respondents have not yet filed any written statement, but we may assume that their defence would not be contrary to what has been stated in the plaint in the Ferrukhabad suit.

10. Question now is whether the matter in issue in both the suits is directly and substantially the same so as to satisfy one of the most essential requirements of Section 10 of the Code. It is true that the learned Chief Justice has said that the "fact that one is a suit under the agreements entered into by the parties and the other is a suit de hors the agreements does not make a substantial identity of the subject-matter per se impossible" in the case of Shorab Merwanji Modi v. Mansata Film Distributors, (AIR 1957 Cal 727) (supra), at page 734 of the report, but his Lordship has qualified his own statement by using the expression "per se impossible." The question as to whether the entire field of controversy in both the suits is the same must be determined on the construction of the pleadings in both the suits and, therefore, no new principle has been laid down in that case by the learned Chief Justice.

11. The learned Chief Justice has further said at p. 734 of the report that "the principal matter in issue" in both the suits must be the same so as to attract Section 10 of the Code and this view has been followed in the case of Arun General Industries Ltd. v. Rishabh Manufacturers P. Ltd., (AIR 1972 Cal 128) (supra), and speaking for this Court, at p. 139 of the report, in that case Mitra, J. says this:

"The matter for determination in the case of an application for stay under Section 10 of the Code is not what the basis of the claim in the two suits is, but what is the matter in issue in the two suits."

12. In our opinion, the expression "principal matter in issue" used by the learned Chief Justice and followed by Mitra, J., should be read, understood and construed in consonance with and subject to the following statement of Sir Ashutosh Mookerjee in the case of Bepin Behari v. Jogendra Chandra, reported in 24 Cal LJ 514 at p. 515 = (AIR 1917 Cal 248 at p. 249) of the report:

"What then is the meaning of the expression 'the matter in issue.' The defendants invite us to hold that the expression is equivalent to 'any of the questions in issue.' The obvious answer is that if that had been the intention of the framers of the section, appropriate words might have been used to bring out such sense. We are of opinion that the expression 'the matter in issue' has reference to the entire subject in controversy

between the parties. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue."

13. One of the most essential conditions of Section 10 is that the matter in issue in the later suit which is sought to be stayed must be directly and substantially in issue in the earlier suit which is pending in the same or in any other court of concurrent jurisdiction. A mere identity of some of the issues in both the suits is not sufficient to attract this section in view of the law laid down by Sir Ashutosh Mookerjee. Unless the decision of the suit operates as *res judicata* in the other suit it cannot be said that the matter in issue is "directly and substantially" the same in both the suits. In other words, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same.

14. The attention of the learned Judge was, however, not drawn to the issues framed in the Ferrukhabad suit. In that suit no issue has been settled relating to the terms and conditions of the dealership agreement between the parties nor there is any issue as to who has committed the breach of the said dealership agreement. Therefore, the finding of the learned Judge cannot be supported and we overrule the contentions of Mr. Bachawat.

15. It is well-settled that unless an issue is framed and decided by the Court it cannot operate as *res judicata* in a subsequent suit between the same parties or their privies. It is true that the written statement in the Ferrukhabad suit has raised some of the questions which are also present in the plaint of the Calcutta suit, but unless in both the suits the entire subject-matter in controversy between the parties are substantially and directly the same it cannot be said that the matter in issue in both the suits is the same. There being no issue in the Ferrukhabad suit as to the terms and conditions of the dealership agreement nor as to its breach, in my opinion, it cannot be said that the matter in issue in both the suits is substantially and directly the same. Hence, the judgment under appeal cannot be supported.

16. In this view of the matter, we allow this appeal and set aside the judgment and order under appeal. The respondents will pay the costs of this appeal to the appellant. The application for stay under Section 10 is dismissed and the costs of that application will be cost in the Calcutta suit.

17. Liberty is given to the respondent to take appropriate directions from the Interlocutory Court with regard to the filing of the written statement.

DIPAK KUMAR SEN, J.:— Speaking for myself I respectfully agreed with the judgment just now delivered by my learned brother. I only wish to point out that in the Ferrukhabad suit, the original dealership con-

tract and its alleged termination have been no doubt, pleaded as part of a historical narrative but both the matters in issue and the cause of action in the Ferrukhabad suit arise mainly on the subsequent transactions and/or arrangement alleged to have been entered into by and between the parties.

18-19. The Ferrukhabad Court is not necessarily called upon to determine the rights and liabilities of the parties flowing from the original dealership agreement and/or its termination. In the manner the issues have been framed and the suit is being proceeded with in Ferrukhabad it is not impossible that the rights and liabilities of the parties, inter se, following from the subsequent alleged transactions may be determined while keeping the earlier rights and liabilities flowing from the earlier dealership agreements undetermined. Therefore, in any event, the matters which will be in issue or in controversy in the Calcutta suit may not be matters in controversy in issue in Ferrukhabad.

Appeal allowed.

AIR 1975 CALCUTTA 413

MURARI MOHAN DUTT AND
NIRMAL CHANDRA MUKHERJI, JJ.

Samar Som, Appellant v. Sm. Sadhana Som, Respondent.

A. F. O. D. No. 482 of 1968, D/- 13-2-1975.*

(A) Hindu Marriage Act (1955), S. 12 (1)
(a) — Impotency — Absence of uterus — Not material to prove impotency.

It cannot be disputed that a woman without a uterus is quite fit for sexual intercourse. Impotency is incapacity for sexual intercourse or when coition is difficult or painful. The presence or absence of uterus is quite immaterial to the question whether a woman is impotent or not. (Para 9)

Cases Referred: Chronological Paras
1924 AC 349 10
(1912) PD 173 = 81 LJ (P) 90 10

P. N. Mitter and Dwijendra Nath Lahiri, for Appellant; Bhabani Prasun Chatterjee, Moni Mohan Mukherjee, for Respondent.

M. M. DUTT, J.:— This appeal is at the instance of the husband against his wife and it arises out of a proceeding under Section 12 (1) (a) of the Hindu Marriage Act.

2. The appellant, who is the husband, made an application under Section 12 (1) (a) of the Act. The marriage between the parties was solemnised on May 7, 1965, according to the Hindu rites. It was alleged that prior to the marriage the respondent had undergone an operation on June 28, 1955, by which her uterus was removed and as such, she was impotent at the time of the marriage and was unfit for consummation or bearing

child to the appellant and was continuing to be so till the date of the presentation of the said application. Further, it was alleged that the respondent was always averse to marital relations with the appellant who had recently been able to find out the cause of such aversion.

3. On the aforesaid allegations the appellant prayed that the marriage between the parties might be annulled by the court by a decree of nullity.

4. The application was opposed by the wife and she filed a written-statement. In paragraph 7 of her written-statement she admitted that she had undergone an operation before her marriage. The allegation that she was always averse to marital relations with the appellant, was denied. It was averred by her that the appellant entered into the ceremony of marriage out of his own free will after fully knowing that she had undergone an operation before the marriage. Accordingly, she prayed for the dismissal of the application.

5. The learned Additional District Judge, 9th Court, Alipore, before whom the application was filed framed the following issues:—

- (1) Was the respondent impotent at the time of her marriage and is she continuing to be so?
- (2) Was the petitioner aware of an operation upon the respondent before marriage?
- (3) What relief, if any, is the petitioner entitled to?

6. At the hearing of the proceeding the respondent did not appear and adduce evidence. The appellant appeared and he examined himself. In his evidence he says that the marriage could not be consummated; that the respondent is impotent and was so at the time of marriage; that she was averse to consummation; that she never agreed to share the same bed; that he found marks on her abdomen, which appeared to be marks of surgical operation and that the respondent told him 6/7 months before the institution of the proceeding that she had an operation at Chittaranjan Seva Sadan and her uterus had been removed before the marriage. Further, he said that before marriage he did not know that the respondent was without uterus.

7. The appellant also examined a gynaecologist. He is P. W. 2. His evidence is that the removal of uterus does not incapacitate a woman for sexual intercourse but removes her child bearing capacity.

8. The learned Judge took the view that the absence of capacity of sexual intercourse is not impotency and that impotency is the absence of capacity for complete and natural sexual intercourse. It has been observed by him that a woman without uterus may be capable of complete and natural sexual intercourse and that accordingly, it cannot be said that the respondent is impotent. Further, it has been held by him that

*Against decree of N. K. Sen, Addl. Dist. J., 9th Court, Alipore in M. S. No. 25 of 1966, D/- 27-6-1967).

the absence of consummation does not necessarily mean impotency of a spouse, for there might be reasons other than impotency. In the aforesaid view of the matter, the learned Judge dismissed the application praying for a decree of nullity of the marriage under Section 12 (1) (a) of the Act. Hence, this appeal.

9. The principal case of the appellant was that the respondent was impotent inasmuch as her uterus was removed by an operation before the marriage. It cannot be disputed that a woman without a uterus is quite fit for sexual intercourse. Impotency is incapacity for sexual intercourse or when coition is difficult or painful. As has been stated already, the presence or absence of uterus is quite immaterial to the question whether a woman is impotent or not. The learned Judge has rightly held that because the uterus of the respondent was removed, she could not be held to be impotent and that accordingly, the marriage could not be declared to be void.

10. Mr. Mitter, learned Advocate appearing on behalf of the appellant, does not dispute the above position. But he submits that, in view of the fact that the respondent was averse to sexual intercourse for a period of ten years since the date of the marriage, it should be reasonably presumed that she is impotent. In support of his contention he has placed reliance on a decision of the House of Lords in *G v. G*, 1924 AC 349. That was also a case by a husband against his wife for a decree of nullity of marriage on the ground of impotency. It was proved that the husband, whose potency was admitted, made frequent attempts extending over a protracted period to consummate the marriage, but failed owing to the unreasoning resistance of the wife, and that this resistance continued after she had formally consented to perform her conjugal duty. The medical examination of the wife showed that there was no structural incapacity. The parties were also on affectionate terms. It was held that the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity, and that the husband was, therefore, entitled to a decree of nullity. In *G v. G*, 1912 PD 173, it was held that if the court was satisfied that a marriage had not been, and that, as regards both the wife and the husband, it could not be, consummated by the parties thereto, though no reason for non-consummation was manifest or apparent, it was warranted in annulling the marriage.

11. The principles of law, which have been laid down in the aforesaid two English decisions, are quite sound. But the question is whether, in the facts and circumstances of the present case, an inference should be drawn that the respondent is impotent. In the court below the entire case of the appellant was

founded principally on the ground of removal of the uterus of the respondent by an operation before the marriage. In his evidence, however, it was alleged by the appellant that the respondent was averse to consummation and that she never agreed to share the same bed. It is true that the respondent did not appear and examine herself and that the appellant was not cross-examined. The evidence of the appellant, therefore, goes unchallenged. But, in our view, that is not conclusive. Before a decree of nullity is granted by the court, the court must be satisfied about the truth of the allegations made by one party against the other even though those allegations are *ex parte* and not controverted at the trial. The marriage was solemnised on May 7, 1956, and the application for a decree of nullity was filed on August 23, 1964, that is, more than 10 years after the marriage. If the case of the appellant has to be accepted, then it comes to this that the respondent never shared the same bed with the appellant for these long ten years. It is very difficult for us to accept this part of the case of the appellant. No explanation has been given why the appellant did not file an application for nullity of the marriage earlier. In paragraph 8 of the application it has been stated that the cause of aversion of the respondent was detected only 6/7 months before the institution of the proceeding, namely, that the respondent had an operation of the abdomen resulting in removal of the uterus. In his evidence the appellant says that he found marks on her abdomen which appeared to be marks of surgical operation and that the respondent told him 6/7 months before the institution of the proceeding that she had an operation at Chittaranjan Seva Sadan and that her uterus had been removed before the marriage. It is also difficult for us to accept that the appellant could detect the marks only 6/7 months before the institution of the proceeding. We do not also find any evidence that the appellant made any attempt for sexual intercourse and failed owing to the unreasonable resistance of the respondent. It has been only alleged that there was aversion on the part of the respondent. After considering the facts and circumstances of the case and the evidence adduced on behalf of the appellant, we are of the view that the appellant has failed to prove that the respondent is impotent or that she was averse to sexual intercourse for these long 10 years as alleged. We are also unable to draw any inference from the evidence of the appellant that the respondent is impotent as contended by Mr. Mitter. The facts of the two English decisions referred to above are different from those of the present case.

12. For the reasons aforesaid, we affirm the judgment and decree of the learned Additional District Judge and dismiss the appeal, but there will be no order as to costs.

N. C. MUKHERJI, J. :— I agree.

Appeal dismissed.

AIR 1975 CALCUTTA 415**CHITTATOSH MOOKERJEE, J.**

Sm. Shanti Neogy, Petitioner v. 1st Land Acquisition Collector, Calcutta and another, Respondents.

Civil Rule No. 4318 (W) of 1974, D/- 5-2-1975.

(A) Land Acquisition Act (1894), Ss. 31, 16, 48 and 55 — Rules under S. 55 by West Bengal Government, R. 10 — Land acquisition — Tender of payment of compensation — Withholding on extraneous grounds not proper — Decision to withdraw acquisition proceedings should be taken at a very early date — Government cannot withhold payment and at the same time suspend payment of interest.

The land Acquisition Collector is under a statutory duty to make payment of the sum awarded in accordance with law to the persons interested and cannot withhold payment on extraneous grounds. Section 16 does not empower the State Government to inordinately and indefinitely delay its decision whether or not possession should be taken and whether the acquisition should be proceeded with. The Government should, at a very early date, decide whether it proposes to withdraw the acquisition proceedings. If it itself inordinately delays taking over of possession the persons in whose favour compensation has been awarded cannot be deprived of the award money. The Government is not entitled to withhold payment of the sum awarded and at the same time suspend payment of interest of the said sum on the ground of delay on the part of the persons interested in receiving the payment.

(Paras 7, 8, 9)

G. C. Basak, for Petitioner; P. K. Sen Gupta and Tapan Kumar Sen Gupta, for Respondents.

ORDER :— On April 25, 1968 the West Bengal State Government issued a notification under Section 49 of the Calcutta Improvement Act, 1911 for acquisition of premises No. 81/1/1A, Canal Circular Road for a street scheme known as Scheme No. XIII-M.

2. The petitioner has claimed that the First Land Acquisition Collector, Calcutta, had served a notice under Section 9 of the Land Acquisition Act upon her to appear before the First Land Acquisition Collector to state the nature of interest in the said land which was proposed to be acquired under the above scheme. On January 11, 1974 the First Land Acquisition Collector passed an Award for compensation for the acquisition of the aforesaid land. Thereafter the First Land Acquisition Collector served a notice under Section 12 (2) of the said Act upon the petitioner in respect of the said Award and further intimated the petitioner that if she was willing to receive a sum of Rs. 70,000/90 p.

(Rupees seventy thousand and ninety paise only) which had been awarded in her favour she might either appear personally or through agent to receive payment (vide annexure E to the petition).

3. According to the petitioner, she had appeared through an agent before the First Land Acquisition Collector on the 31st January, 1974 to receive payment of the above compensation money but the awarded sum was not paid on the said date. The said compensation awarded to the petitioner has not been yet paid. Accordingly, the petitioner has filed this writ application for commanding the respondents to perform their statutory duties by making payment of the said awarded sum to her in terms of the notice under Section 12 (2) of the Act.

4. The respondents in paragraph 5 (vi) of their affidavit in opposition by Nirmal Chandra Roy have set out the reasons for not making the payment to the petitioner. According to the deponent to the said affidavit in opposition, the Calcutta Improvement Trust had informally informed the Land Acquisition Collector, Calcutta, that they were reviewing the entire Scheme XIII-M at the instance of the Calcutta Metropolitan Development Authority. Secondly, an alleged vigilance enquiry was pending regarding suspected malpractices adopted in the matter of claims on the basis of which assessment and Awards of compensation were made. Lastly, the deponent to the affidavit in opposition has stated that although Awards have been made the petitioner and other occupants of the premises have not vacated the premises. For these reasons the Land Acquisition Collector did not consider it expedient to make payment of compensation before getting actual possession of the premises with structures intact.

5. The First Land Acquisition Collector in the matter of payment of the sum awarded in the present case must act in accordance with the provisions of Land Acquisition Act, 1894 read with the Rules and Executive Instructions of the Government of West Bengal. Sub-section (1) of S. 31 of the Act provides that on making an Award under Section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the Award, and shall pay to them unless prevented by some one or more of the contingencies mentioned in the next sub-section of Section 31. Sub-section (2) mentions the three circumstances in which the Collector instead of making payment shall deposit the amount of compensation in court. The circumstances are— (a) if the awardees do not consent to receive it, (b) if the person concerned was not competent to alienate the land, and (c) if there be any dispute as to the title to receive the compensation or as to the apportionment of it. But a person interested, under first proviso to sub-section (2), may receive payment under protest as to the

sufficiency of the amount. According to the petitioner, her application under Section 18 for making a reference was still pending before the Land Acqn. Collector, Calcutta. Therefore, she had prayed that the payment may be made to her under protest. In the instant matter, it is nobody's case that the petitioner had a limited interest or there was any dispute about apportionment. Therefore the sub-section (3) of S. 31 is not attracted.

6. Rule 10 of the Rules issued by the Government of West Bengal under Section 55 of the Land Acquisition Act, 1894 inter alia provides that in giving notice of the Award under sub-section (2) of S. 12 and tendering payment under Section 31 (1) to such of the persons interested as were not present personally or by representative when the Award was made the officer shall require them to appear personally or by representative by a certain date to receive payment of the compensation awarded to them. If they do not appear and do not apply for a reference to the civil court under Sec. 18 the officer shall after any further endeavour to secure their attendance cause the amounts due to be paid into the treasury as revenue deposits payable to the persons to whom they are respectively due and vouched for in the form (marked 'E'). The Officer is also required to give notice to the payees of such deposits. When the payees ultimately claim payment of sums placed in deposit, the amounts will be paid to them in the same manner as ordinary revenue deposits. Whenever payment is claimed through a representative whether before or after deposit of the amount awarded such representative must show legal authority for receiving compensation on behalf of the principal. Presumably in accordance with the above Rule 10, the First Land Acquisition Collector in his notice under Section 12 (2) had informed the petitioner that on her failure to promptly receive payment interest will cease on the awarded sum. The executive instructions regarding payment of compensation are contained in Chapter X of the Land Acquisition Manual, 1951. Paragraphs 92-93 and 94 respectively provide for conditions under which payment can be made, competence to receive compensation money and payment into treasury as revenue deposit; paragraph 95 prescribes the methods of payment; paragraph 99 of the said executive instructions expressly provides that the Collector should see that there was no avoidable delay in the matter of payment of compensation.

7. I have set out the above provisions at some length to indicate that the reasons put forward by the First Land Acquisition Collector in his affidavit in opposition filed in this case do not come within the four corners of the said provisions of the Act, Rules and executive instructions. The First Land Acquisition Collector is under a statutory duty to make payment of the sum awarded in accordance with law to the persons interested

and cannot withhold payment on extraneous grounds. Mr. Sen Gupta, learned Advocate for the respondents, has drawn my attention to Section 16 of the Land Acquisition Act which inter alia provides that even after an Award is made the Collector may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances. Mr. Sen Gupta pointed out that in case the Government ultimately does not take possession of the land acquired under the aforesaid scheme, the petitioner will not be entitled to receive any compensation. But, Section 16 does not empower the State Government to inordinately and indefinitely delay its decision whether or not possession should be taken and whether the acquisition should be proceeded with. It may be also pointed out that Section 48 (1) of the Land Acquisition Act provides that except in cases provided in Section 36, the Government shall be at liberty to withdraw from acquisition any land of which possession had been taken. Under sub-section (2) when the Government so withdraw the Collector is required to determine the amount of compensation due for the damage suffered by the owner in consequence of service of notice or of any proceeding thereunder and shall pay such compensation to the person interested. Therefore, the payment of the compensation which was already tendered to the petitioner cannot be indefinitely withheld and the Government should, at a very early date, decide whether it proposes to withdraw the acquisition proceedings.

8. Mr. Sen Gupta himself did not overemphasize the fact that an alleged Vigilance enquiry was pending in the matter of assessment of compensation. It is hardly necessary to say that such Vigilance enquiry if not already concluded ought to be expeditiously finished. Further such enquiry cannot be a ground for denying payment of compensation to those who are not suspected of any malpractice or irregularity. It is also up to the Government to promptly take possession of the acquired lands in order to avoid damage to the structures in question. If it itself inordinately delays taking over of possession the persons in whose favour compensation has been awarded cannot be deprived of the award money. It may be noted that according to the notice given by the First Land Acquisition Collector the interest on the Award sum was likely to cease in case the compensation money was not withdrawn promptly. Therefore, the respondents are not entitled to withhold payment of the sum Awarded and at the same time suspend payment of interest of the said sum on the ground of delay on the part of the persons interested in receiving such payment. In the instant case, therefore, I propose to direct the respondents to discharge their statutory duties in the matter of payment of compensation money awarded in accordance with law within the period mentioned hereinafter.

In case the land in question is released from acquisition, obviously, the question of payment of the awarded sum should not arise.

9. I accordingly make the Rule absolute in part. Let a writ of mandamus issue commanding the respondents to dispose of the application filed by the petitioner for receiving compensation money within a period of four months from this day in terms of the notice under Section 12 (2) of the Land Acquisition Act, dated January 18, 1974 and in accordance with law.

10. There will be no order as to costs.
Rule made absolute in part.

AIR 1975 CALCUTTA 417

ANIL KUMAR SEN AND
BANKIM CHANDRA RAY, JJ.

Union of India, Petitioner v. Bararashi Lal Agarwalla, Opposite Party.

Civil Rule No. 1023 of 1961, D/- 15-1-1975.

(A) Limitation Act (1908), Art. 31 — Suit against railway for damages for non-delivery of goods entrusted to it — Starting point of limitation.

The starting point of limitation for a suit for compensation for non-delivery of goods entrusted to a public carrier (in this case the Railway) is, where there is an agreed date for delivery, the date so agreed, and where there is no such agreed date, the date after the lapse of a reasonable time for delivery. The starting point is not the date of the final refusal, after correspondence by the carrier of the claim for compensation. AIR 1962 SC 1716, Rel. on. (Para 7)

(B) Railways Act (1890), S. 77 — Notice — Suit for compensation for non-delivery of goods entrusted to Railway for carriage — Notice under S. 77 is necessary — In the absence of such notice the suit is not maintainable. AIR 1961 SC 725, Rel. on. (Para 8)

Cases Referred : Chronological Paras
AIR 1962 SC 1716 = (1963) 1 SCR 70 7
AIR 1961 SC 725 = (1961) 3 SCR 647 8
Ajoy Kumar Basu, for Petitioner.

ORDER :— This Rule is at the instance of the defendant Railway administration and is directed against an appellate decree whereby the lower appellate court reversing the decision of the trial court decreed the money claim of the opposite party as against the Railway administration.

2. Undisputedly the plaintiff opposite party booked a consignment of coal with the Railway administration on June 28, 1951. It was so booked at the Barakar Railway Station in the Eastern Railway. According to the plaintiff-opposite party the consignment should have reached the consignee at Chapra

within 15 days but it did not do so. After a long correspondence between the parties the suit was instituted for realisation of damages for non-delivery assessed at Rs. 767/-. This suit having been contested by the Railway administration was dismissed by the trial court on two-fold grounds namely the claim was barred under Article 31 of the Old Limitation Act and on the ground that no such claim is maintainable in the absence of a notice under Section 77 of the Indian Railways Act. The fact that there was no such notice under Section 77 is also not in dispute.

3. On an appeal by the plaintiff-opposite party this decision of the trial court was reversed and the suit was decreed. On the question of limitation, the lower appellate court accepted the position that the case would be governed by Article 31 of the old Limitation Act and the limitation would be one year from the date when the goods ought to be delivered. But according to the lower appellate court the date of such delivery is to be proved by the carrier defendant and the defendant not having discharged that burden it cannot be said positively what would be the date when the goods in suit ought to have been delivered. In addition thereto, the lower appellate court took the view that the limitation was to run only from the date of final refusal to deliver and as such refusal should be construed to be the last of the correspondence dated March 10, 1956; the suit which was instituted on April 22, 1957 must be considered to be well within the period of limitation calculated from that date excluding the period of notice under Sec. 80 of the Code of Civil Procedure. On the question of the effect of absence of notice under Section 77 of the Indian Railways Act, the court of appeal below took the view that the said section can have no application to the present case where the claim is based on non-delivery and the carrier defendant has not proved that such non-delivery is due to any loss incurred by the Railway administration.

4. Being aggrieved by such a decree of reversal the Railway administration has now come up in revision to this Court the judgment and decree being not appealable in view of the provision of Section 102 of the Code.

5. This Rule is not being contested at the hearing by the plaintiff-opposite party although the said opposite party did enter appearance at one stage.

6. Mr. Bose, learned Advocate for the Railway administration has contended that the lower appellate court was in error on both the points as to limitation and maintainability of the claim in the absence of notice under Section 77 of the Indian Railways Act. According to him, both the points are covered by two decisions of the Supreme Court. In our considered opinion, the contention raised by Mr. Basu has ample merits.

7. It cannot now be disputed that in a suit of the present nature, the limitation for the claim would be governed by Art. 31 of the Act and the period prescribed is one year from the date when the goods ought to be delivered. The significance of the terms when the goods ought to be delivered previously led to some diversion of judicial opinion which has been set at rest by the Supreme Court decision in the case of *Bootamal v. Union of India*, AIR 1962 SC 1716. It has been held that the limitation under Article 31 should run from the date where there is an agreed date for delivery from the date so agreed and in the absence of any such agreed date from the date after the lapse of reasonable time for the delivery. Now, in the present case admittedly there was no agreed date for delivery and upon the plaintiff's own case reasonable time for delivery is 15 days from the date of the consignment. The consignment having been booked on June 28, 1951 the date of delivery would be about the middle of July 1951 so that the period of limitation when counted from that date would expire in or about the middle of July 1952. The suit having been filed long after such a date the claim is clearly barred under the provisions of the Limitation Act. The learned Judge in the lower appellate court is clearly in error when he thought that in the absence of any proof by the carrier defendant as to the date when the goods ought to have been delivered the limitation would not run or that the limitation should run only from the date of final refusal. Neither of these two elements is to be found on the language of Article 31 of the old Act which corresponds to Article 11 of the new Act. In this view, we must accept the contention of Mr. Basu and hold that the claim being *ex facie* barred even on the allegations made in the plaint, the court of appeal below acted illegally in the exercise of its jurisdiction in decreeing the suit of the plaintiff. While on this point we must, however, make it clear that there is no question of saving the limitation by virtue of any acknowledgement arises in the present case on the correspondence between the parties in view of the fact that there had been no acknowledgment before the expiry of one year from the middle of July 1951.

8. So far as the other point of maintainability of the claim is concerned, the claim being a claim of damages for non-delivery of the goods must be held to be governed by Section 77 on the decision of the Supreme Court in the case of *Governor-General in Council v. Musaddi Lal*, AIR 1961 SC 725. The Supreme Court has clearly pointed out that non-delivery is the consequence of loss or destruction and the non-delivery itself cannot be distinguished as a separate cause of action for a suit of the like nature. Loss is not only loss to the administration but also to the owner of the goods. As such, it has been definitely held that it cannot be said

that a suit for compensation for loss because of non-delivery of the goods does not fall within Section 77. This being the position, the finer distinction sought to be made by the lower appellate court is clearly unsustainable in law and it must be held that the suit not being instituted on a prior notice under Section 77 of the Act the claim itself was not maintainable. The lower appellate court, therefore, equally acted illegally in the exercise of its jurisdiction in decreeing a claim which was not otherwise maintainable in law.

9. For reasons as above, this application succeeds and the Rule is made absolute. The judgment and decree of the lower appellate court is set aside and that of the trial court restored.

10. There will be no order as to costs.
Application allowed.

AIR 1975 CALCUTTA 418

R. BHATTACHARYA, J.

Nirmalendu Basu and others, Appellants
v. Sm. Nilima Chatterjee, Respondent.

Second Appeal No. 1609 of 1966, D/-
2-9-1975.

(A) Transfer of Property Act (1882),
S. 108, clauses (b) and (c) — Suspension of
rent — Doctrine — Applicability — Dispos-
session of tenant from leased property —
Physical force, coercion, threat or fraudulent
process used — Tenant is entitled to suspen-
sion of rent — Cannot be treated as defaulter.

A tenant is entitled to suspension of rent in a case where the landlord dispossesses his tenant from any portion of the leased property by exercising physical force, coercion, threat or any other trick or means or any fraudulent or mala fide process against the wish or will or natural inclination of the latter or where the landlord connives with or assists others directly or indirectly to dispossess the tenant or does something which is responsible for the dispossession of the tenant from any portion of the tenancy or by his acts or omission leads the tenant to part with possession of any portion of the property in lease against his will or consent or depriving him of the benefit or use of such property, the tenant so dispossessed shall be entitled to suspension of the entire rent if he so likes so long as he does not get back the portion from which he is dispossessed. AIR 1932 Cal 385 and AIR 1925 PC 97 and AIR 1951 Cal 338 and (1899) ILR 23 Bom 510, Ref.; AIR 1966 SC 1361, Disting.

(Paras 15 and 16)

Cases Referred :	Chronological	Paras
AIR 1966 SC 1361 = (1966) 3 SCR 458	14	
AIR 1960 Cal 346 = 63 Cal WN 922	10, 14	
AIR 1951 Cal 338	13	
AIR 1948 PC 24 = 70 Ind App 18	14	
AIR 1932 Cal 385 = 36 Cal WN 72	11	

IS/IS/D463/75/GGM

AIR 1925 PC 97 = 30 Cal WN 1 12
 (1899) ILR 23 Bom 510 = 1 Bom LR 267 17

Dilip Kumar Banerjee, for Appellants;
 Madhusudan Banerjee, for Respondent.

JUDGMENT :— This appeal has been directed against the judgment and the decree passed by an Additional District Judge, Howrah in Title Appeal No. 495 of 1965 setting aside the dismissal of the original suit by a Munsif at Howrah in Title Suit No. 61 of 1963. The appellants are the successors-in-interest of the original defendant duly substituted during the appellate stage.

2. The respondent before this Court Nilima Chatterjee started the original suit for eviction and for mesne profits against the defendant Nandalal Bose, a tenant of hers in respect of the suit premises. The plaintiff purchased the suit property from her vendor under whom Nandalal Bose was a tenant in respect of the suit properties at a monthly rental of Rs. 27/- payable according to English Calendar month. During the time of the plaintiff's vendor, the defendant became a defaulter in payment of rent from the month of May, 1961 onwards. After purchase in December, 1962, the plaintiff served a notice upon the defendant to quit on the expiry of the month of February, 1963. The ground of eviction was the default in payment of rent on the part of the defendant-tenant from May, 1961 till the end of February, 1963. The defendant appeared and filed a written statement denying all material allegations. In particular, the defence was that the notice to quit was invalid and insufficient as the entire premises under the tenancy was not described in the notice. It has also been pleaded that as the defendant was dispossessed from the first floor of the premises under threat of criminal prosecution and coercion by the vendor of the plaintiff with the help of the Howrah Municipality, the landlady is not at all entitled to any rent unless the defendant is put into possession of the major portion of the suit premises from which the tenant has been dispossessed. The defendant has characterised the dispossession of the tenant from the portion of the suit premises as a mala fide action. According to the defendant, the suit is liable to be dismissed.

3. The learned trial court on consideration of the evidence found that the defendant had to vacate the first floor rooms of the premises under the tenancy as the said room became ruinous and precarious and were in urgent need of repair. It has also been found by the learned Munsif that the rooms on the first floor have not yet been repaired and restored to the defendant. The learned trial court has further found that the arrears of rent during the regime of the plaintiff's vendor cannot be made use of by the plaintiff. The findings of the trial court

are that the defendant was not a defaulter and that the suit is bad for partial eviction because the entire premises under tenancy has not been included in the suit. At the dismissal of the suit by the trial court, an appeal was taken by the plaintiff which was ultimately disposed of by the Additional District Judge, Howrah. According to the first appellate court below, the evidence on record has proved that the entire tenancy has been included in the suit and that the suit was not bad for partial eviction. On the question of default, the learned Additional District Judge on consideration of several decisions has come to the finding that the plaintiff will be entitled to get the benefit of default made by the tenant in respect of payment of rents during the time of her vendor, the previous landlady of the defendant. On the question of dispossession of the tenant by the previous landlady, the learned Judge has come to the conclusion that there is evidence on record that the first floor rooms required repairs and that it has been established that the respondent does not possess those first floor rooms. According to the learned Judge below, when the tenant became unable to possess a portion of the premises under tenancy, as the same became unfit for use for want of repairs, he is not entitled to suspension or abatement of rent. On the above findings, the court below found that the defendant was a defaulter in payment of rent from May, 1961 onwards. The appeal was, therefore, allowed and the suit was decreed. Against this decision of the appellate court below, the instant appeal has been filed.

4. I have heard Mr. Dilip Kumar Banerjee, appearing on behalf of the appellants and also Mr. Madhusudan Banerjee, appearing on behalf of the respondent.

5. From the side of the appellants, it has been first contended that the learned Additional District Judge below erred in law to hold that the tenant was not entitled to suspension of rent overlooking the material facts and circumstances and also misreading the evidence on record. The decision as to default arrived at in the court below was illegal and without evidence. Secondly, it has been argued that the notice served upon the defendant was insufficient and illegal according to the evidence. In this connexion it has been submitted that the plaintiff's suit should have been held bad for partial eviction and for non-joinder of essential parties.

6. The most important point to be decided in this appeal is whether in the instant case the defendant-tenant was entitled to the suspension of rent. For this purpose my attention has been drawn to several pieces of evidence which, according to the learned Advocate appearing on behalf of the appellants, are material and were not considered by the appellate court below. In this case it is admitted before me by both the parties that the plaintiff purchased the suit premises from Aukhoy Kumar Mukherjee and Nantu-

bala Devi. There is no dispute that there are rooms on the first floor as well as on the ground floor which were in the occupation of the defendant from the time of the plaintiff's predecessor-in-interest Nantubala. It has been specifically alleged in the written statement that due to the mala fide conduct of the vendor of the plaintiff, there were several litigations and ultimately she succeeded to dispossess the defendant who was forced to vacate the first floor rooms of the suit premises on the threat of criminal prosecution and coercion on the part of the landlady with the help of the municipality and that since then the defendant is deprived of the possession of the major portion of the tenanted house. It is also stated that the said dispossession is high handed action of the landlady and that the landlady or her successors are not entitled to claim any rent for not allowing the defendant to hold the entire premises peacefully. The plaintiff, according to the defendant, is not entitled to claim for rent due to the substantial interference by the landlady with the defendant's peaceful enjoyment of the suit premises. I have already indicated earlier that the learned first appellate court below has come to the finding that the respondents who were the appellants before me did not possess the first floor rooms and that the first floor rooms require repairs. It has also been found that the tenant became unable to possess a portion of the suit premises because the same became unfit for use due to want of repairs. The grievance of the appellants is that the learned court below did not at all consider the material evidence which will support the defendant's claim for suspension of rent for being out of possession due to the mala fide and coercive conduct of the landlords and not for inhabitable condition of the first floor rooms.

7. Let us now consider the evidence on record. Plaintiff herself has not given evidence. Her husband is P. W. 4. He has simply stated that the defendant has not been dispossessed from any portion of the suit premises. In spite of the specific allegation made by the defendant in the written statement about dispossession by the plaintiff's vendor, no attempt has been made to examine the vendor of the plaintiff. As the defendant was indisposed at the time of hearing, his son gave evidence. He is D. W. 3. From his evidence, we get that previously the defendant used to occupy all the rooms of both the floors but when a notice from the Howrah Municipality was received, the first floor was vacated and the defendant started occupying only one room on the ground floor. It has been stated that at the instance of the landlady, the rooms of the first floor were vacated. It has been also stated that the landlady started possessing the said rooms for repairs and that the defendant had not been reinstated in the former position. We also get from the evidence of D. W. 3 that after taking possession of the first floor rooms, the previous

landlady kept the said rooms vacant. It has been clearly stated that since May, 1961, the tenant has not been paying rent sometime after the dispossession from the rooms on the first floor. In support of the evidence of D. W. 3, we get evidence of another witness D. W. 2 who says that the defendant occupies only one room on the ground floor of the suit premises and that previously he saw the defendant occupying all the rooms on the ground and the first floors. He has stated that the defendant vacated the first floor at the request of the landlady for the purpose of repairs.

8. In addition to the oral evidence, we have got documentary evidence about which there is no dispute between the parties. Ext. B is a notice from the Howrah Municipality dated 20-1-1960 served upon the tenant-defendant, Nandalal Bose under Rule 4 (1) of Schedule XVIII of Calcutta Municipal Act of 1923 as extended to the Municipality of Howrah. By this notice the tenant was required within seven days from the service of the notice to secure, repair or demolish the ruinous and dangerous building namely, the suit premises. It was stated in that notice that failing compliance, steps would be taken by the Chairman under Section 510 to execute the works required without prejudice to the right of the Commissioners to take proceedings against the defendant under Section 488 read with Rule 4 (1) of the Schedule XVIII of the Act. Ext. A6 is a letter of the defendant in reply to Ext. B written to the Assistant Engineer, Howrah Municipality on 28-1-1960. On receipt of the threat, the defendant wrote to the Engineer that he had shifted to the ground floor rooms for facilitating repairs of the upper storey rooms. The defendant requested the Engineer so that the landlady might be required to repair the rooms at the earliest convenience. Next, we get another letter from the Howrah Municipality to the defendant regarding the dangerous building. Ext. A5 shows that the defendant was informed by a memo issued on 16-5-1960 that prosecution had already been started for the notice under Rule 4 (1) Schedule XVIII which has already been referred to. On 3-8-1960 the defendant wrote to the Vice-Chairman, Howrah Municipality asking for expeditious repairs of the first floor portion of the suit premises to be made by the landlady as he had been suffering very much for scanty accommodation. The defendant further complained that although he had vacated the first floor portion for repairs, the landlady took no steps in the matter. This letter has been marked Ext. A3. Ext. A2 is a letter written to the previous landlady, Nantubala Devi by the Howrah Municipality and issued on 21-11-1960 requesting her to repair the building at once failing which action would be taken under Section 512 of the Calcutta Municipal Act. Another letter was issued to the previous landlady on 24-3-1961 by the Howrah Municipality asking

her to make repairs of the 1st floor walls the staircase and the roof of the first floor within seven days. Ext. C is the judgment in the Non-Judicial Case No. 22 of 1960 in which the previous landlady Nantubala Devi started a proceeding under Section 527 of the Calcutta Municipal Act against the tenant, Nandalal Bose for getting vacant possession of the entire suit premises for the purpose of repairs. This judgment was passed on 8-2-1961. The learned Munsif in this case found that the plea for a direction upon the tenant for vacating the entire suit premises set up by the landlady was not a bona fide one being intended to cause needless inconvenience and harassment to the tenant. The learned Munsif has further noted that the evidence shows that with the intention of affording facilities, Nandalal Bose, the defendant even vacated the rooms on the first floor. This evidence given by D. W. 1 could not be denied by the son of the previous landlady. But, he wanted to say that the entire premises had to be vacated for repairs. The learned appellate court below did not consider the material and important facts and evidence. I have just mentioned to appreciate the defendant's case and thus his decision became erroneous. From the evidence on record and circumstances, it is quite clear that the previous landlady wanted to evict the defendant and for that purpose she deliberately avoided to make essential repairs of the first floor portion of the suit premises which was ruinous and dangerous. The Howrah Municipality in order to avoid serious mishap and collapse of the building served a notice upon the previous landlady-owner and also upon the defendant who was occupying the suit premises as tenant. The defendant was in a precarious position. The landlady did not make repairs of the dangerous building but wanted to keep the defendant in apprehension of danger of loss of human life. Due to the threat of proceedings from the municipality and due to mala fide action of the landlady to put pressure upon the defendant for vacating the suit premises, the defendant vacated the entire first floor portion of the suit premises so that the landlady could effect necessary repairs. The landlady was not satisfied at that. She started proceedings to get possession of the entire suit premises but that attempt has failed as evidenced by Ext. C. Substantial portion of the suit premises though vacated by the defendant, the landlady remained callous and indifferent so that the defendant might be compelled to vacate the suit premises and leave the place. The aim of the landlady could not be fulfilled. The defendant ultimately decided to stop payment of rent and in fact no rent was paid from the month of May, 1961 onwards. The evidence clearly shows that the previous landlady although got possession of the first floor portion of the suit premises, did not attempt to make repairs but ultimately sold the suit premises to the present plaintiff without giving

that possession of the first floor portion of the suit premises to the defendant. It is not unreasonable to hold that the present plaintiff purchased the suit properties and took a chance for speculation for getting possession of the entire suit premises by evicting the defendant after starting an ejectment suit on the ground of default in payment of rent. The defendant-tenant in this case being threatened with litigations and proceedings vacated the first floor portion of the suit premises in favour of the previous landlady but the said portion has not been returned to him.

9. Coming to the rule of suspension of rent on account of dispossession by the landlord, we should remember that ordinarily it follows from the principles of natural justice, equity and good conscience. This doctrine of suspension of rent emanates from clauses (b) and (c) defining rights and liabilities of the lessor as stated in Section 108 of the Transfer of Property Act, 1882. The learned Advocates of both the sides have relied upon several decisions.

10. From the side of the respondent reliance has been placed on the Bench decision of this Court in the case of Surendranath v. Stephen Court Ltd., 63 CWN 922 = (AIR 1960 Cal 346). The facts of that case are different. There the lessor failed to deliver a portion of the leased property to the lessee initially when the lease started. The question arose if the non-delivery of the portion of the property leased out would give any right for suspension of the rent. It was held as follows:

"In the view that we take, we are definitely of opinion that the doctrine of suspension of rent has no application in India in cases of failure of the landlord to give possession to the tenant of a part of the demised premises. Whether the doctrine has application to cases of eviction of the lessee by the lessor from a part of the property leased, we do not decide."

In all cases we are to see whether suspension of rent is available to the tenant if he is dispossessed from any part of the suit premises. This point has not been decided in the case just mentioned as indicated by the last sentence quoted.

11.- The decision in Krishna Chandra Ray v. Surendranath Bandopadhyaya, 36 Cal WN 72 = (AIR 1932 Cal 385) is by a Division Bench of this Court consisting of Suhrawardy and Graham, JJ., Suhrawardy, J., has spoken about suspension of rent in the following words,

"If a landlord by force or otherwise keeps the tenant out of possession of a portion of a holding, he thereby forces the tenant to accept the tenancy different from what he originally stipulated for. Moreover, it will create a new tenancy against the will of the tenant. I do not think that any Court of justice should encourage the landlord to dispossess his tenant and by keeping him out

of possession for some time succeed in creating a different tenancy. There is nothing to prevent the tenant profiting by the tortuous act of the landlord and holding the portion left to him without payment of rent. If the rent is suspended under the law, it is suspended not for a particular period but until the tenant is restored to possession of the original tenure

Graham, J. in his separate judgment also supported the principle of suspension of rent so that there might not be any incentive to landlords to keep their tenants out of possession. According to the principle laid down in this case suspension of rent will be available when the landlord by force or otherwise, meaning resorting to various other means, dispossesses a tenant from any portion of the leased property.

12. The Privy Council in the case of *Katyayani Debi v. Uday Kumar Das*, 30 Cal WN 1 = (AIR 1925 PC 97) had occasion to deal with the question of suspension of rent. It was a case of land leased out but not any house premises. But that does not matter as we are concerned with the principles of law relating to any immovable property leased out either land or house. Here the Judicial Committee held as follows:

"The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha."

13. In this connexion I am to refer to another relevant decision of a Division Bench of this Court in the case of *Nilkhantha Pati v. Kshitish Chandra Satpati*, reported in AIR 1951 Cal 338. The judgment was delivered by R. P. Mukherjee, J. on behalf of the Court agreed to by Lahiri, J. In that case it was found that the tenant was dispossessed by the landlord from a portion of the tenancy. Here on the question of dispossession, it has been stated as below:

"The Court has to consider whether the act of the landlord in dispossessing the tenant was a tortuous or a mala fide one or an inadvertent one. Are the facts such as to attract equitable rules for granting relief?"

The judgment goes on to say—

"The mere fact that the area dispossessed is a small one is not of an overriding importance so as to dissuade the Court from applying the principles of justice, equity and good conscience if the Court finds that the act of the landlord was definitely a tortuous one."

Lastly the decision asserts in the following language:

"If and when the landlord chooses to put the tenant in possession of the portion from which the latter had been dispossessed, he will be entitled to the rent and not till then."

14. The decision of the Supreme Court in the case of *Surendra Nath v. Stephen Court Ltd.* appearing in AIR 1966 SC 1361 which came up in appeal against the decision already referred to as mentioned in 63 Cal WN 922 = (AIR 1960 Cal 346) should also be noted.

The Supreme Court has said—

"On the one hand it does not seem equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property; in other words to borrow the language of Sir George Rankin, that he should enjoy a windfall. On the other hand it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property which he is taking appropriate measures for specific performance of contract. It seems to us that it will depend on the circumstances of each case whether a tenant would be entitled to suspend payment of rent or whether he should be held liable to pay proportionate part of the rent. On the facts of this case we are of the opinion that the tenant is not entitled to suspend the payment of rent but he must pay a proportionate part of the rent."

In the next paragraph of the judgment the Supreme Court made it quite clear about the application of the principle laid down in this particular case quoted below:

"We may make it clear that like the Privy Council, in *Ram Lal Dutt's case*, 70 Ind. App 18 = (AIR 1948 PC 24). We are not deciding that the doctrine of suspension of rent should or should not "be applied at all to cases of eviction of the lessee by the lessor from a part of the land, and if so, whether it is limited to rents reserved as a lumpsum and whether it is a rigid or discretionary rule — these questions will call for careful review when they are presented by the facts of a particular case."

It is quite clear, therefore, that the principles adopted in the case of *Surendranath* cannot be applied in the case before me, where the possession of a substantial portion of the tenanted house was taken by the landlady from the tenant-defendant on a plea of repairs but the tenant has not been restored to possession deliberately and compelling him to squeeze in only one room of the ground floor for so many years. Moreover, the present case is not a case, as I have already indicated earlier, where in spite of lease, the lessee has not been given possession of the demised premises as per contract and where other remedies may lie. This is not a case for recovery of rent or compensation from the defendant for the use of occupation of any property. The Supreme Court has not laid down any principles to be followed in a suit for eviction of the lessee by the lessor

on account of arrears of rent when the defendant has been dispossessed by the landlord from a substantial part of the tenancy to a great hardship to the latter during the continuance of the tenancy.

15. In view of the decision above on the question of suspension of rent, it cannot be held that only in case of dispossession of the tenant from a portion of tenancy by landlord by physical force, such tenant can get advantage of suspension of rent. The principle is that in a case where the landlord dispossesses his tenant from any portion of the leased property by exercising physical force, coercion, threat or any other trick or means or any fraudulent or mala fide process against the wish or will or natural inclination of the latter or where the landlord connives with or assists others directly or indirectly to dispossess the tenant or does something which is responsible for the dispossession of the tenant from any portion of the tenancy or by his acts or omission leads the tenant to part with possession of any portion of the property in lease against his will or consent or depriving him of the benefit or use of such property, the tenant so dispossessed shall be entitled to suspension of the entire rent if he so likes so long as he does not get back the portion from which he is dispossessed. The question of proportionate reduction of rent in case of partial dispossession by the landlord does not arise on the ground of the rent being fixed in lump or indivisible because the present suit is not one for recovery of arrears of rent or compensation but one for ejectment of the tenant on ground of arrears of rent fixed mutually for a particular premises clearly defined.

16. In the present case before me it has been proved by evidence that the suit premises became ruinous and dangerous. The local municipality gave notice to the owner landlady for repairs or demolition but to no effect. Notice was also served on the tenant in occupation under threat of proceedings. The tenant had to part with possession of the first floor portion of the suit premises so that repairs might be effected. The landlord got possession of the said portion but made no repairs. He started proceeding to get possession of the entire suit premises but it was found that there was no necessity for the tenant to vacate it as he had already vacated the first floor. The previous landlord did not do any repair works though she got possession of the first floor portion. On the other hand she sold the suit premises to the present plaintiff who also did not restore the possession of the first floor to the defendant. On the contrary she started the action in ejectment on ground of non-payment of rent. Clearly both the plaintiff and the previous landlady acted fraudulently to keep the defendant-tenant out of possession of the portion of the suit premises and they are responsible for the continued dispossession of the tenant. Their ac-

tions are mala fide and tortuous. The defendant-tenant, therefore, was justified to suspend payment of rent from May, 1961. Consequently the defendant cannot be held as a defaulter in payment of rent. There was no necessity to file any application under Section 17 (1) and (2) of the West Bengal Premises Tenancy Act, 1956.

17. Before I leave this point of law, I should mention a decision of a Single Judge of Bombay High Court in the Original Side in the case of Merwanji Mancherji Cama v. Syed Sirdar Ali Khan, (1899) ILR 23 Bom 510. In that case there was a lease for ten years. Before the expiry of the lease the defendant was obliged to vacate the premises under notices from the plague authorities. In this suit for arrears of rent, the defendant pleaded that he was not liable for rent for the period he was out of possession due to the notice of plague authorities as he was interfered with quiet enjoyment of the leased property. Fulton, J. held that when under the provisions of Act III of 1897 it became unlawful for the tenant to occupy the premises in the manner contemplated by the lease, there was no breach of the lessor's contract for quiet enjoyment by the lessee. The learned Judge, therefore, did not relieve the tenant of the rent nor did he pass any decree for damages against the plaintiff as claimed. The facts of the case are different from those appearing in the case before me. In the Bombay case there was no question of dispossession of the tenant by the landlord. There the landlord was in no way interested in the matter of dispossession. Neither did he get the possession of the tenanted premises. In the instant case the landlady got possession of the portion of the suit premises in fraudulent and mala fide manner and the defendant has not been restored to possession thereof quite deliberately in order to compel the defendant to vacate the suit premises in a high handed manner. Without expressing my views on the principle accepted in the Bombay case, I should only say that it is not applicable in the present case.

18. In the view I have taken on the question of suspension of rent as indicated above, I should hold that the appellate court below erred to find that the defendant-tenant was a defaulter in payment of rent. It should have been held that the tenant was not a defaulter and that no case had been made out for his eviction. As the main point as to the question of payment of rent has been decided by me against the plaintiff-respondent, I do not propose to deal with other points raised.

19. In the result, the appeal succeeds. The judgment and the decree of the learned Additional District Judge in the appellate court below are set aside and the dismissal of the suit by the trial court is hereby affirmed. The appellant shall get from the plaintiff respondent the costs in this appeal as well as in the appellate court below.

20. Mr. Banerjee, on behalf of the respondent, verbally prays for leave to file appeal under Letters Patent. It is refused.

21. The cross-objection is not pressed and the same is dismissed without costs. Appeal allowed.

AIR 1975 CALCUTTA 424

SABYASACHI MUKHARJI, J.

The Official Trustee of West Bengal, Petitioner v. Manichoor Ghosha and others, Respondents.

Originating Summons Suit No. 389 of 1972, D/- 30-5-1975.

(A) Succession Act (1925), S. 74 — Will — Construction — Bequest of income from residuary estate to several beneficiaries for life in defined shares — Clause providing for devolution on death of any beneficiary — Devolution per stirpes or per capita.

Clause 16 of the will read, "I give and bequeath the rest and residue of my estate referred to as 'my residuary estate' unto my Executor and Trustee upon Trust to collect the whole of the Income thereof and pay the same to the following persons (hereinafter referred to as the 'beneficiaries') for and during the term of their respective natural lives according to the shares mentioned against their respective names." Clause 17 read, "I will and direct that upon the death of any of the 'beneficiaries' hereinbefore mentioned my Executor and Trustee shall make over the share in the corpus in my residuary Estate represented by the income payable to him as mentioned in the last preceding clause hereof to his lineal male descendants then living per stirpes and not per capita absolutely and for ever provided nevertheless that if such beneficiary or beneficiaries shall die without leaving any lineal male descendants him or them surviving the benefit hereby intended to be conferred on his or their lineal male descendants shall be taken by the surviving beneficiaries and the lineal male descendants of such of the beneficiaries as may have died leaving such descendants absolutely and for ever." Sometime after the death of the testator one of the beneficiaries died without leaving lineal male descendants. The question was whether the deceased beneficiary's share in the corpus of the residuary estate of the testator should be distributed per stirpes or per capita. Held, if the proviso is treated as merely a proviso and part of the main clause then there being clear expression of the testator the principle of per stirpes and not per capita should be the guiding factor. If on the other hand, the proviso is construed as an independent provision though contained in a proviso to guide a different situation then contemplated by the main part of the clause, then there being no expression of the

testator that the said situation would also be guided by the principle of per stirpes and not the normal principle of per capita, it should be governed by the principle of per capita. In construing the entirety of clause 17 it appears that the situations contemplated by the main substantive part of clause 17 and the proviso are really two independent provisions of the Will and the latter provision should not be construed as merely a proviso to the first provision though couched in the expression of the proviso. If these two are intended to be two substantive provisions, then there being no express will of the testator that the principle of per stirpes should govern the principle of per capita which is the normal rule should govern. There is a further aspect to be borne in mind. The descendants are now the beneficiaries upon whom the interest has devolved upon the death of a beneficiary. It would be more equitable to construe that the testator intended that they should share equally in the contingency that has happened. (Para 3)

Cases Referred: Chronological Paras
(1949) 1 Ch 49 = (1948) 2 All ER 961 2
(1948) 2 All ER 131 = 92 SJ 377 2
(1913) 41 Ind App 51 (PC) 3

K. S. Roy with N. Mitter, for Petitioner;
P. K. Roy with J. Pugalia, for Respondents.

ORDER:— This is an originating summons for construction of the will of one Rai Bahadur Ganendra Chandra Ghosh, since deceased. It appears that he executed a Will on the 3rd February, 1934 in respect of movable and immovable assets. By the said will the testator had revoked his previous dispositions and the predecessor-in-interest of the plaintiff, that is to say, the Official Trustee of Bengal became the sole executor and the trustee. Clauses 16 and 17 of the said Will provide as follows:

"16. I give, devise, and bequeath the rest and residue of my estate and effects of whatsoever natural and wheresoever situated which I shall be seized and possessed of and not hereby or otherwise disposed of hereinafter referred to as "my residuary estate" unto my Executor and Trustee upon Trust to collect the whole of the Income thereof and pay the same to the following persons (hereinafter referred to as the 'beneficiaries') for and during the term of their respective natural lives according to the shares mentioned against their respective names:

1. My nephew Asoke Sri Ghosha 1/6th (one sixth)
2. My nephew Krishna Kishore Ghosha 1/6th (one sixth)
3. My nephew Joyatsen Ghosha 1/6th (one sixth)
4. My nephew Raratsen Ghosha 1/6th (one sixth)
5. My grand nephews Debabrata Ghosha, and Bhagabati Charan Ghosha in equal shares 1/9th (one ninth)
6. My Grand nephews Debabrata Ghosha, Satyabrata Ghosha, Priyabrata Ghosha

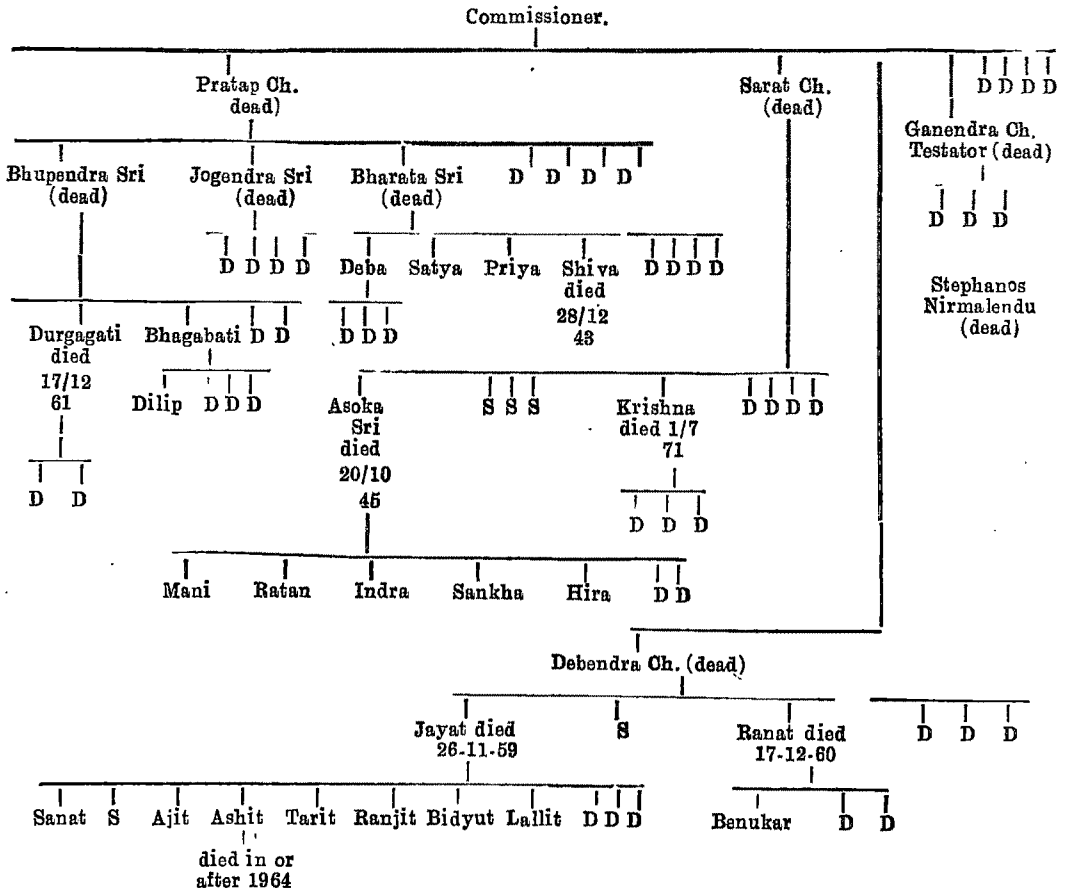
and Sibabrata Ghosha in equal shares 2/9th (two ninth).

17. I will and direct that upon the death of any of the 'beneficiaries' hereinbefore mentioned my Executor and Trustee shall make over the share in the corpus in my residuary Estate represented by the income payable to him as mentioned in the last preceding clause hereof to his lineal male descendants then living per stirpes and not per capita absolutely and for ever provided nevertheless that if such beneficiary or beneficiaries shall die without leaving any lineal male descendants him or them surviving the benefit hereby intended to be conferred on his or their lineal male descendants shall be taken by the surviving beneficiaries and the lineal male descendants of such of the beneficiaries as may have died leaving such descendants absolutely and for ever."

(Contd. on Col. 2)

Thereafter in October, 1934, first of several codicils was executed by the testator. By clause 8 it revoked clause 17 and substituted another bequest and added one Sm. Nalini Ghosha. On the 9th February, 1935, the testator executed another 3rd codicil whereby he revoked the said clause 8 of the first codicil and restored the bequest contained in clauses 16 and 17 of the said will. None of the several codicils touched clauses 16 and 17 of the will. On the 17th May, 1942 the testator died. On the 18th May, 1942 the said will of the testator along with the several codicils was probated by this Court and since the grant of the probate the plaintiff being the Official Trustee of West Bengal has been administering the estate in terms of the provisions contained in the said will. Some of the beneficiaries have died which will be clear from the genealogical table which is as follows:

Hare Chandra Ghosh (Dead)



On the 17th December, 1961, Durgagati died leaving two daughters and his widow. On the 1st July, 1971, Krishna Kishore died leaving him surviving three daughters and his widow and no lineal male descendants. The surviv-

ing beneficiaries were claiming payment of Durgagati's share in the corpus of the residuary estate of the testator. In the premises, the Administrator General has taken

out this originating summons for consideration of the three following questions:

- (a) In the facts and circumstances of the case are the defendants herein and the legal representatives of the said Asit Kumar Ghosha deceased and Krishna Kishore Ghosha deceased to the exclusion of all others entitled to the distribution among themselves of the share of Durgagati in the corpus of the said residual estate.
- (b) If so, is such distribution to or devolution upon the said defendants and the said legal representatives of the said Asit Kumar Ghosha and Krishna Kishore Ghosha both since deceased governed by the principle of per stirpes?
- (c) If not, should such distribution be made or devolution take place as per capita and/or in equal shares amongst the said defendants and the said legal representatives of the said Asit Kumar Ghosha and Krishna Kishore Ghosha both since deceased."

On the first question there is no dispute that the answer should be in the affirmative. It is also apparent on the construction of the relevant clauses of the Will and in the facts and circumstances the answer to the first question must be by saying 'yes'.

2. The main question, however, is whether such distribution or devolution in the facts and circumstances of the case that happened, should be governed by the principle of per stirpes or not. That will depend on the construction of clause 17 of the Will set out before. The testator has provided that upon the death of any of the beneficiaries mentioned the executor-trustee shall make over the share in the corpus represented by the income payable to him in clause 16 to his lineal male descendants then living per stirpes and not by per capita. By a proviso he has stipulated that if such beneficiary or beneficiaries should die without leaving any lineal male descendants, him or them surviving, the benefit thereby intended to be conferred on his or their lineal male descendants should be taken by the surviving beneficiaries and the lineal male descendants of such beneficiaries as might have died leaving such descendants absolutely for ever. If the two situations, that is to say, the situation contemplated by the main clause of the said clause 17 and the situation contemplated by the proviso are treated as part of the same clause and the proviso being treated only as an exception to the main clause, then it was argued that as the testator had mentioned that the lineal male descendants then living should take by per stirpes and not by per capita, that intention should also guide the proviso. It is indisputable that normally if there is no specific or clear expression, the devolution should take place by principle of per capita and not by principle of per stirpes. These

principles are well settled. Reliance in this connection may be placed on the observations in the case of *In re: Jeeves — Morris — Williams v. Haylett*, (1949) 1 Ch 49; in the case of *Jeffrey (deceased) Welch v. Jeffrey*, (1948) 2 All ER 131; and *Jarman on Wills*, 8th Edition 1583. Therefore, here in this case the testator was obviously aware of the normal rule and, therefore, by use of clear expression in the first part of clause 17 he has eliminated the operation of the principles of per capita and has provided for the principle of per stirpes. The question, is, whether the proviso should be guided by that principle of the substantive provision.

3. If the proviso is treated as merely a proviso and part of the main clause then there being clear expression of the testator the principle of per stirpes and not per capita should be the guiding factor. If on the other hand, the proviso is construed as an independent provision though contained in a proviso to guide a different situation then contemplated by the main part of the clause, then there being no expression of the testator that the said situation would also be guided by the principle of per stirpes and not the normal principle of per capita, in my opinion, it should be governed by the principle of per capita. In construing the entirety of Cl. 17 it appears to me that the situations contemplated by the main substantive part of Cl. 17 and the proviso are really two independent provisions of the Will and the latter provision should not be construed as merely a proviso to the first provision though couched in the expression of the proviso. If these two are intended to be two substantive provisions, then there being no express will of the testator that the principle of per stirpes should govern, in my opinion, the principle of per capita which is the normal rule should govern. There is a further aspect to be borne in mind. The descendants are now the beneficiaries upon whom the interest has devolved upon the death of Durgagati. It would be more equitable to construe that the testator intended that they should share equally in the contingency that has happened. Reliance in this connection may be placed on the observations of the Judicial Committee in the case of *Venkata Narasimha Row v. Parthasarathy Appa Row*, (1913) 41 Ind App 51 at p. 70 (PC). In the aforesaid view of the matter I answer question (b) in the negative and question (c) in the affirmative.

4. Therefore, I answer question (a) — yes, question (b) — no and question (c) — yes.

5. Cost assessed at 30 Gms. to each of the appearing parties to come out of the assets.

Questions answered.

AIR 1975 CALCUTTA 427

SABYASACHI MUKHARJI, J.

Sm. Sukla Chowdhury, Petitioner v. Miss Manjoly Tweedie and another, Respondents.
Suit No. 491 of 1974, D/- 28-4-1975.

(A) Civil P. C. (1908), O. 2, R. 3 — Court-fees Act (1870), S. 7 (xi) (cc) — West Bengal Court-fees Act (10 of 1970), S. 7 (iv) (a) — West Bengal Premises Tenancy Act (12 of 1955), S. 20 — Suit by A to evict B from premises on basis that B was tenant filed in Calcutta High Court — Subsequently C impleaded as trespasser and possession claimed against him also — Joining of several causes of action on same set of facts held was permissible — Value of suit for High Court's jurisdiction would be value of aggregate subject-matter of suit — High Court held had jurisdiction under S. 20, W. B. Premises Tenancy Act.

Where A instituted a suit in the Calcutta High Court to evict B from the suit premises on the basis that B was a tenant on a monthly rent of Rs. 225/- and subsequently by amendment of the plaint C was impleaded on the ground that he occupied the premises as a trespasser in violation of the agreement between A and B and possession was claimed against C also, it was held that the joining of several causes of action against B and C was permissible because the causes of action were based on the same set of facts and by virtue of Order 2, Rule 3 the High Court's jurisdiction would depend on the amount of value of the aggregate subject-matter of the suit which under Section 7 (xi) (cc) of Court-fees Act 1870 and Section 8, Suits Valuation Act 1877 read with Section 7 (iv) (a), W. B. Court-fees Act would exceed Rs. 54,000/- as claimed by the plaintiff in the plaint and therefore the High Court under Section 20, W. B. Premises Tenancy Act had jurisdiction to entertain the suit. AIR 1972 Cal 313, Rel. on; AIR 1922 Cal 500 and AIR 1951 Pat 364, Dist.; (1965) 69 Cal WN 469, Ref. (Paras 1, 2, 6)

Cases Referred : Chronological Paras
AIR 1972 Cal 313 = 1973 Ren CJ 84 6
(1965) 69 Cal WN 469 6
AIR 1951 Pat 364 6
AIR 1922 Cal 500 = 27 Cal WN 82 6

K. J. John, for Petitioner; R. K. Lala, for Respondents.

ORDER:— On the 11th of October, 1974 Srimati Sukla Chowdhury claiming to be the owner of premises No. 5, Kyd Street, Calcutta instituted Suit No. 491 of 1974 against the two defendants originally, namely, Miss Manjoly Tweedie and Miss Shamin Tweedie. It is the case of the plaintiff that on or about 14th March, 1973 at the request of one Mrs. Sofie Tweedie, mother of the said defendants the plaintiff agreed to let out one room attached with bath room and the kitchen on the south-east corner of the ground floor of premises No. 5, Kyd Street, Calcutta

to the said defendants on certain terms, inter alia, contained in paragraph 1 of the plaint filed. The said terms permitted the said defendants only to stay and occupy the said room and provided that the defendants should pay Rs. 225/- per month as rent on the 6th of every month according to English calendar, and the said defendants would have exclusive control and possession of the said room. It is further stipulated that the said defendants would return to the flat by 10 P. M. every night and that they should not create any nuisance nor carry on any illegal or immoral activities in the said flat. It was also stipulated that the said defendants would leave the flat when requested to do so by the plaintiff. It is the case of the plaintiff that pursuant to the agreement dated the 14th of March, 1973 the plaintiff delivered possession of the portion of the ground floor of the south-east corner of premises No. 5, Kyd Street, Calcutta. The said defendants took possession of the said flat and became a monthly tenant under the West Bengal Premises Tenancy Act. Then a few days after taking possession of the portion of the said premises, the defendants started coming late and creating nuisance and certain alleged acts of nuisance and alleged immoral activities are mentioned in the plaint. It is further stated that the said defendants failed and neglected to pay to the plaintiff rent since February, 1974 until the institution of the suit, as a result whereof, according to the plaintiff, the said defendants are defaulters for more than four months in the course of twelve months and became liable to be evicted from the portion of the said premises under the provisions of the West Bengal Premises Tenancy Act. It is alleged that on the 1st December, 1973 the said defendants informed the plaintiff that they would vacate the flat on the expiry of the month of December, 1973, but in spite thereof they have not vacated the said premises. It is further alleged that they are staying in the said portion of the flat in violation of the terms of the agreement as trespassers. The plaintiff stated that the said defendants violated the provisions of Cl. (m), Cl. (o) and Cl. (h) of Section 108 of the Transfer of Property Act, 1882 as a result whereof the said defendants and each of them became liable to be evicted from the said premises. The plaintiff has claimed rent @ Rupees 225/- per month from February, 1974 to September, 1974. The plaintiff has further claimed interest @ 12 per cent. per annum on the rent due from the respective due dates as and by way of damages. In the premises, the plaintiff has claimed Rs. 1,800/- on account of arrears of rent and Rs. 90/- on account of mesne profits and possession. The plaintiff has claimed decree for possession and mesne profits as mentioned in the plaint.

2. After the institution of the suit the plaintiff made an application for amendment and by an order passed by this Court on the

24th of March, 1975, the plaint has been amended by adding defendants Nos. 3, 4 and 5 as parties to the suit. Defendant No. 3 is the mother of the first two defendants and defendant No. 4 is the husband of the said defendant No. 3. It is stated in the amended plaint that defendants Nos. 3, 4 and 5 have wrongfully and illegally occupied a portion of the said premises as trespassers in violation of the agreement as aforesaid between the plaintiff and the defendants Nos. 1 and 2. The plaintiff has therefore claimed also possession from the said defendants. The plaintiff has valued the portion of the said premises and the suit at Rs. 54,000/- for the purpose of jurisdiction.

3. This is an application by the defendants Nos. 1 and 2 for several reliefs, namely — that the plaint be returned to the plaintiff for presentation to the proper court, alternatively relief be given under Section 17 (2) and 17 (2-A) (b) of the West Bengal Premises Tenancy Act, 1956, time be allowed to ask for particulars and file the written statement. In this petition the defendants Nos. 1 and 2 have set out the fact and have alleged that there is no relationship of landlord and tenant between the plaintiff and the defendants and that the suit according to the said defendants, did not disclose material particulars and was a gross abuse of the process of the court and was not maintainable in law. It is further stated that the legal tenant was the mother of the defendants who was regularly depositing the rent with the Rent Controller, Calcutta since February, 1974. It is further stated that this Court has no jurisdiction taking into account the provisions of Section 7 (xiii) (d) of the West Bengal Court-fees Act, 1970 read with Suits Valuation Act. According to the said petitioners the value of the suit would be Rs. 4590/- and inasmuch as the same was not within the jurisdiction of this Court, this plaint should be returned. In the alternative, it has been stated that this application should be treated as an application for extension of time for the deposit or payment of the amount as determined by this Court under Section 17 (2) and Section 17 (2-A) (b) of the Act.

4. The first question, therefore, is whether the suit is within the jurisdiction of this Court. Under the Calcutta City Civil and Sessions Courts Acts, after the amendment effected by Section 5 of the City Civil and Sessions Courts (Amendment) Act, 1969, the High Court will have only the jurisdiction to entertain the suit if the value of the suit exceeded Rs. 50,000/-. Prior to the amendment it was provided that the jurisdiction would attract provided the value of the suit or value of the premises exceeded Rupees 10,000/-. Now by the amendment the value of the premises is no longer relevant. What is relevant is the value of the suit.

5. Under Section 20 of the West Bengal Premises Tenancy Act, 1956, read

with the schedule thereto, the value of the suit must exceed Rs. 50,000/- only then the High Court will have jurisdiction to try and entertain the same.

6. The notional valuation of a suit for ejecting a tenant on the basis of preceding 12 months' rent under the Court-fees Act, 1870 is for computation of the Court-fees payable. That notional value and the value for purposes of jurisdiction shall be the same under Section 8 of the Suits Valuation Act, 1877. But the Court-fees Act is also applicable in Calcutta High Court now. Therefore, if it was a suit against the tenant, then the relevant question would have been the value of the suit which would have been valued on the basis of 12 months' rent and which in this case would be far below Rs. 50,000/- and this Court will not have jurisdiction to entertain the suit. But under Section 7 (vi) (a) of the West Bengal Court-fees Act, 1970 for recovery of possession of the immovable property against a trespasser where no declaration of title to property is either prayed for or necessary, value of the suit for court-fees purposes must be the amount to which relief is sought and as valued in the plaint subject to the provisions of Section 11 of the said Act. Now the value of the suit has been valued in this case in the plaint at Rupees 54,000/-. As mentioned hereinbefore, the plaint was originally against the defendants Nos. 1 and 2 on the basis that they were the tenants of the plaintiff. That cause of action has subsequently been amended to include the defendants Nos. 3, 4 and 5 on the basis that they are trespassers and therefore, recovery in this suit based on the same set of circumstances both against the tenants as well as against the trespassers. The question is in such a case what would be the basis of valuation. Counsel for the applicant contended before me that the suit should be considered as against the original defendant and should be held to be incompetent. He drew my attention to the decision in the case of *Girdharlal Govindji v. Pravin Chandra Ochhavlal*, (1965) 69 Cal WN 469 and contended that in view of The West Bengal Court-fees Act, 1970 the ratio of the said decision would not be applicable any longer. In this connection reliance may be placed on the decision of this Court in the case of *Ramdayee v. Dhanraj*, AIR 1972 Cal 313 where it was held that where a suit was filed for recovery of possession of Schedule A premises against tenant defendant No. 1 and for possession of B Schedule premises against defendants 1 and 2 as a trespasser for a declaration of title in respect of B Schedule premises and for damages, the suit was not bad for multifariousness as common questions of fact and law would arise if suits in respect of A and B Schedules were filed separately. Therefore, in this connection reference may be made to the provisions of Order 2, Rule 3 (1) which provides the plaintiff might unite

in the same suit several causes of action against the same defendant or the same defendants jointly and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants might unite such causes of action in the same suit. Sub-rule (2) of Rule 3 provides that where causes of action are united the jurisdiction of the Court as regards the suit should depend on the amount or value of the aggregate subject-matters at the date of the institution of the suit. I am therefore of the opinion that the combination of the several causes of actions against the defendants Nos. 1 and 2 as well as the defendants Nos. 3, 4 and 5 on the same set of facts was permissible as was done by the amendment of the plaint because the causes of action against these defendants are on the same set of facts. If that is the position then by virtue of Order 2, Rule 3 the jurisdiction of the Court will depend on the amount or value of the aggregate subject-matter of the suit. Now the amount or value of the aggregate subject-matter of the suit after the amendment would be over Rs. 54,000/- as claimed by the plaintiff by virtue of Section 7 (vi) (a) of the West Bengal Court-fees Act, 1970. After the amendment of the plaint the amendment would relate back to the date of the institution of the suit and on that date therefore the Court would have jurisdiction. In the premises I am unable to accept the contention that this suit is not maintainable on the ground of jurisdiction. Counsel for the applicant drew my attention to the decision in the cases of *B. N. W. Railway v. Sadram*, AIR 1922 Cal 500 and in *Sri Ram v. Bindeshwari*, AIR 1951 Pat 364. In my view the ratio of the said decisions are not applicable to the problem that I have to decide in this case. In the premises I need not discuss the said decisions in detail. The first prayer of the petition therefore fails.

7. The second prayer of the petition is that relief be given under Section 17 (2) and under Section 17 (2-A) (b) of the West Bengal Premises Tenancy Act, 1956. Under sub-clause (b) of Section 2-A of Section 17 it is stated having regard to the circumstances of the tenant the Court might permit the tenant to deposit or pay rent in such instalments as the Court might fix. Therefore it is necessary to determine in order to entitle to this right there must be circumstances entitling the tenant to obtain such relief. No circumstances indeed have been mentioned in the petition. In the premises I am of the opinion that the petitioner is not entitled to alternative relief as asked for. In the premises this application fails. The application is dismissed. Costs cost in the cause. Certified for counsel.

Application dismissed.

AIR 1975 CALCUTTA 429

CHITTATOSH MOOKERJEE AND
S. K. BHATTACHARYYA, JJ.

Manindra Nath Ghose, Appellant v. Sm.
Ashalata Mitra and others, Respondents.

Letters Patent Appeal No. 185 of 1974,
D/- 17-4-1975.

(A) Tenancy Laws — Calcutta Thika Tenancy Act (1949), S. 2 (5) — Thika tenant — Who is. (Decision of M. M. Dutt, J. (Cal), Reversed).

A person in order to establish thika tenancy must fulfil the following conditions :

- (i) He holds under a registered lease or otherwise land.
- (ii) he has either erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purposes.

Section 2 (5) also makes thika tenancy heritable and transferable. Three categories of persons are expressly excluded from the ambit of definition of a 'thika tenant' viz. (a) person holding a lease in perpetuity, (b) a person holding under a registered lease for a duration expressly stated to be for a period of not less than 12 years and (c) a person holding land under another person and using and occupying the land as a khatal. Section 30 of the Act also bars application of the Act to certain lands.

(Para 9)

In the instant case after the term of the registered lease had expired the lessee admittedly held over i.e. a new tenancy was created in accordance with the provisions of Section 116 of the T. P. Act. It cannot be said that the lessee was not a thika tenant merely because the structures were erected by him prior to the date of the new tenancy by holding over. (1962) 66 Cal WN 338 (352, 353), Held obiter.

(Para 10)

If it was held that only those who erected or acquired structures after obtaining a lease of the land would be thika tenants within the meaning of S. 2 (5), same would have the effect of excluding a large number of thika tenants who might otherwise fully satisfy the requirements of Section 2 (5) and thereby ameliorative provisions of the Act would be unjustly denied to them. The statute was enacted to give protection to a class of tenants of land who had erected structures but had only precarious right in land. This interpretation is likely to defeat the objects of this social legislation. Decision of M. M. Dutt, J. (Cal), Reversed.

(Para 13)

Cases Referred : Chronological Paras

AIR 1965 Cal 55 = 68 Cal WN 1036	3, 8
(1962) 66 Cal WN 338 = ILR (1962) 1 Cal	
1	5, 6, 7, 8
AIR 1949 FC 124 = 1949 FCR 262	3
AIR 1927 Cal 725 = 31 Cal WN 973	3

M. N. Ghose and J. R. Ganguli, for Appellant; R. P. Bagchi and Subrata Roy, for Respondents.

CHITTATOSH MOOKERJEE, J.—This Letters Patent Appeal is at the instance of the defendant. On August 9, 1954, Kali Charan Mitra and Shyama Charan Mitra, predecessors-in-interest of the plaintiff-respondents had granted a registered Indenture of Lease in favour of the appellant in respect of a vacant land measuring more or less two cottahas comprised in premises No. 32/2, Chakraberia Road for a term of twelve years certain with effect from 9th day of August 1954 at a monthly rental of Rs. 25/- only excluding all Corporation taxes payable on or before the 7th day of every succeeding month. The lessors and the lessee inter alia agreed that the lessee would be allowed to construct a two-storied masonry building with corrugated iron/abbestos roof according to plan sanctioned by the Calcutta Corporation but no permanent structures would be raised. The lessors further allowed the lessee to construct a permanent privy with drainage system at his own cost according to Municipal rules. Under Cl. 10 of the said Indenture of lease, the entire structures including privy, water taps, electricity connection if built by the lessee and if not removed by him within a reasonable time after the expiry of the lease, were to be treated as the property of the lessors, who in that case, before taking possession of the land and structures would have to pay an amount equivalent to the cost price of the structures, privy, water taps, drainage, electricity connection and all developments made for the land after deducting depreciation of twenty per cent. of the costs. It is unnecessary for our present purpose to refer to the other provisions contained in the Indenture of lease.

2. It is not disputed that in view of the provisions of Section 2 (5) (b) of the Calcutta Thika Tenancy Act, 1949, the above Indenture of lease in favour of the defendant appellant was not governed by the said Act, but it is admitted that after the expiry of the terms of the lease of 12 years certain provided in the said Indenture of lease, the defendant-appellant had held over and the lessors had assented to continuance of his possession. The plaintiff respondents in paragraph 6 of the plaint have themselves pleaded that after the expiry of the aforesaid lease, the defendant lessee had 'held over' within the meaning of Section 116 of the Transfer of Property Act under the same terms and conditions. In the eye of law the said term 'holding over' after the expiry of the term of the lease created a new tenancy in favour of the defendant appellant.

3. It is settled law now that when a tenancy is created by holding over under Section 116 of the Transfer of Property Act, although the old possession may continue under the terms of the lease which had expired, in the eye of law a new tenancy arises.

See the cases of Bengal National Bank Ltd. v. Raja Janaki Nath Roy, 31 Cal WN 973 = (AIR 1927 Cal 725); Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden, 1949 FCR 262 = (AIR 1949 FC 124) and other cases considered by P. N. Mookerjee and T. P. Mukherji, JJ. in the case of Satadal Basini Dasi v. Lalit Mohan Dey, reported in 1968 Cal WN 1036 = (AIR 1965 Cal 55). It may be noted in the instant case the lease in favour of the appellant was not renewed in terms of any clause in the Indenture of lease providing for exercise of option of renewal.

4. The principal point in this appeal is whether or not the said tenancy of the defendant appellant would be governed by the provisions of the Calcutta Thika Tenancy Act, 1949. In the event the defendant appellant became a thika tenant after a new tenancy was created as a result of his holding over, then the suit for ejectment and for other reliefs brought by Kali Charan Mitra, since deceased, the predecessor in interest of the respondents was plainly not entertainable in civil court. On the other hand, if the defendant's tenancy was not governed by the Calcutta Thika Tenancy Act the decree for eviction passed against him must be sustained.

5. M. M. Dutt, J. dismissed the second appeal of the defendant lessee, appellant before us, because he felt himself bound by the observations of P. B. Mukherji, J. (as he then was) in the case of Annapurna Seal v. Tincowrie Dutt, reported in (1962) 66 Cal WN 338 at pp. 352-353.

6. We have given our anxious consideration to the matter but we are unable to hold that the decision in Annapurna Seal's case (supra) has any manner of application to the facts of the present case. In Annapurna Seal v. Tincowrie Dutt, (1962) 66 Cal WN 338 (supra) originally in the year 1925 an indenture of lease had been granted in favour of the predecessor in interest of the lessees who were respondents in that appeal for a term of twelve years. In the year 1925-26 the lessees had built certain structures on the said land. After the said lease had expired, in the year 1937 a fresh lease was granted for another period of 12 years from 1st July, 1937. On these facts the question that arose for determination in the case of Annapurna Seal (supra) was whether the defendants under the second lease of 1937 could be called thika tenants within the meaning and interpretation of that expression under the Calcutta Thika Tenancy Act (vide the judgment of P. B. Mukherji, J. (as he then was), at page 342, right-hand column, second paragraph). Both P. B. Mukherji, J. (as he then was) and Bachawat, J. (as he then was) found that after the determination of the second lease of 1937 there was neither any holding over nor was there any renewal of lease. Their lordships further found that the second lease of 1937 was not only in respect of a bare land but the same included structures.

(See the judgment of P. B. Mukherji, J. at p. 352, second paragraph). Similarly, Bachawat, J., at page 359, of the Reports, left-hand column, 4th paragraph, held that when the lease dated the 5th July, 1937 was executed the lessees had already built a two-storeyed building and structures with corrugated sheet roofing for residential and business purposes. Bachawat, J. agreed with the conclusion of P. B. Mukherji, J. (as he then was) that as the registered lease dated July 5, 1937 was for a term of 12 years certain the lessees were not *thika* tenants in view of Section 2 (5) (b) of the Calcutta *Thika* Tenancy Act. These findings accordingly were sufficient for disposal of the said case. Bachawat, J. did not consider the further question which appeared to be of an academic nature as to whether a person who was originally excluded under Section 2 (5) (b) from becoming a *thika* tenant, could claim to have become a *thika* tenant during the period he held over under Section 116 of the Transfer of Property Act.

7. Thus the passage quoted by the learned Judge sitting singly in his judgment under appeal (at page 8 of the paper-book) represented only the views of P. B. Mukherji, J. (as he then was) and it does not appear that Bachawat, J., had concurred with these observations. Further, having regard to the facts and circumstances of the case these observations appear to be in the nature of an obiter as they were not necessary for the determination of the points which arose before the Division Bench in the case of *Annapurna Seal v. Tincowrie Dutt*, (1962) 66 Cal WN 338 (supra). Further, we are inclined to think that P. B. Mukherji, J. in the above passage did not endeavour to lay down any general proposition of law inasmuch as he had clearly indicated that in the facts and circumstances of the said case it was impossible to discover how and by what legal process the respondent had become a *thika* tenant. We have already pointed out that in the said case the demise made in July, 1937 was not in respect of bare land but land adorned with structures. Secondly, the said lease itself was covered by Section 2 (5) (b) and the lessees were accordingly excluded from becoming *thika* tenants.

8. P. N. Mookerjee and T. P. Mukherji, JJ. in their judgment in the case of *Satadal Basini Dasi v. Lalit Mohan Dey*, reported in 68 Cal WN 1036 = (AIR 1965 Cal 55) (supra) (at p. 1041 of Cal WN) = (at p. 57 of AIR) had noticed the submission made before them that the two learned Judges who constituted the Division Bench in *Annapurna Seal's* case, (1962) 66 Cal WN 338 (supra) had followed different lines of reasonings although they reached the same conclusion. The Division Bench in *Satadal Basini Dasi's* case (supra) deemed it unnecessary to consider the said submissions regarding the apparent inconsistencies in the modes

of approaches of the learned Judges who decided *Annapurna Seal's* case (supra).

9. In our view, in the facts and circumstances of the case the defendant, during the period he held over, ought to be considered a '*thika* tenant' within the meaning of Section 2 (5) of the Calcutta *Thika* Tenancy Act. A person in order to establish *thika* tenancy must fulfil the following conditions:

- (i) He holds under a registered lease or otherwise land.
- (ii) he has either erected or acquired by purchase or gift any structure on such land for residential, manufacturing or business purposes.

Section 2 (5) also makes *thika* tenancy heritable and transferable. Three categories of persons are expressly excluded from the ambit of definition of a '*thika* tenant' viz. (a) person holding a lease in perpetuity, (b) a person holding under a registered lease for a duration expressly stated to be for a period of not less than 12 years and (c) a person holding land under another person and using and occupying the land as a *khatal*. Section 30 of the Act also bars application of the Act to certain lands.

10. In the instant case, after the term of the registered lease in his favour had expired the lessee admittedly held over. In other words, a new tenancy had been created in accordance with the provisions of Section 116 of the Transfer of Property Act. The said lease, it is not disputed, was from month to month. The defendant appellant also owned the structures which stood on the land in question. But he erected such structures during the currency of the registered lease in his favour and not after the date he began to hold over under Section 116 of the Transfer of Property Act. We are unable to hold that the defendant appellant cannot be considered a *thika* tenant merely because the structures were erected by him prior to the date of the commencement of his new tenancy by holding over. So long as the term of the registered lease subsisted, Section 2 (5) (b) of the Calcutta *Thika* Tenancy Act had precluded the present appellant from claiming the status of a *thika* tenant. But as already stated, after the expiry of the said registered lease a new monthly tenancy having arisen by holding over in his favour and he being still the owner of the structures erected by him he fulfilled all the necessary conditions of Section 2 (5). Thus he had become a *thika* tenant.

11. At this stage we may consider the submission of Mr. Bagchi, learned Advocate for the respondents, that these structures immediately after the registered lease expired by efflux of time had vested in the lessor. We have already referred to clause 10 of the Indenture of lease under which the lessee was entitled to remove the structures privy, water tap and other installations erected by him

within a reasonable time after the expiry of the lease and only on his failure to do so the lessors would be entitled to claim rights over the same subject to the payment of an amount equivalent to the cost price of the said structures and other installations. In the instant case, presumably, immediately upon the determination of the registered lease, by efflux of time, a new tenancy by holding over was created in favour of the defendant-appellant as a result of payment and acceptance of rent. According to the plaintiffs themselves the said new tenancy was subject to same terms and conditions as those embodied in the said registered Indenture of lease. Accordingly clause 10 was still applicable to the new tenancy. It may be pointed out that in the rent receipts granted during the said period the plaintiff-respondents described the defendant appellant as 'thika proja' (vide Exhibits (B1) and (B2)). Further, it appears that Kali Charan Mitra, since deceased, the predecessor-in-interest of the respondents, in his application under Order 40 of the Code of Civil Procedure filed in Title Suit No. 34 of 1961 for partition with his co-sharers described the item of property No. 32/2, Chakraberia Road as under occupation of two thika tenants, according to the particulars, the present appellant was one of them (vide Exhibit 'N').

12. The learned Munsif in decreeing the suit out of which this appeal arises in favour of the plaintiffs directed the defendant to deliver vacant possession after removing the standing structures therein within two months from the date of the judgment. In case the defendant failed to remove the structures within the said period, then standing structures were to vest in the plaintiffs and the plaintiffs would be entitled to take possession of the same after payment of the cost price of the same less twenty per cent., as per lease deed dated August 9, 1954. Directions were given also regarding determination of the price. The plaintiffs did not prefer any appeal against the said part of the decree of the trial court and did not also file any cross-objection in the appeal preferred by the defendant appellant against the said decree for recovery of possession. For all these reasons we are unable to hold that immediately after the expiry of the term of the registered deed the structures which were admittedly erected by the defendant during the terms of the above registered lease had vested in the lessor. This was not the position under the general law of this country nor did the contract between the parties provide for the same. In the result, we hold that the defendant appellant must be considered to be the owner of the structures.

13. We have already observed that merely because the structures were erected by the defendant appellant during the term of the lease for twelve years and during the currency of which he was excluded from the

operation of the Calcutta Thika Tenancy Act, he was not precluded from claiming the status of thika tenant after a new lease had arisen by operation of S. 116 and such new lease admittedly was not covered by Section 2 (5) (b) of the Calcutta Thika Tenancy Act. We find nothing in Section 2 (5) to indicate that in all cases of thika tenancy a person must first take lease of the land and only thereafter either erect the structures or acquire the same by purchase or gift. The law contemplates a thika tenant must be owner of the structures either by erecting them or by acquiring the same and at the same time must be holder of a subsisting lease of land other than lease covered by clauses (a), (b) and (c) of subsection (5). If it was held that only those who erected or acquired structures after obtaining a lease of the land would be thika tenants within the meaning of Section 2 (5), same would have the effect of excluding a large number of thika tenants who might otherwise fully satisfy the requirements of Section 2 (5) of the Calcutta Thika Tenancy Act and thereby ameliorative provisions of the Thika Tenancy Act would be unjustly denied to them. We are unable to read this statute in such a manner. The statute was enacted to give protection to a class of tenants of land who had erected structures but had only precarious right in land. This interpretation is likely to defeat the objects of this social legislation. It can be very well visualised that a person may first acquire structure by purchase from the owner and thereafter obtain a lease of the land. Similarly, in expectation of granting of a lease of the land, one may erect structures. But once lease of the land is granted in favour of a person who has acquired the structures by sale or gift or has erected the structures he would be clothed with all the rights of a thika tenant. Ownership of the structures unaccompanied by tenancy right in land would fall short of the definition of a thika tenant. Similarly, a tenancy right in bare land without ownership of the structures either by erection or by acquiring the same by sale or gift would not make a person thika tenant. But where both the conditions are present viz. tenancy of land and ownership of structures a person would be a thika tenant within the meaning of Section 2 (5) subject to exception in clauses (a), (b) and (c). It is immaterial whether or not the act of obtaining such tenancy right preceded the erection of structures or acquisition of the same by purchase or gift.

14. For the aforesaid reasons we hold that the defendant appellant after he began to hold over in terms of Section 116 of the Transfer of Property Act, had become a thika tenant and, therefore, the instant suit brought in the civil court by the plaintiff respondents for recovery of possession was not maintainable and the civil court had no jurisdiction to pass any decree.

15. The orders passed in this proceeding, however, will not preclude the plaintiff-respondents from instituting proceedings, if any, under appropriate provisions of law and the decision made in this case would be without prejudice to the rights and contentions of the parties therein. It is, however, made clear that the status of the defendant appellant was that of a thika tenant and his tenancy was governed by the Calcutta Thika Tenancy Act.

16. Subject to these observations, we allow the appeal, set aside the judgment and decree passed in the second appeal and also those of the trial court and the lower appellate court. As the civil court has no jurisdiction, the plaintiff respondents would be at liberty to take back the plaint for filing a proper application in appropriate forum within a period of four months from the date of the arrival of the records in the trial court, in default of which the plaint shall stand rejected. The parties would bear their respective costs throughout.

S. K. BHATTACHARYA, J.:— I agree.

Order accordingly.

AIR 1975 CALCUTTA 433

R. BHATTACHARYA, J.

Mrs. Ajit Kumar Ray, Petitioner v. Jnanendra Nath Dey and others, Opposite Parties.

C. R. No. 2253 of 1974, D/- 5-9-1975.

(A) Civil P. C. (1908), O. 21, R. 97 — Resistance or obstruction to delivery of possession of property by third party — Whether judgment-debtor should be joined as a party to application by decree-holder depends on allegations made against him — At any rate third party obstructor cannot make a grievance about non-joinder of judgment-debtor.

(Paras 5, 6)

(B) Calcutta High Court Civil Rules and Orders, R. 208 — Application under, for police help in execution of decree — Powers of Court — When to be exercised.

The prayer for police help may be made by the decree-holder either in an application under Rule 97 and/or 98 of Order 21, C. P. Code or separately without filing such application or before any specific obstruction made by a particular person. But Rule 208 can be used only in exceptional cases and not too readily, when the court will be of opinion that unless police help is given there will be danger to the public peace on account of the execution of the decree. This application for police help is a discretionary matter to the judicial officer who deals with it.

(Paras 7, 8)

(C) Civil P. C. (1908), S. 115 — Application by decree-holder for police help in execution of decree alleging resistance by judgment-debtor's wife — Order granting police help without applying mind to allegations and without giving reasons set aside in revision. (Paras 9, 10)

Barun Kumar Roy Chowdhury, for Petitioner; Amarendra Narayan Bagchi, for Opposite Parties Nos. 1, 2 and 4.

ORDER:— This revisional application has been filed by one Mrs. Ajit Kumar Roy, the alleged resister, in execution case of a decree for recovery of khas possession of the suit premises against the order dated 20-4-74 passed by the 9th Bench of the City Civil Court, Calcutta, in Miscellaneous Case No. 553 of 1972 allowing a prayer for police help at the time of delivery of possession by the court's bailiff as prayed for by the decree-holders Jnanendra Nath Dey and others, the opposite parties before this Court.

2. The relevant facts to be stated in brief are simple. The decree-holder-petitioners obtained a decree for eviction against the judgment-debtor Ajit Kumar Roy in respect of the Suit No. 8 at premises No. 79/28, Lower Circular Road, Calcutta. The decree in question was put in execution. According to the allegation of the decree-holders, on 22-6-72 the bailiff of the court accompanied by one of the decree-holders, Amal Kumar Dey, went to the suit premises for effecting delivery of possession. One lady representing herself to be the wife of the judgment-debtor stated that the judgment-debtor was absent and on hearing the contents of the writ for delivery of possession refused to comply with the direction in the writ and offered resistance and obstructed the bailiff in the matter of delivery of possession. It is alleged that the bailiff apprehending breach of peace had to come back without executing the decree. Thereafter, an application was filed in court by the decree-holders under Order 21, Rules 35, 97 and 98 of the Code of Civil Procedure. It was stated in the petition further that Mrs. Ajit Kumar Roy had no right to offer resistance to the bailiff in executing the writ for delivery of possession and that it was very much necessary to pass an order for police help at the time of execution of the writ for delivery of possession. In that application Mrs. Ajit Kumar Roy was made the opposite party. A notice was served upon Mrs. Roy after the application was registered as Miscellaneous Case No. 553 of 1972. Mrs. Roy appeared and ultimately filed objection. On the date when the matter came up for ultimate hearing there was a prayer for adjournment from the side of Mrs. Roy and it was refused. The matter was, therefore, heard ex parte. The learned Judge

of the City Civil Court on perusal of the petition supported by affidavit found that the decree-holders obtained a decree against the judgment-debtor Mr. Ajit Kumar Roy in respect of the Suit No. 8 as already stated and that on 22-6-72 when the court's bailiff went to take delivery of possession in execution of the decree the said judgment-debtor, Mr. Roy refused to deliver vacant possession and resisted the bailiff so that he could not enter into the suit premises for giving delivery of possession. The learned Judge accepted the allegations about resistance made in the petition on the ground that the judgment-debtor did not adduce any evidence to deny resistance. Ultimately, the learned Judge allowed the application and passed orders for police help for the delivery of vacant possession of the suit premises. Against this order the instant revisional application has been filed.

3. I have heard Mr. Roy Chowdhury, the learned Advocate appearing on behalf of the petitioner and Mr. Bagchi for the decree-holders-opposite parties.

4. Mr. Roy Chowdhury first contended that the order of the learned Judge is bad because in the Miscellaneous Case started upon the application under Order 21, Rule 97 for police help the judgment-debtor was not a party. Secondly, it has been urged by Mr. Roy Chowdhury that in a case for police help the learned Judge ought to have followed the provisions contained in Rule 208 of the Civil Rules and Orders framed by this High Court for the guidance of the Subordinate Courts. His grievance is that the learned Judge did not follow the mandatory provision indicated in that rule. Lastly, Mr. Roy Chowdhury's contention is that the learned Judge below did not apply his mind to the facts and circumstances as also to the allegations made by the petitioner-decree holders and that his decisions are without any material or basis.

5. With regard to the first question whether the judgment-debtor should be made a party or not it depends, in my view, upon the allegations made by the decree-holders on the question of resistance or obstruction as the case may be. Rule 97 of Order 21 of the Code of Civil Procedure says that where the decree-holder for possession of immovable property, as in the present case, is resisted or obstructed by any person in obtaining possession of the property he may make an application complaining about such resistance or obstruction. According to sub-rule (2) on receipt of such application the court shall fix a date for investigating the matter and shall summon the party against whom the application is made, to appear and answer the same. Rule 97 speaks about resistance or obstruction

made by any person. It does not specify the judgment-debtor alone to be the resister. The elementary principles of natural justice is that whenever any allegation is made against a particular person or persons it is the duty of the court to give an opportunity to that person or persons to be heard about the allegations made. There may be cases where the decree-holder makes some allegations against a third party without reference to the judgment-debtor. In that case, I think, it is not necessary for the court to call upon the judgment-debtor to answer or to show cause against the allegations made against the third party. The third party is the proper person to be impleaded in the proceedings so that he may get an opportunity to be heard. There may also be cases where the allegation is that the third party at the instance of the judgment-debtor or with his connivance made the obstruction. In that case not only the third party but also the judgment-debtor should be made parties and be given information about the allegations and opportunity to place their cases. Therefore, in my view, as already indicated, it cannot be universally stated that in all cases of allegations of obstruction the judgment-debtor must be made a party.

6. In the present case, the decree-holders' allegation is that Mrs. Roy offered resistance and obstructions to the bailiff in the matter of execution of the writ of delivery of possession. In paragraph 6 of the application it has been further stated that the opposite party has been set up by the defendant judgment-debtor to illegally and wrongfully deprive the decree-holders of enjoying the benefits of the decree. It has been also stated in paragraph 5 that at the instigation of the judgment-debtor Mrs. Roy, his wife, without any just cause offered obstruction and resistance. On the very face of the allegations there can be no doubt whatsoever that the judgment-debtor should have been given notice about the application of the decree-holders giving him an opportunity to submit proper reply. But here Mr. Roy Chowdhury does not represent the judgment-debtor. Mrs. Roy can have no grievance for non-joinder of the judgment-debtor. She could have relied on her own case and statement made in the petition of objection. This ground of non-joinder of judgment-debtor would have been a good defence from the side of the judgment-debtor himself. However, in the present facts and circumstances, I do not think that the petitioner before me can have any grievance for the non-joinder of the judgment-debtor. Of course, even in the absence of any representation from the judgment-debtor it was the duty of the learned Judge below to make the judgment-debtor a party and a notice

should have been served upon him for proper adjudication of the dispute. However, in view of my discussion above, I do not think that the petitioner can have any assistance from the non-joinder of the judgment-debtor in the Miscellaneous Case.

7. The next contention of Mr. Roy Chowdhury is that in view of Rule 208 of the Civil Rules and Orders framed by this Court, the order passed by the learned Judge was illegal and without jurisdiction as the mandatory provision contained therein has not been followed. The relevant portion of Rule 208 namely, sub-rule (1) says that if any decree-holder prays for police help in execution of a decree, he shall state in his application the full reasons thereof supported, if required, by an affidavit. The court after the submission of that application in spite of the affidavit filed by the decree-holder may further examine the decree-holder or such other person as it thinks fit for coming to a decision as to whether or not there is any necessity for police help. Upon consideration of all the facts and circumstances when the court will be clearly of opinion that unless police help is given the execution will not be effected without serious danger to the public peace, he will then record his reasons for allowing such police help and request the police authority for extending help at the time of execution of the decree. It has been made quite clear that only in case of grave situation this extreme step should be taken by the court. This provision contained in Rule 208 can be used only in exceptional cases and not too readily, when the court will be of opinion that unless police help is given there will be danger to the public peace on account of the execution of the decree. This application for police help is a discretionary matter to the learned judicial officer who deals with it.

8. In this connexion Rule 98 of Order 21 of the Code of Civil Procedure should also be noted. There is no doubt that Rules 97, 98 and 99 are to be read collectively. Upon the filing of an application under Rule 97 and upon hearing the parties and considering the materials before it when the court is satisfied that there was resistance or obstruction without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, according to the Calcutta Amendment, it shall direct that the decree-holder be put into possession of the property. But in spite of the direction, if the decree-holder still resisted or obstructed then according to Rule 98 of Order 21, C. P. Code the person resisting or obstructing may be detained in civil prison as indicated therein. This is the

ordinary procedure in case of obstruction or resistance by the judgment-debtor or any other person as contained in Rules 97 and 98. The prayer for police help may be made by the decree-holder either in an application under Rule 97 and/or 98 of Order 21, C. P. Code or separately without filing such application or before any specific obstruction made by a particular person. There may be cases where the decree-holder may pray for police help due to the general disturbance in the locality for which execution without police help cannot be possible. Then without filing any application under Rule 97 of Order 21 an application may be filed direct before the court for police help. There may be cases where in spite of repeated obstruction by the judgment-debtor or any person at his instance the decree-holder cannot get possession, but the court's bailiff or the decree-holder faces serious breach of peace or personal danger at the time of execution of the decree. In that case also the court will consider whether police help will be essential for the execution of the court's decree to see that such decree is respected and executed. However, in the present case before me, I do not find any allegation made by the decree-holder that there was any serious breach of peace or apprehension of danger to the person of the decree-holder or the court's bailiff at the time of execution. Courts should remember that they should not readily grant police help whenever there would be any application for such relief. As clearly stated earlier only in case of grave situation or in cases where for the execution of the decree police help is essential such prayer should be granted. In the instant case undoubtedly no such case has been made out by the decree-holder.

9. The last contention of Mr. Roy Chowdhury is that the learned Judge of the City Civil Court did not apply his mind to the allegations made in the petition of the decree-holder. He has drawn my attention to the finding of the court. The finding is that at the time when the court's bailiff went to the premises for execution of the writ for delivery of possession the judgment-debtor Mrs. Roy made obstructions. "Mrs. Roy" is not a slip of pen. The very order indicates that from the start to the finish, the learned Judge had the impression that Mrs. Roy was the judgment-debtor and that she resisted the execution. There can be no doubt, therefore, that the learned Judge did not apply his mind at least to see who the actual resister was. According to the decree-holders, the wife of the judgment-debtor was the resister but the learned Judge found that the wife of the judgment-debtor was the judgment-debtor

herself. Mr. Roy Chowdhury's contention is no doubt acceptable specially in view of the fact that there is no reason given in the order that there was any grave situation created by the resister or that the police help was very much necessary.

10. In view of my findings above, this revisional application must succeed. I hereby, set aside the order of the learned Judge below passed on 20-4-74. The Rule is thus made absolute but without costs in the circumstances of this case.

11. Send down the records to the lower Court as quickly as possible and the learned Judge will proceed according to law with the execution case.

Revision allowed.

AIR 1975 CALCUTTA 436

R. BHATTACHARYA, J.

Chotalal Shaw, Appellant v. Ram Golam Shaw and others, Respondents.

Second Appeal No. 1436 of 1973, D/- 31-7-1975.

(A) Evidence Act (1872), S. 115 — Waiver — Party can waive even a mandatory provision in his favour.

Even if there is any mandatory provision which confers any right or privilege or advantage to any of the parties to the litigation, such right, privilege or advantage may be waived by the party in whose favour the provision of law stands.

(Para 6)

Waiver may be express or implied. It may be intentional or due to inaction or gross carelessness or absence of diligence on the part of the party having the right or advantage in his favour. The party having such right or privilege has a discretion to exercise the same.

(Para 6)

(B) West Bengal Premises Tenancy Act (12 of 1956), S. 17 (3) — Plaintiff's right to have defence struck off under the sub-rule can be waived — Right must be exercised in the trial Court and not in appellate Court.

The procedure referred to in S. 17 (3) is to be followed and complied with in the trial court where the suit is pending for hearing and decision and the plaintiff-landlord, if willing to exercise his right under sub-section (3) for getting the defence struck out, must do so in the trial court and not in the appellate court where the appeal awaits decision. That right again must be exercised before the defendant starts leading evidence in support of his defence against the grounds of eviction under Section 13 of the West Bengal Premises Tenancy Act. Once the trial

Court decides the case on merits on consideration of the evidence on record including that of the defendant adduced without any objection by the landlord and the suit or proceeding is disposed of, it will have no jurisdiction after the judgment to recall the same for the purpose of striking out the defence of the defendant which has already been considered for the decision of the case. (Para 8)

After the disposal of the suit by trial Court on merits, the suit comes to an end and in the appellate court there can be no question of striking out of the defence and proceeding with the hearing of the suit which has already been decided.

(Para 9)

Cases Referred: Chronological Paras
(1963) 67 Cal WN 501 9
(1913) 17 Cal WN 64 = 16 Ind Cas 849 6

Saktinath Mukherjee, Bhaskar Ghosh, Bimal Kumar Chatterjee, for Appellant; Pramatha Nath Mitter, Chandidas Roychowdhury and Dipankar Chakraborty, for Respondents.

JUDGMENT:— This second appeal by the defendant is against the decision of the Additional District Judge, Baraset reversing the judgment and the decree passed by the Munsif dismissing the suit of the plaintiff for ejectment against the defendant.

2. The plaintiff Ram Golam Shaw brought the suit against the defendant Ramdas Chotalal, a monthly tenant in respect of the suit premises at a rental of Rs. 23 payable according to English Calendar month. The allegations made in the plaint are that he has been carrying on a cloth business at a rented house. Due to the business at the rented house, the plaintiff is suffering inconvenience and wastage of money in spite of his having a house of his own. Moreover, the suit premises is very much suitable for his business. His landlord is demanding excessive rent for the room where he is carrying on business. He asked the defendant to vacate the premises but his request has been fruitless. The plaintiff, moreover, requires the suit premises for building and rebuilding as the house has become old and dilapidated. It has further been alleged that the defendant has been a defaulter in payment of rents from the month of October, 1970 to April, 1971. The plaintiff after service of notice of ejectment on the defendant filed the suit for eviction on the ground that he requires the suit premises for his own use and occupation and for building and rebuilding and also on the ground that the defendant has been in arrears of rent for seven months.

3. The defendant filed a written statement stating that he has been wrong-

ly described as Ramdas Chotalal Shaw, his name is Chotalal Shaw. The defendant has denied the allegation about non-payment of rent and challenged the correctness of the allegations that the plaintiff requires the suit premises either for reasonable requirement for his own use and occupation or for the purpose of building and rebuilding.

4. The learned Munsif upon consideration of the evidence came to the finding that in a previous suit the defendant signed his name as Ramdas Chotalal and that deposits of rents were made by the defendant describing himself as Ramdas Chotalal. He found that the defendant was correctly described. Regarding the arrears of rent, the learned Munsif found that the defendant duly deposited the rents for the alleged period of default and on hearing the parties upon an application filed under Section 17 (2) of the West Bengal Premises Tenancy Act, he was satisfied that there was no amount due to be deposited towards any alleged default and that the current rents were being deposited by the defendant month by month. The learned Munsif, therefore, found that there was no necessity for the defendant to deposit anything towards arrears of rent. On the question of reasonable requirement for the plaintiff's own use and occupation of the suit premises, the learned Munsif did not find any requirement as alleged by the plaintiff. There was a detailed discussion on the question of requirement and the plaintiff's plea was rejected. The issue relating to requirement of the suit premises for building and rebuilding was abandoned by the plaintiff in the trial court and not pressed. The suit of the plaintiff was, therefore, dismissed.

5. Against the dismissal of the suit by the trial court an appeal was taken by the plaintiff before the District Judge and the same was disposed of by the Additional District Judge, Baraset. Regarding the misdescription of the defendant, the learned Additional District Judge held that the defendant had been correctly described. Regarding the question of reasonable requirement of the plaintiff for use and occupation, the learned Judge concurred with the trial court that the plaintiff had not been able to make out a case for reasonable requirement for use and occupation. As for the ground of default in payment of rent, the learned Judge held that as during the pendency of the suit the defendant deposited the amount at the rental rate for the month of June, 1971 on 26th of July, 1972 beyond the 15th of the following month, the said deposit was not valid and therefore there had been a violation of the provision of Section 17 (1) and on the sub-

mission of the plaintiff-appellant the defence against delivery of possession was struck out and the finding of the trial court on the question of default was overruled. Accordingly, the first appellate court below allowed the appeal decreeing the suit after setting aside the decision of the trial court. Against the said judgment of the learned Judge, the instant appeal has been preferred by the tenant-defendant.

6. The first point that has been urged by the learned Advocate appearing on behalf of the appellant is that the learned Judge below erred in law in allowing the first appeal and decreeing the suit on the ground that there had been no valid deposit for the month of June, 1971 during the pendency of this suit and that there had been delay in making such deposit. It has been argued that the learned Judge below ought not to have struck out the defence in the appeal when no such prayer was made at any time in the trial court or during the trial of the suit. The contention of the appellant is that the right of the plaintiff-landlord to have the defence struck out for invalid deposit of any amount under Section 17 (1) was waived. To appreciate this submission on the part of the appellant, we are to note the relevant facts of the present case. Along with the appearance in the suit, the tenant-defendant filed a petition under Section 17 (1) and (2) of the West Bengal Premises Tenancy Act and an objection was filed by the plaintiff to that application. The defendant was permitted by the Court to deposit rents month by month during the pendency of the suit. The petition relating to the prayer under Section 17 (2) of the West Bengal Premises Tenancy Act was heard and on 18-3-71 the learned Munsif found that the challans filed by the defendant showing deposit of rents proved that all the rents from October, 1969 onwards had already been deposited in time and as such it was ordered that the defendant was not to deposit any further amount towards arrears of rent. Subsequent to this order, admittedly, there was a delay of about 11 days on the part of the defendant to deposit the amount at the rental rate for the month of June, 1971. Deposits in respect of other months were within time. The suit was heard in August, 1971 and during trial evidence was adduced on both sides. At no point of time in the trial court, the plaintiff exercised his right to have the defence struck out under Section 17 (3) of the West Bengal Premises Tenancy Act for non-deposit or invalid deposit of an amount equivalent to rent for any particular month during the pendency of the suit under Section 17 (1). Now the question arises whether

there was waiver on the part of the plaintiff as to his right under Section 17 (3) in respect of the invalid deposit of the rental amount for the month of June, 1971. According to the learned Judge below, the provision under Section 17 (3) is mandatory and therefore, it leaves no discretion to the Court to condone any delay in depositing the amount. Even if there is any mandatory provision which confers any right or privilege or advantage to any of the parties to the litigation, such right, privilege or advantage may be waived by the party in whose favour the provision of law stands. For citing an example, we may refer to the provision contained in Section 80 of the Code of Civil Procedure for service of notice upon the Government or the Collector of the District as mentioned therein before the institution of the suit. That provision is no doubt mandatory. The object of the notice is to give an opportunity to the Officers concerned as mentioned in the section to investigate the cause of the complaint or to make amends if thought fit before the Government is impleaded. This is a special advantage or privilege given to the authority of the State. This advantage or privilege given by law, can certainly be waived, that is to say the authority or the officers mentioned in Section 80 of the Civil Procedure Code are competent to waive the notice and they may be estopped by their conduct from pleading the want of notice even at a late stage of the trial if not already pleaded earlier. In this connexion the decisions of this Court in *Bhola Nath Roy v. The Secretary of State for India in Council*, (1913) 17 Cal WN 64 may be looked into. Waiver may be express or implied. It may be intentional or due to inaction or gross carelessness or absence of diligence on the part of the party having the right or advantage in his favour. The party having such right or privilege has a discretion to exercise the same. The landlord-plaintiff has under Section 17 (3) of the West Bengal Premises Tenancy Act a right to have the defence against delivery of possession struck out in case the defendant does not comply with the provisions of Section 17 (1) and (2) of the West Bengal Premises Tenancy Act but the plaintiff may or may not exercise that right. By acquiring such right the plaintiff may apply to exercise such right before the Court to put the tenant-defendant in precarious position. In case of non-compliance of Section 17 (1) and (2) the plaintiff, if he so chooses, may not file any application under Section 17 (3) of the West Bengal Premises Tenancy Act. Whatever the case may be, if the right under Section 17 (3) is not exercised by the plaintiff, the suit shall be decided on merits at the time of trial and the defendant at that time may not get re-

dress or benefit. In the present case, admittedly, the plaintiff knew that the defendant filed an application under Section 17 (1) and (2) of the West Bengal Premises Tenancy Act and that the Court allowed the defendant to deposit rental amounts month by month under Section 17 (1). The plaintiff was conscious of his own right given under Section 17 (3). The plaintiff before the starting of the hearing of the suit or before the defendant started leading evidence at the time of trial or at any point of time before the judgment was delivered, could have exercised the right to have the defence of the defendant against delivery of possession struck out. He could have asked the defendant to produce all the challans showing deposit of amounts equivalent to rent which were to be deposited by the defendant. But this was not done by the plaintiff. He made no attempt to exercise his right. He was not prevented by the defendant in any manner from exercising his right under Section 17 (3). No objection was raised during the trial by the plaintiff as to any illegal deposit made by the defendant for the month of June, 1971. On the other hand at the time of trial the defendant in due course entered into defence and adduced evidence on his side and examined witnesses without the least objection from the side of the plaintiff. With full knowledge of his right to have the defence against delivery of possession struck out, the plaintiff raised no objection to the defendant's evidence. The conduct on the part of the plaintiff and the facts and circumstances of this case clearly indicate that the plaintiff did waive his right given to him under Section 17 (3) of the West Bengal Premises Tenancy Act. There is no material to show that the plaintiff did not intentionally waive his right. His inaction to exercise his right or his gross carelessness or absence of diligence in the matter of taking action under Section 17 (3), even if there (sic) would amount to waiver when by such conduct the defendant has gained some advantage in his favour and when judgment had gone against the plaintiff. After the judgment had been passed against the plaintiff, he should not be heard for exercising the right under Section 17 (3) of the West Bengal Premises Tenancy Act in the appellate stage. If such right is allowed to be exercised by the plaintiff at the appellate stage to the prejudice of the defendant, when such right was not previously exercised by the plaintiff in spite of sufficient opportunity, it would be unjust, inequitable and against the principles of natural justice. This attempt to exercise right under Section 17 (3) of the West Bengal Premises Act at this late stage, cannot be regarded as bona fide and per-

missive. I should hold that the learned Judge below acted illegally causing great injustice by directing on the prayer of the appellant during argument, to strike out the defence of the defendant against delivery of possession. It is to be noted that in the memorandum of appeal filed by the plaintiff before the first appellate court, there was no ground touching Section 17 (3) of the West Bengal Premises Tenancy Act.

7. In the case before me, the finding of the trial court is that there was no arrear of rent at the time of hearing of the suit. The arrears as alleged by the plaintiff were all deposited in time including the amounts at the rate of monthly rent during the pendency of the suit except for the month of June, 1970. The plaintiff could be entitled to get a decree for eviction on the ground of arrears of rent as alleged by him but the allegations proved incorrect. When the suit was filed by the plaintiff, the defendant was not in arrear of rent for any month and therefore, the suit could not succeed even if there was any default in deposit of amounts at the rate of the rent per month, during the pendency of the suit. At best that could give the plaintiff a right to have the defence against delivery of possession struck out. But, simply by getting the defendant's defence against delivery of possession struck out, the plaintiff cannot succeed in his case on the ground of default if the arrears of rent as contemplated in Section 13 of the West Bengal Premises Tenancy Act be not proved. Even if the plaintiff could get the benefit under Section 17 (3) of the West Bengal Premises Tenancy Act, that would not have given any decree on the ground of default in payment of rent unless the ground is proved. The learned Additional District Judge below erred in law to strike out the defence against delivery of possession of the defendant. He ought to have held that the appellant had already waived his right under sub-section (3) of Section 17 of the West Bengal Premises Tenancy Act during the pendency of the suit. He cannot in the appeal after the suit had been decided on merits, pray for striking out the defence of the defendant to undo a judgment passed against him. The appellate court should not encourage such unjust, illegal and unreasonable demand of the plaintiff.

8. From another standpoint, the action taken by the appellate court below to strike out the defence cannot be held to be legal and sustainable. Sub-section (1) of Section 17 of the West Bengal Premises Tenancy Act says that within the period mentioned therein after appearance in the suit or proceeding filed by the landlord for ejectment of the tenant

on any ground mentioned in Section 13 of the Act, the latter shall subject to sub-section (2) of Section 17 deposit arrears of rent if any with interest as indicated and shall go on depositing amount at the rate of rent month by month. Sub-section (2) of Section 17 says among other things that in any suit or proceeding referred to in sub-section (1), if the tenant disputes as to amount of rent payable by him, he shall within the time mentioned deposit the amount admitted by him along with an application for determination of the rent payable by him. The Court shall then determine the amount and the tenant shall deposit the same in the manner and within the time to be specified in the order of the court. Sub-section (2A) speaks about the extension of time for deposit as mentioned in sub-section (1) or (2). The next relevant sub-section is (3) which says that if the tenant fails to deposit or pay any amount or instalment, as the case may be referred to in sub-sections (1), (2) and (2A) of Section 17, the Court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit. From the reading of sub-sections (1), (2), (2A) and (3) of Section 17 of the Premises Tenancy Act, I have no doubt to hold that the procedures referred to therein are to be followed and complied with in the trial court where the suit is pending for hearing and decision and that the plaintiff-landlord, if willing to exercise his right under sub-section (3) for getting the defence struck out, must do so in the trial court and not in the appellate court where the appeal awaits decision. That right again must be exercised before the defendant starts leading evidence in support of his defence against the grounds of eviction under Section 13 of the West Bengal Premises Tenancy Act. Once the trial court decides the case on merits on consideration of the evidence on record including that of the defendant adduced without any objection by the landlord and the suit or proceeding is disposed of, it will have no jurisdiction after the judgment to recall the same for the purpose of striking out the defence of the defendant which has already been considered for the decision of the case. Such interference is unthinkable if the judgment has been passed in favour of the defendant. The language of Section 17 clearly says that the landlord can have the defendant's defence against delivery of possession struck out under sub-section (3) in the trial court alone and that such right cannot be claimed for the first time before the appellate court. Besides the scheme of Section 17 and the language in sub-sections (1), (2), (2A) and (3), we get at the end of sub-section (3), "..... the Court shall order the defence against deli-

very of possession to be struck out and shall proceed with the hearing of the suit". The word 'suit' is significant. There is no indication anywhere to suggest that in the appellate stage the court can strike out the defence to dismiss the suit. Rather the very language in sub-section (3) clearly indicates that the defence shall be struck out before the hearing of the suit in the trial court is concluded. The word 'suit' does not include or imply appeal in sub-section (3). There is no provision in the Act giving any power to the appellate court to strike out defence at the instance of the landlord. Had there been any such intention it would have been clearly stated that the appellate court would proceed with the hearing of the appeal by striking out defence. In the West Bengal Premises Tenancy Act, 1956 there is reference to appeals and appellate jurisdiction of the Court for doing certain function. For example, to mention one instance, there is such reference to appellate jurisdiction in Explanation under sub-section (1) of Section 17-D.

9. In this connexion I have already noticed that the provision of sub-section (1) of Section 17 of the Premises Tenancy Act is a procedure to be followed during the pendency of the 'suit' as in the case of other sub-sections (2), (2A) and (3) observed hereinbefore. Regarding sub-section (1), R. N. Dutt, J. in the case of Radharani v. Angurbala, (1963) 67 Cal WN 501, held as follows:—

"..... Lastly the suit may be disposed of after trial on merits. The suit may either be dismissed or decreed. If the suit is dismissed, the tenant continues to be a tenant but if decreed, he ceases to be a tenant. But in any case the suit ceases to be pending after such disposal and operation of sub-section (1) comes to an end. There may be an appeal against the decision of the trial court. During the pendency of the appeal there is no liability to deposit rent under sub-section (1)"

In the same line of thought it may also be said that after the disposal of the suit by trial court on merits, the suit comes to an end and in the appellate court there can be no question of striking out of the defence and proceeding with the hearing of the suit which has already been decided. In the view, I have taken as discussed earlier, I should hold that the appellate court below acted illegally by striking out the defence as stated in the judgment and decreeing the suit on that ground although it did not disturb the findings of the trial court that the plaintiff had failed to prove the grounds of his reasonable requirement for the suit premises and of default in payment of rent

as required under law. The evidence on record justifies the dismissal of the suit.

10. In view of my finding above, the appeal is allowed with costs. The judgment and the decree of the learned Subordinate Judge in the appeal below are set aside and the judgment and the decree of the trial court are restored. The appellant shall also get the costs in the courts below.

Appeal allowed.

AIR 1975 CALCUTTA 440

SABYASACHI MUKHARJI, J.

M/s. Hoare Miller & Co. Ltd., Petitioners v. The Assistant Collector of Customs and others, Respondents.

Matter No. 677 of 1967, D/- 7-7-1975.

(A) Imports and Exports (Control) Act (1947), S. 3 (1) — Scope.

The authority under S. 3 (1) is given to impose restrictions in all cases and also in specified classes of cases. The expression "all cases" is wide enough to cover cases of both direct and indirect exports. Thus, an order under S. 3 cannot be said to be without jurisdiction merely because it restricts export indirectly. (Para 6)

(B) Imports and Exports (Control) Act (1947), S. 3 — Effect of deeming provision in S. 3 (2) — Order under S. 3 (1), if can be deemed to have been made for purposes of S. 11 (2) of Customs Act.

The legislature does not enjoin that the purposes of S. 11 of the Customs Act, 1962 should be engrafted to an order made under S. 3 (1) of Imports and Exports (Control) Act. S. 11 (1) of the Customs Act empowers the Central Government to prohibit export or import of goods for the purposes mentioned in Section 11 (2). By virtue of S. 3 (2) of the Imports and Exports (Control) Act, the goods prohibited by S. 3 (1) shall also be deemed to have been prohibited under S. 11 of the Customs Act. The role of the deeming provision in a legislation is often to bring within the scope of legislation something which normally is not within its scope, but unless the legislation so enjoins the causation or the motivation of thing which is not within the scope of legislation does not come within the deeming provision. (Para 7)

The effect of the deeming provision, in S. 3 (2) is not that the order made under S. 3 (1) should be deemed to have been made for the purposes enjoined under S. 11 (2) of the Customs Act. Therefore, the principle which should guide the interpretation of the expression of an order made under S. 11 of the Customs

Act, cannot, be applicable to an order made under S. 3 (1) of the Imports and Exports (Control) Act. (Para 8)

(C) Imports and Exports (Control) Act (1947), S. 3 (1) — Expression "all cases" — Meaning — Order prohibiting export of "all goods" to a country held to be beyond the authority given by S. 3.

The expression "all cases" in S. 3 (1) has to be read in conjunction with specified classes of cases. The expression "all cases" cannot be so construed as to mean the goods of specified description to mean goods identified by destination of the goods. "Description" is here an adverb relating to the goods, that is to say, to the qualities of the goods and not to the identification of the goods. When by any provision authority is given to impose restriction on the trade that provision must accordingly be construed strictly. Thus, an order under S. 3 (1) prohibiting export of "all goods" to a country is beyond the authority given by S. 3 because there is no specification of the goods intended to be prohibited (Paras 10, 11)

Cases Referred: Chronological Paras

AIR 1967 Punj 174 = 1967 Cri LJ 581	5
AIR 1961 SC 1762 = (1961) 2 Cri LJ 828	5
AIR 1957 SC 637 = 1957 Cri LJ 1014	7
AIR 1957 Cal 83 = 1957 Cri LJ 1238	4
AIR 1955 SC 661 = 1955 SCR 603	7
AIR 1952 SC 317 = 1952 Cri LJ 1269	5
1939 AC 468 = (1939) 3 All ER 98	7
AIR 1915 Bom 232 = 17 Bom LR 1087	11

ORDER:— In this application under Article 226 of the Constitution Messrs. Hoare Miller & Co. challenges the notice dated 5th October, 1967 issued by the Assistant Collector of Customs to the petitioner to show cause why the goods covered by the three shipping bills mentioned in the said notice should not be confiscated under Section 113 (d) of the Customs Act, 1962 and why penal action should not be taken against the petitioner under Section 114 of the Customs Act, 1962. After setting out the facts of those three shipping bills the notice stated, inter alia, as follows:—

"3. The facts detailed in para. 2 tend to show that the contracts in respect of the subject goods have been entered into between Messrs. Union Agencies (Distributors) Pvt. Ltd. Rhodesia and the exporters. The name of their Zambia Associates Messrs. Factors Zambia Ltd., had been utilised as a cover and Messrs. J. N. Barnett & Co. Beirs as their Agent for diversion of the goods to Rhodesia.

Exports to Rhodesia are prohibited in terms of the Government of India order No. 9/65 dated 17-11-65 issued under Section 3 of the Imports & Exports (Control) Act, 1947. As it appears that Messrs. Hoare Miller & Co. Ltd., have filed the

shipping bills under reference in an attempt at exporting the goods to Rhodesia in contravention of the aforesaid prohibition, the goods under reference appear to be liable to confiscation under Section 113 (d) of Customs Act and Messrs. Hoare Miller & Co. Ltd. is liable to penal action under Section 114 *ibid*, for attempting to contravene Section 11, Customs Act read with Sec. 3, Imports & Exports (Control) Act, 1947.

Messrs. Hoare Mills & Co. Ltd. are hereby directed to explain in writing and to show cause within a week hereof why the goods should not be confiscated under Section 113 (d), Customs Act, 1962 and why penal action should not be taken against them under Section 114, Customs Act, 1962. They should also produce documentary evidence if any in support of their explanation. They may also inform this office in writing if they would like to avail of any personal hearing in this matter.

If no reply is received within the stipulated time, the case will be adjudicated on the basis of evidence on record without any further reference to them.

This is without prejudice to any other action that may be taken under any other law for the time being in force in India.

They may take inspection of the documents and copies thereof by prior appointment with the undersigned."

2. In effect, the notice stated that the goods covered by the shipping bills were indirectly meant for Rhodesia export to which country was prohibited and as such the petitioner has contravened the provisions of law. In this connection, it is relevant to refer to the Notification of the Ministry of Commerce prohibiting export of goods to Rhodesia. The said notification was to the following effect:—

"S. O. 3613.— In exercise of the powers conferred by Section 3 of the Imports and Exports (Control) Act, 1947 (18 of 1947), the Central Government hereby prohibits the import and export of all goods, whether directly or indirectly, into or from any port or place in India, from or to any place in Rhodesia.

No. IPC (Genl. 44)/65

P. Sabanayagam,

Chief Controller of Imports & Exports."

3. In this application under Article 226 of the Constitution the petitioner has challenged the said show cause notice. For the purpose of this application the petitioner has confined the challenge to three grounds. It was contended, firstly, that the prohibition of export was by the Controller and not by the Central Government. It was contended that under the Imports and Exports (Control) Act, 1947 it was the Central Government which was

competent to impose any prohibition and not the Controller. Secondly, it was urged that there was no jurisdiction under Section 3 of the Imports and Exports (Control) Act, 1947 to restrict export indirectly. It was submitted that such a restriction amounted to vague restriction. It was, thirdly, urged that the order in question was not valid inasmuch as there was no specification of the goods intended to be prohibited. I will examine the validity of the each one of the aforesaid three contentions. In this connection, it may be relevant first to refer to the provisions of the Imports and Exports (Control) Act, 1947. Section 3 of the said Act provides as follows:—

"3. Powers to prohibit or restrict imports and exports.— (1) The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling, in all cases, or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order;

(a) the import, export, carriage coast-wise or shipment as ships, stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 11 of the Customs Act, 1962 (52 of 1962), and all the prohibitions of that Act shall have effect accordingly.

(3) Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad, of any goods or class of goods imported into India."

4. The first contention, therefore, was as mentioned before the Central Government was authorised to impose prohibition, if any, and the prohibition in this case was not by the Central Government. It was contended that under the Imports and Exports (Control) Act, 1947 the Chief Controller being himself an authority created by the Act, could not himself exercise the powers under the Imports and Exports (Control) Act, 1947. In this connection reference was made to the provisions of clause 6 of the Imports (Control) Order, 1955 and clause 8 of the Exports (Control) Order, 1968. On behalf of the respondents learned counsel however con-

tended that it was wrong to contend that the Chief Controller had made the impugned order. It was submitted that the order in question had been made by the Central Government and the said order had been merely authenticated by the Chief Controller of Imports and Exports. In this connection reliance was placed on the decision of this court in the case of C. T. A. Pillai v. H. P. Lohia, AIR 1957 Cal 83. There it was held that under the Imports and Exports (Control) Act (1947), a Joint Secretary or Deputy Secretary and also assistant and under secretaries were entitled to authenticate the order of the Government and there was no reason to think that the orders authenticated by them were not orders by the Government. Reliance was also placed on Article 77 of the Constitution. My attention was also drawn on behalf of the respondents to the Authentication (Orders and Other Instruments) Amendment Rules, 1965 which amended the Authentication (Orders and Other Instruments) Rules, 1958. The relevant provisions of Authentication 1958 Rules provided, inter alia, as follows:—

"(2) Orders and other instruments made and executed in the name of the President shall be authenticated....."

5. In 1965 the Amendment Rules provided as follows:

"In Rule 2 of the Authentication (Order & Other Instruments) Rules, 1958.

(i) in clause (aa) the word 'or' shall be added to the end—

(ii) After clause (aa) the following clause shall be inserted namely:

(aa) (sic) in the case of orders and other instruments relating to the office of the Chief Controller of Imports and Exports, by the Chief Controller of Imports and Exports."

It was, therefore, contended on behalf of the respondents that by virtue of the said Authentication (Order and Other Instruments) Rules, 1958 as amended in 1965, the impugned order which was signed by the Chief Controller of Imports and Exports should be deemed to have been passed by the Central Government. In view of the provisions of the General Clauses Act and in view of the said amended Rules I would have been inclined to accept this contention on behalf of the respondents and to hold that the impugned order was really passed by the Central Government and was properly authenticated by the Chief Controller of Imports and Exports. The controversy is not whether the order was properly authenticated but whether the Chief Controller was duly authorised to make the order on behalf of the Central Government. But unfortunately on behalf of the respondents no documents had

been produced before me showing the authority of the Chief Controller. My attention was drawn to a decision of the Supreme Court in the case of *E. G. Barsay v. State of Bombay*, AIR 1961 SC 1762 and counsel drew my attention to the observations of the Supreme Court in paragraphs 25 and 26 of the said judgment. There the Supreme Court upheld the order as there was evidence that the order made by the Deputy Secretary was on behalf of the Central Government in exercise of the powers conferred on him under the Rules. But the Supreme Court observed in respect of an order which was couched in more or less similar terms, that in legal position the order in question in that case did not comply with the provisions of Article 77 (2) of the Constitution. It does not, however, appear that the attention of the Supreme Court was drawn to the relevant provisions of the General Clauses Act. Be that as it may, I need not in the view I have taken on other aspects of this matter, express my opinion on this point urged by on behalf of the petitioner. In this connection counsel also drew my attention to the observations of the Supreme Court in the case of *State of Bombay v. Purushottam Jog Naik*, AIR 1952 SC 317 and *P. B. Pardasani v. The State*, AIR 1967 Punj 174. But as I have mentioned hereinabove, in the view I have taken, it is not necessary for me to go into the question any further.

6. The next question, is, whether Section 3 of the Imports and Exports (Control) Act, 1947 authorises imposition of restriction as to cover exports made indirectly. I have noticed the language used in Section 3. It authorises the Central Government to make provisions by prohibiting and restricting or otherwise controlling "in all cases or in specified class of cases" the import, export etc. Therefore, the authority is given to impose restrictions in all cases and also in specified classes of cases. In my opinion the expression "all cases" is wide enough to cover cases of both direct and indirect exports. Therefore, I am unable to accept the contention that the impugned order was without jurisdiction and as such the show cause notice was bad.

7. The third ground which was urged in this case was that the authority given to the Central Government by Section 3 of the Imports and Exports (Control) Act, 1947 was to restrict or to put restrictions on imports and exports of goods "of specified description". It was contended that the section did not authorise the Central Government to put an embargo against all exports to a particular country. The question, therefore, is whether identification of goods as being destined for a particular country can be

said to fulfil the requirement of "goods of specified description" in Section 3 of the aforesaid Act. Whether identification is the specification that was required to be made under clause (a) of Section 3 of the Act. Counsel on behalf of the respondents contended that the expression "in all cases or in specified classes of cases" in the section was wide enough to cover the impugned notification. He urged that the Court should take into consideration the fact that it was the Government policy to ban trade with Rhodesia because of the colour policy followed by that country. Therefore, in order to maintain international peace and harmony this restriction had been imposed and I should construe the provision of the Act liberally having regard to the mischief which the Act was intended to avoid and having regard to the purposes contemplated to be fulfilled by the Act. It is in those lights the counsel for the respondent contended that the expression 'all cases or specified classes of cases' should be construed and if such a construction was made it would be sufficient specified description of goods if the goods were merely identified as being goods meant for import or export to a particular country. Counsel in this connection drew my attention to several decisions in aid of the proposition that the Courts should take into consideration the state of affairs before the legislation was passed, and the mischief intended to be removed by the legislation in order to find out the true meaning of the expressions used in a particular statute. In aid of that submission reliance was placed on the decision in the case of *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661; *Sarwan Singh Rattan Singh v. State of Punjab*, AIR 1957 SC 637; and *Ladore v. Bennet*, 1939 AC 468. Section 11 of the Customs Act gives power to the Central Government to prohibit importation or exportation of goods for certain purposes. The goods, however, must be of specified description. The purposes for which such prohibition can be made are provided under sub-section (2) of Section 11 of the Customs Act, 1962 and one of the purposes is in clause (a), namely, "the fulfilment of obligation under the Charter of the United Nations for the maintenance of international peace and security". The purposes also include the implementation of a treaty agreement or covenant with another country. Therefore, counsel for the respondents contended that having regard to the use of the language "in all cases or in specified classes of cases" in Section 3 of the Act and in view of the fact that establishment of international amity and peace and the obligations under the Charter of the United Nations are purposes to be served this Court should hold that the specification of goods can be

by mere identification of goods by destination to a particular country. While there is no dispute that if there is ambiguity the Court in order to resolve that ambiguity in a particular statute, or if any question of construction arises, is entitled to take into consideration the state of law prior to the introduction of the law and the mischief which the law intended to remedy, I am not concerned with any prohibition issued under Section 11 of the Customs Act, 1962. The expression, 'specified description' is used in Section 11 of the Customs Act, 1962 and if a question arises as to whether the aforesaid requirement of description would be sufficiently fulfilled by identification of goods as being destined for a particular country, I need not express any opinion at this stage. But it has to be borne in mind that I am concerned with Section 3 of the Imports and Exports (Control) Act, 1947 and that Act does not refer to any of the purposes mentioned in sub-clause (2) of Section 11 of the Customs Act, 1962. My attention, however, was drawn to sub-section (2) of Section 3 of the Imports and Exports (Control) Act, 1947 which I have noted before. By the said sub-section if there is a prohibition under sub-section (1) of the Imports and Exports (Control) Act, 1947, the legislature requires the said prohibition should be deemed to have been made under Section 11 of the Customs Act, 1962. But can it be said that by that deeming provision it has also to be deemed that when a prohibition is imposed under sub-section (1) of the Imports and Exports (Control) Act, 1947, the same was also for the purposes of Section 11 of the Customs Act, 1962? The deeming provisions in legislations are occasions when very often pent up legal romance is allowed its full play. But I am of the opinion that while it is improper to boggle one's imagination it is not proper either simply because there is a deeming provision to deem further than what the legislature enjoins the Courts to do. The legislature in this case, in my opinion, does not enjoin that the purposes of Section 11 of the Customs Act, 1962 should be engrafted to an order made under sub-section (1) of Section 3. Sub-section (1) of Section 11 of the Customs Act, 1962 empowers the Central Government to prohibit export or import of goods for the purposes mentioned in sub-section (2) of that section. By virtue of sub-section (2) of Section 3 of the Imports and Exports (Control) Act, 1947 the goods prohibited by sub-section (1) of that section shall also be deemed to have been prohibited under Section 11 of the Customs Act, 1962. The role of the deeming provision in a legislation is often to bring within the scope of legislation something which normally is not within its scope, but unless

the legislation so enjoins the causation or the motivation of thing which is not within the scope of legislation does not come within the deeming provision.

8. The effect of the deeming provision, in this case in my opinion, is not that the order made under sub-section (1) of Section 3 of the Imports and Exports (Control) Act, 1947 should be deemed to have been made for the purposes enjoined under Section 11 (2) of the Customs Act, 1962. Therefore, the principle which should guide the interpretation of the expression of an order made under Section 11 of the Customs Act, cannot, in my opinion, be applicable to an order made under sub-section (1) of Section 3 of the Imports and Exports (Control) Act, 1947.

9. Quite apart from this, it appears to me that the construction which is being contended for on behalf of the respondents cannot be accepted. The effect of the construction would be to make the section read as follows (leaving aside the non-essential part).

"The Central Government may, by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling, in all cases, or in specified classes of cases..... the import, export..... of goods of any specified description."

10. Therefore, the expression 'all cases' has to be read in conjunction with specified classes of cases. The expression 'all cases' cannot be so construed as to mean the goods of specified description to mean goods identified by destination of the goods. 'Description' is here an adverb relating to the goods, that is to say, to the qualities of the goods and not to the identification of the goods. It should be borne in mind that by this provision, authority is given to impose restriction on the trade and must accordingly be strictly construed.

11. In this connection, a similar question arose in the case of Karl Ettlinger & Co. v. Chagandas & Co., AIR 1915 Bom 232. In that case under Section 19 of the Sea Customs Act, 1878 the Government was empowered to prohibit export of specified articles or things. The defendant in that case by a contract made on July 24, 1914 had agreed to supply to the plaintiffs one thousand tons freight at 11 s. 6 d. per ton, the material to be carried being manganese, from Bombay to Antwerp, shipment in September. On the 7th September, 1914 the defendants telegraphed to the plaintiffs that owing to force majeure the contract was cancelled. The plaintiffs refused to accept cancellation and sued for damages. It was contended that the Government of India's notification of 7th August, 1914 prohibiting ex-

port of all materials used for manufacture of ammunition and explosives covered the case and had rendered the contract impossible of performance. It was held that under the Sea Customs Act the Government was only empowered to prohibit export of specified article and it was not enough to describe different commodities ejusdem generis in vague description. Inasmuch as the notification in that case did not specifically prohibit the export of manganese, performance of the contract had not become unlawful and the contract not having become impossible the defendants were held to be liable. I am in respectful agreement with the ratio of the said decision and I am of the opinion that the said ratio is applicable to the facts of this case. If that is the position then the order dated 17th April, 1964 which prohibited export of 'all goods', in my opinion, was beyond the authority given by Section 3 of the Imports and Exports (Control) Act, 1947. As such the show cause notice based on the alleged violation of the said order, in my opinion, is without jurisdiction. In the premises, on this ground I would hold that the notice was issued without jurisdiction and, therefore, the respondents had no authority to issue the show cause notice dated the 5th October, 1967.

12. The notice dated 5th October, 1967 is therefore, quashed and appropriate writ in the nature of certiorari do issue and the respondents are restrained from proceeding under the said notice and a writ in the nature of mandamus do issue. The Rule is made absolute to the extent indicated above.

13. In the facts and circumstances of this case, there will be no order as to costs.

14. There will be a stay of operation of this order for a period of six weeks.

Rule made absolute.

AIR 1975 CALCUTTA 445

K. J. SEN GUPTA AND M. N. ROY, JJ.
Hiralal Agarwala, Appellant v. Bhagirathi Gore and others, Respondents.

A. F. A. D. No. 929 of 1969, D/- 17-6-1975.

(A) Specific Relief Act (1963), S. 15 — Decree for specific performance — Scope of right of decree-holder under.

A decree for specific performance passed on the basis of a contract for sale of immovable property does not create any interest in the property in favour of the decree-holder. It only super-adds the

sanction of the Court to enforce it through the medium of court. As such the decree-holder can enforce the said contract and get it enforced through court, subject to whatever interest the judgment-debtor had at the time of execution. AIR 1922 Cal 412 (2), Distinguished.

(Para 16)

(B) Trusts Act (1882), S. 91—Scope—Equitable right under — Enforceable in a suit for specific performance.

Section 91 of the Indian Trusts Act, 1882, creates an equitable right to be enforced in a suit for specific performance.

(Paras 20 and 22)

(C) T. P. Act (1882), S. 53-A — Plea under — Cannot be raised for first time in second appeal — (Civil P. C. (1908), Section 100).

The plea under S. 53-A being a mixed question of law and fact cannot be allowed to be raised for the first time in the second appeal by the respondent to support the judgment on this plea which was never raised at the earlier stages. AIR 1934 PC 235, Relied on.

(Para 23)

(D) Registration Act (1908), S. 17 (2) Explanation — Registration of document not requiring registration — No scope for constructive notice.

If the document requires no registration, registration of such a document will not raise a constructive notice against the purchaser of such a property, as under the law he was not bound to search the registration office, to find out whether the property proposed to be purchased was the subject-matter of a contract and whether the same was registered. (Para 25)

(E) T. P. Act (1882), S. 54 — Sale at a reduced price — Not sufficient to show that it is not bona fide.

Merely showing the difference in price between the two sale deeds relating to the same property, executed at different times, it cannot be said that the subsequent purchase at a reduced price must be collusive and as such it cannot be said to be a bona fide one. On the contrary, the mala fide purchaser generally inflates the price. (Para 28)

Cases Referred: Chronological Paras
AIR 1934 PC 235 = 60 Cal LJ 370 23
AIR 1922 Cal 412 (2) = 34 Cal LJ 79 15

Bhabesh Chandra Mitra and Paramesh Chatterjee, for Appellant; Sudhir Kumar Acharya, D. N. Chatterjee and Sudhansu Kumar Hazra, for Respondents.

SEN GUPTA, J.:— This appeal is at the instance of the plaintiff who has challenged the judgment and decree passed by Sri P. Chatterjee, Addl. District Judge, 5th Court at Alipore in Title Appeal No. 1411 of 1967 reversing the decision of Shri L. K. Pal, Subordinate Judge, 9th Court at Alipore in Title Suit No. 78 of 1965.

2. The plaintiff brought the suit in the Subordinate Judge's Court on the allegation that he purchased the suit property from defendant No. 1 by a registered kobala dated 18-11-55; on the same day defendant No. 1 executed a registered kabuliyat in favour of him and the defendant No. 1 became a tenant under the plaintiff at a monthly rental of Rs. 40-8-0 in respect of the suit premises.

3. The plaintiff filed Title Suit No. 357 of 1956 in the 2nd Court of Munsif at Baraset for ejectment of defendant No. 1 from the suit premises and for mesne profits. Defendant No. 1 contested the said suit and for the first time disclosed that he executed a registered deed of agreement on February 24, 1953 in favour of defendant No. 2 wherein it was stated that defendant No. 2 agreed to purchase the suit property at a sum of Rs. 4001 out of which the earnest money already paid was Rs. 3001. On coming to know about the said fact the plaintiff impleaded defendant No. 2 as a party in that suit. The said defendant No. 2 asserted that on the strength of the deed of agreement dated 24-2-53 he filed Title Suit No. 13 of 1956 in the 9th Court of Subordinate Judge at Alipore for specific performance of contract against defendant No. 1. That suit was decreed on 10th April, 1956. Defendant No. 2 got possession in the suit premises on 16th December, 1956 in Title Execution Case No. 8 of 1956.

4. The plaintiff got the decree for mesne profits against defendant No. 1 in Title Suit No. 357 of 1956 but his prayer for khas possession of the premises in suit was refused. In the second appeal against the judgment and decree passed in Title Suit No. 357 of 1956 all questions involved as between the plaintiff and defendant No. 2 in respect of the suit properties were left open.

5. The plaintiff next filed Title Suit No. 78 of 1965 for evicting the defendants from the suit premises and for getting khas possession as well as mesne profits from them. Defendant No. 2 Bhagirathi Gore contested the claim of the plaintiff in this suit. According to him, the plaintiff was the purchaser of the suit property with notice of his agreement with defendant No. 1 for the purchase of the suit premises at a sum of Rs. 4001 dated 24th April, 1953; the plaintiff thus could not be said to be a bona fide purchaser for value without notice; he further contended that the sale in favour of the plaintiff by defendant No. 1 was a collusive one which was created only to defeat and delay his claim in respect of the property in question. Other contentions which were raised in the said suit are not relevant for the purpose of consi-

deration in this appeal. The contentions of defendant No. 2 were not accepted by the trial court who decreed the suit in favour of the plaintiff. Against the said decision defendant No. 2 preferred Title Appeal No. 1411 of 1967. The court of appeal below allowed the said appeal and dismissed the suit. Against the said judgment and decree this second appeal has been preferred by the plaintiff.

6. It will be convenient to refer to the parties in their original characters of plaintiff and defendants, bearing in mind that the plaintiff is now the appellant and the defendants Nos. 1 and 2 are now respondents Nos. 2 and 1 respectively.

7. Mr. Bhabesh Chandra Mitra, learned Advocate for the plaintiff-appellant has challenged the said finding of the court of appeal below on the ground that on the materials on record the said finding was not justified and also bad in law. Mr. Mitra went so far as to argue that even if all the averments of defendant No. 2 as made in his written statement be accepted still then as the plaintiff was not made a party in Title Suit No. 13 of 1956 of the 9th Court of Subordinate Judge for specific performance of contract brought by defendant No. 2, he cannot resist the claim of the plaintiff in the suit; whether the plaintiff was a bona fide purchaser for value with notice or not is immaterial in this case as he was not made a party in Title Suit No. 13 of 1956. According to Mr. Mitra, this is a claim or this is a competition for establishing the right of the respective parties on the basis of two title deeds—one dated 18-11-55 and another dated 24th September, 1956; the plaintiff's kobala being earlier in time would prevail as, according to the plaintiff, the deed of agreement even assuming to be a bona fide one did not create any charge on the property in question.

8. Mr. Acharya, learned Advocate for Bhagirathi Gore defendant No. 2 (respondent No. 1), on the other hand, contends that since the purchase of the property by Bhagirathi he has been possessing the same; that he being the purchaser of the suit property on the basis of the prior deed of agreement, Ext. M dated 24-2-53, his title will relate back from that date; in any case he has acquired an equitable right on the basis of that agreement to avoid the plaintiff's sale deed dated 18-11-55 by which he purchased the suit property. Before we enter into the discussion of the respective points raised in this case, we like to state certain admitted facts to show how defendant No. 1 dealt with the property. He first sold the same to one Mangilal.

9. Sitaram brought the Title Suit No. 87 of 1953 against the heirs of Mangi-

lal for specific performance of contract on 25-2-53 and got the decree on 11-5-54. He got the sale deed in his favour on 15-3-55 in Title Execution Case No. 76 of 1954. His possession in the same continued throughout as he was holding the property under Mangilal as a monthly tenant in terms of a separate deed executed on 9-3-49, the same date when Sitaram sold the property to him, and got another deed for reconveyance.

10. Just one day before the institution of the Title Suit No. 87 of 1953, that is on 24-2-53, the defendant No. 1 agreed to sell that property to defendant No. 2 his brother-in-law and executed a registered deed of agreement in favour of defendant No. 2.

11. That deed of agreement was followed by a suit for specific performance of a contract brought by defendant No. 2 against defendant No. 1 Sitaram. That suit was registered as Title Suit No. 13 of 1956 in the Court of 9th Subordinate Judge at Alipore, on 11-2-56. That suit was decreed on 10-4-56. He got the sale deed in his favour through court on 24-9-56 in Title Execution Case No. 8 of 1956.

12. Another pertinent fact need be stated here: Sometime before the Title Suit No. 13 of 1956 was filed Sitaram (defendant No. 1) again sold the property to one Kanai Shaw on 23-6-55, who again resold the same to Sitaram on 18-11-55, the day, when plaintiff purchased the same from Sitaram.

13. The following facts, therefore, emerge for our consideration: That in the Title Suit No. 13 of 1956 brought by defendant No. 2, against defendant No. 1, the plaintiff was not a party, that the plaintiff's sale deed by which he purchased the property is prior in time, as it was executed on 18-11-55, whereas defendant No. 2's sale deed was executed on 24-9-56. The point for our consideration is, in a competition between these two kobalas which will prevail.

14. There is no dispute that the deed executed earlier will prevail over the one executed subsequently.

15. Mr. Acharya, learned Advocate for the defendant No. 2 submits that as the contract for sale of the property in question was entered into on 24-2-53 the sale deed in favour of defendant No. 2 by defendant No. 1 will relate back from the date of the agreement. This contention is sought to be established by the decision in the case of *Johur Mull Bhurtra v. Jatindra Nath Bose*, reported in 34 Cal LJ 79 = (AIR 1922 Cal 412 (2)). Their Lordships held:

"When a suit for specific performance of a contract for transfer of immovable

property is ended by a final decree transferring the title, that title relates back to the date of the agreement on which suit is based, and the court will not permit its decree to be rendered nugatory by intermediate conveyances. Such a suit operates as *lis pendens*."

That decision is based on the principle of *lis pendens* as the transfer took place during the pendency of the suit for specific performance of contract. In the instant case the sale in favour of the plaintiff took place long before the suit for specific performance of contract was instituted by defendant No. 2 against defendant No. 1. Moreover in that Title Suit No. 13 of 1956, the plaintiff was not made a party. For that reason, the decree passed in that suit cannot be binding on the plaintiff, and in consequence whereof the decision referred to by the respondent cannot apply in the facts of this case.

16. Our attention has been drawn to the decree passed in Title Suit No. 13 of 1956, wherein defendant No. 2 is the decree-holder. The effect of such a decree for specific performance of contract requires our consideration. In our view a decree for specific performance passed on the basis of a contract for sale of immovable property does not create any interest in the property in favour of the decree-holder. It only super-adds the sanction of the court to enforce it through the medium of court. As such the decree-holder can enforce the said contract and get it enforced through court, subject to whatever interest the judgment-debtor had at the time of execution.

17. Let us now turn to the relevant provision of Section 54 of the Transfer of Property Act. Reference may be made to the following part of that section. It is as follows:—

"A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

18. The above provision clearly lays down that the contract for sale does not create any interest in the property in favour of the person contracting to purchase the same. In this view of the matter the agreement dated 24-2-53 (Ext. M) by itself is of little assistance to defendant No. 2.

19. To obviate that difficulty, Mr. Acharya has drawn our attention to Section 91 of the Indian Trusts Act, 1882. To understand, the implication of the submissions of Mr. Acharya in this regard, we quote that section here:—

"Where a person acquires property with notice that another person has enter-

ed into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

20. The words "to the extent necessary to give effect to the contract" are very significant. It means a particular right which the contracting party had, to enforce the said contract, namely a suit for specific performance. The plaintiff held that property subject to the said equity. The defendant No. 2, on other condition being satisfied could have enforced his contract against this plaintiff provided he was impleaded a party in his suit for specific performance. The only mode to enforce that trust was by means of that suit. The defendant No. 2 having failed to avail of that opportunity cannot resist the claim of the plaintiff, who has acquired a better title in the property, his purchase being prior in time.

21. Mr. Acharya next contends that the plaintiff having purchased the property with notice, of the prior contract, cannot get a decree for khas possession of the suit premises and that such a plea can be taken as a defence to defeat the claim of the plaintiff who is a purchaser with the notice of the prior agreement for sale. This submission resolves into two parts, namely whether such a plea can be taken by way of defence and secondly whether the plaintiff can be said to have purchased the property with notice.

22. We have already referred to the provisions of Section 91 of the Indian Trusts Act, 1882. The said provision creates an equitable right to be enforced in a suit for specific performance.

23. Last clause of Section 54 of the Transfer of Property Act clearly indicates that by such a contract for sale, no interest is created. In this respect it differs from the English law which recognises that a contract for sale recognises an equitable estate to the purchaser. A person can protect himself in a suit by taking some defence, if otherwise available under Section 53-A of Transfer of Property Act, but apart from that such a plea by way of defence cannot be taken. Such a question was raised in the case of *Khan Bahadur Mian Pir Bux v. Sardar Mahmood Tahar* reported in 60 Cal LJ 370 = (AIR 1934 PC 235) wherein it has been held by their Lordships of the Judicial Committee that apart from Section 53-A an averment of possession following upon the contract, is not a relevant defence to an action for ejectment in India. We shall presently discuss whether the provision of Section 53-A of Transfer of Property Act, is available to the defendant

No. 2, on the facts and materials on record. Such a plea is not available to the defendant No. 2, as the same was not raised in the trial court. The said point being a mixed question of law and fact cannot be allowed to be raised for the first time in the second appeal by the respondent to support the judgment on this plea which was never raised at the earlier stages.

24. The principles of part performance has been incorporated in Section 53-A of Transfer of Property Act. When an instrument is defective and not completed in the manner as prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession. In the instant case, the defendant No. 2 actually got a sale deed in his favour through court. Accordingly, his possession, even if any, can now be traced on the basis of a valid deed. The deed of agreement, Ext. M, even if not a collusive one, did not create any title in him in the property proposed to be purchased. As such in the competition between two title deeds— one in favour of plaintiff and another in favour of defendant No. 2, the former one being prior in time will prevail.

25. Let us now consider whether the plaintiff can at all be said to be a purchaser with the notice of prior contract. It is not the case of the defence that the fact of prior contract was actually brought home directly to the plaintiff, rather his case is that the plaintiff, from the circumstance and materials on record, should be presumed to have constructive notice of the existence of the prior contract. Mr. Acharya wants to establish his case that the plaintiff had constructive notice of the prior contract on two grounds, namely, that registration of such a deed was a sufficient notice to those persons intending to deal with such property and secondly that the defendant No. 2 was in actual possession of the same at the time when plaintiff purchased it. While dealing with the first point, it is seen that the explanation to Section 17 (2) has been added by Section 2 of the Indian Registration (Amendment) Act, 1927. The said explanation clearly provides that such a document requires no registration. In that view of the matter registration of such a document will not raise a constructive notice against the purchaser of such a property, as under the law he was not bound to search the registration office, to find out whether the property proposed to be purchased was the subject-matter of a contract and

respondents. If this be so, we do not see why the subsequent application should not be regarded as an application for the amendment of the original application. Instead of lumping the two together and hearing the parties on both of them together, the supplementary allegations made in the second application may be more conveniently incorporated in the original application by way of amendment. This power is conferred on the Commission both by Section 18 (1) (a) which enables the Commission to regulate its own procedure and the conduct of its business as also by regulation 22 which empowers the Commission to amend a notice of hearing.

12. What is a notice of hearing? Regulation 6 states that an application made under Section 10 (a) (iii) by the Registrar shall contain the facts which constitute the restrictive trade practices. Regulation 7 requires a notice to be given to the person against whom allegations of restrictive trade practices are made stating that the Commission proposed to hold an inquiry into the practices. It follows, therefore, that a notice must specify the allegations constituting the restrictive trade practices. Unless the notice states the allegations of restrictive trade practices, it will be meaningless. The party on whom it is served will not know the very reason for the issue of the notice and will not be able to draft a statement of case to meet the allegations which were to be conveyed by the notice. The power to amend the notice thus includes the power to amend the allegations conveyed by the notice. Regulation 27 also gives the Commission the power to give a direction that the notice of hearing be amended.

13. The provisions for the amendment of notice contained in the Regulations of 1974 are even more explicit. Regulation 72 (3) empowers the Commission to allow an amendment even before a notice of inquiry is served on the respondent. The Commission, however, must give a notice of the application for amendment to the respondents before allowing the amendment. Before the issue of the notice, the only document which would be before the Commission in a proceeding pending before it under Section 37 of the Act would be the complaint or the reference or the information received by it under Section 10 (a). Each of these documents could be amended after notice to respondents and after the respondents are heard even before the notice of the filing of the complaint or the report or the information is issued to the respondents. The complaint under Section 10 (a) (iii) is thus capable of being amended by the Commission on the application of the complainant.

14. Regulation 72 (1) enables the Commission to amend any defect or error in any proceeding including the notice of inquiry. As already observed above, the notice has to contain the allegations of restric-

tive trade practices made against the respondents. The amendment of the notice would thus include the amendment of these allegations.

15. Since clauses (3) and (1) of regulation 72 cover the amendment of the notice, clause (2) thereof does not cover it. Learned counsel for the petitioner argued that the amendment could be made only under clause (2) and since it does not include the complaint under Section 10 (a) (iii) the said complaint cannot be amended at all. He further argued that only a pleading could be amended under regulation 72 (2) read with regulation 70. This argument ignores regulations 72 (1) and 72 (3). Even if, therefore, this argument were correct by itself, it is answered by pointing out that the power of amendment of the complaint is given to the Commission by regulations 72 (1) and 72 (3).

16. Another argument put forward by the learned counsel for the petitioner against the impugned order was that at one stage the Registrar had stated that the additional allegations would be only to support the allegations made in the original complaint. But the application for amendment seeks to add new allegations to the allegations made in the original complaint. But there is no estoppel against the Registrar in making additional allegations even if he had thought at one stage that the additional allegations would support only the original allegations and would not make out new restrictive trade practices.

17. It was then argued that having once filed a complaint on specific allegations and having asserted that the additional material will be only to strengthen those allegations, the Commission cannot allow the amendment of the original complaint by the introduction of totally new allegations. This would amount to making out a new case. We are unable to appreciate this argument. The complaint is that the respondents are resorting to restrictive trade practices. Whether the restrictive trade practice is only one or they are numerous, the object of the complaint is to invite inquiry by the Commission under Section 37. Each restrictive trade practice may be connected with another or may be quite different from the others. The disparate nature of restrictive trade practices is like separate causes of action. Just as separate causes of action can be joined in one civil suit similarly different allegations of restrictive trade practices can also be made in one complaint. They can be introduced by an amendment of the original complaint just as they can be introduced by an amendment of the plaint or an application. This question has been decided by a Full Bench of this Court in *Smt. Abnash Kaur v. Dr. Avinash Nayyar*, ILR (1974) 2 Delhi 133 = (AIR 1975 Delhi 46 FB).

18. The acceptance of the argument that once a notice of hearing is given in respect of certain restrictive trade practices only, other restrictive trade practices cannot be

introduced by way of amendment in the said notice of hearing would allow technicality to defeat justice. For if such an amendment is not allowed and a decision is given as to the allegations made in the unamended notice of hearing, a subsequent complaint by the Registrar praying the Commission to inquire into additional restrictive trade practices would be resisted on the ground that it is barred by the principle of constructive res judicata. It would be arguable that these additional restrictive trade practices might and ought to have been alleged in the first complaint itself and that the failure of the Registrar to do so operated against him as constructive res judicata. It appears from the order of the Commission that the Registrar was new and not very experienced. He, therefore, omitted to allege certain restrictive trade practices in the first complaint made by him. To prevent him from moving the Commission by amending the notice of inquiry, that is, the complaint annexed to the notice of inquiry, would give to the petitioners before us an undeserved advantage. Such a consequence could not have been contemplated by the framers of the Regulations.

19. For the above reasons, the writ petition is dismissed after hearing both the parties but before it was admitted with no order as to costs.

20. Civil Writ 1523 of 1974 has been dismissed by a reasoned order delivered today. Shri Ashok Desai, learned counsel for the petitioner, orally prays that a certificate may be granted under the amended Article 133 of the Constitution that the case is a fit one for appeal to the Supreme Court. The three requirements for the grant of such a certificate are that the case should involve (1) a substantial question of law, (2) of general importance, and (3) which needs to be decided by the Supreme Court. Taking the last requirement first, we are of the view that the question of law in this case is not capable of two equally persuasive different views to be taken and also does not involve any conflict of decisions. As the last condition is not satisfied, it is not necessary to consider whether the first two conditions are satisfied. The certificate cannot, therefore, be granted.

Petition dismissed.
Leave refused.

AIR 1975 DELHI 210

JAGJIT SINGH AND PRITHVI RAJ JJ.

Gulab Chand Sharma, Appellant v. Smt.

Saraswati Devi and another, Respondents.

First Appeal (OS) No. 13 of 1974, D/- 11-11-1974*.

*(From Judgment of Avadh Behari J. in I. A. No. 469 of 1973, D/- 26-3-1974.

DS/ES/B188/75/GNB

(A) Civil P. C. (1908), S. 37 — Import of S. 37 explained — Subject-matter of decree transferred to jurisdiction of another court — That court can entertain application for follow-up action with reference to decree.

Section 37 gives a wider meaning to the expression "the court which passed the decree" for the purpose of executing the decree and empowers the court which could have passed the decree at the time when the execution application is made to execute the decree in case the court which actually passed the decree ceased to exist or ceased to have jurisdiction to execute it and where the subject-matter of the decree is transferred to the jurisdiction of another court that court acquires inherent jurisdiction over the same by reason of such transfer and if it entertains an execution application with reference thereto it would at the worst be an irregular assumption of jurisdiction and not a total absence of it. AIR 1944 Sind 173 and AIR 1943 Mad 449 and AIR 1956 SC 87 and (1908) ILR 35 Cal 974 and AIR 1962 Punj 394 (FB) Rel. on; (1901) ILR 23 All 88 and (1900) ILR 23 Mad 521 and (1909) ILR 31 All 328 Dist. (Paras 16, 19)

(B) Delhi High Court Act (1966), Section 16 and Section 5 (2) — Civil P. C. (1908), Order 34 Rr. 7 and 8 — Property mortgaged for Rs. 70,000/ — Suit for redemption filed in Court of Sub Judge Delhi dismissed in 1962 — Delhi High Court allowing appeal and passing preliminary decree for redemption in 1972 — Suit held stood transferred to Delhi High Court under Section 16 — Application for final decree was entertainable by High Court.

Where the suit for redemption of property mortgaged in lieu of Rs. 70,000/- filed in the court of Sub-Judge Delhi was dismissed in 1962 and the appeal against the trial Court's decree was heard and allowed by the Delhi High Court and a preliminary decree for redemption was passed by it in 1972, it was held that even after the passing of the preliminary decree the suit must be taken to be pending in the trial Court on the date of enforcement of the Delhi High Court Act namely 31-10-1966 and the same stood transferred to the Delhi High Court by virtue of Section 16 of the Act and therefore the High Court had jurisdiction to entertain the application for final decree and even otherwise the application was entertainable by the High Court by reason of Section 5 (2) since the High Court also had ordinary original Civil jurisdiction in every suit in respect of the Union Territory of Delhi the value of which exceeded fifty thousand rupees. AIR 1927 All 305 and (1882) 20 Ch. D. 637 Rel. on. (Paras 20, 22)

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AIR 1943 Mad 449 = (1943) 1 Mad LJ 198	16
AIR 1942 Cal 321 = 75 Cal LJ 255	14
AIR 1933 Cal 684 = 37 Cal WN 679	14
AIR 1927 All 305 = 100 Ind Cas 324 (1909) ILR 31 All 328 = 6 All LJ 251	20, 18
(1908) ILR 35 Cal 974 = 12 Cal WN 859	17
(1901) ILR 23 All 88 = 1900 All WN 209	8, 18
(1900) ILR 23 Mad 521 = 10 Mad LJ 145	8, 18
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D. B. Chawla and C. L. Chaudhry, for Appellant; D. R. Dhamija, D. D. Sharma and J. N. Saxena, for Respondents.

JUDGMENT:— This Regular First Appeal under Section 10 of the Delhi High Court Act, 1966, (herein to be called 'the Act') has been filed against the judgment dated 26th March, 1974, passed by a learned Single Judge passing final decree for redemption of the suit property in favour of the respondents.

2. Relevant facts necessary for disposal of the appeal are as under. One Bakshi Mohan Lal Sason, husband of Saraswati Devi, was the owner of property bearing No. 13, Keeling Road, New Delhi. Mohan Lal in his lifetime created a mortgage in respect of this property in favour of the appellant by deed dated May 31, 1966, in lieu of the sum of Rs. 70,000/- that he borrowed from him. The deceased had earlier created two mortgages against the property in favour of two other persons, namely, Smt. Lajya Wati and Malwa Devi with which mortgages we are not concerned in this appeal. Failing to get the property redeemed because of the stand of the appellant that he (Mohan Lal Sason) having not paid the debt within four years from the date of execution of the mortgage deed the transfer made in favour of the appellant had become an absolute sale in his favour, the mortgagor filed suit No. 65 of 1961 (Mohan Lal Sason v. Gulab Chand Sharma) for redemption of the suit property alleging that he had approached the appellant to take the mortgage money and get the property redeemed but the appellant refused to receive the money and release the mortgage. The appellant resisted the suit, among others, on the ground that the mortgage stood converted into a sale on the failure of Mohan

Lal Sason to redeem the property within the period of four years from the date of the mortgage deed. The appellant during the pendency of the above suit, filed a suit (No. 154 of 1961 — Gulab Chand Sharma v. Mohan Lal Sason) for the grant of permanent injunction restraining Mohan Lal Sason from alienating or in any manner dealing with the property, the subject-matter of the mortgage.

3. The two suits were tried together and by a common judgment dated 30th January, 1962, Shri B. K. Agnihotri, Sub-Judge 1st Class, Delhi, dismissed the suit (No. 65 of 1961) filed by Mohan Lal Sason and decreed the suit (No. 154 of 1961) filed by the appellant, passing a decree for permanent injunction against Mohan Lal Sason restraining him from alienating the suit property or in any manner dealing with it. Feeling dissatisfied with the aforesaid judgment and decree, Mohan Lal filed appeals (Nos. 116-D of 1962 and 157-D of 1963) in the erstwhile Punjab High Court. During the pendency of those appeals Mohan Lal Sason died and he was represented by Smt. Saraswati Devi, his widow. The appeals were heard by a Bench of this Court. The Bench by its judgment and decree dated 4th August, 1972, allowed appeal No. 116-D of 1962 (Delhi) and passed a preliminary decree for redemption of the suit property on payment of Rupees 70,000/-. The amount was to be deposited within six months. In the result, the other appeal No. 157-D of 1963 arising out of the suit filed by the appellant was also allowed and his suit for injunction was dismissed.

4. The respondent Saraswati Devi in January 1973 pursuant to the aforesaid decree of the Division Bench filed an application (I. A. No. 469 of 1973) under Order 34 Rules 7 and 8 and Section 151 of the Code of Civil Procedure (herein called 'the Code') stating that she had deposited the sum of Rs. 70,000/- in the Court in terms of the decree; that she consequently is entitled to receive back the title deeds of the mortgaged property and the possession from the appellant and that she could seek the said relief from this Court in pursuance of the provisions of Section 5 (2) and Section 16 of the Act. The appellant resisted the application on a host of grounds which need not be recapitulated as they are not relevant for the purpose of the disposal of this appeal. An objection, however, was raised regarding the jurisdiction of this Court to entertain the application on the ground that on the day the Act came into operation viz., 31st October, 1966, the suit filed by Mohan Lal Sason was pending in the trial Court, the same having not been transferred to this Court, the proper forum to seek the relief was the trial Court. The appellant by a separate application (I. A. No. 1070 of 1974) prayed that he had filed a civil suit in this Court in March 1974 against Shrimati Saraswati Devi seeking declaration that he

had become full owner of the property in question and that he cannot be dispossessed therefrom by any means whatsoever. He accordingly contended that proceedings in I. A. No. 469 of 1973 be stayed till the decision in the above-said suit.

5. The learned Single Judge repelling the contention regarding jurisdiction of this Court to entertain the application under Order 34 Rules 7 and 8 (I. A. No. 469 of 1973) held that there was no defence to the said application and allowed the same and by judgment and decree dated 26th March, 1974, passed a final decree in favour of Smt. Saraswati Devi. In the result, I. A. No. 1070 of 1974 filed by the appellant was dismissed.

6. The appellant feeling aggrieved by the aforesaid judgment has filed the present appeal.

7. Before us on behalf of the appellant only two contentions were raised, firstly, that this Court had no jurisdiction to entertain the application (I. A. 469 of 1973) filed by Saraswati Devi and secondly, that in view of the pendency of the civil suit (No. 145 of 1974) filed by the appellant seeking declaration that he had become full owner of the property in question, the said application was liable to be stayed.

8. In support of the first contention it was submitted that the decree passed by the Division Bench must be taken to be the decree which the Court of first instance should have passed if it had decided the case correctly. The application (I. A. No. 469 of 1973) was required to be moved in the trial Court regardless of the fact that at the time the said application was made a change had occurred in its pecuniary jurisdiction because a Court does not cease to exist by the pecuniary limits of its jurisdiction being altered. Strenuously contending that when a decree for redemption is passed by an appellate Court, execution application is required to be made not to that Court but to the Court of first instance and urging that the more reasonable view would be that the proceedings in the appellate Court stood terminated with its decree and any further order which the parties required in order to give effect to their rights as settled by the decree, should be obtained from the Court of first instance on which would devolve the duty of making such an order if a correct decree had been passed in the first instance. Strong reliance was placed on *Sheonarain v. Chuni Lal* (1901) ILR 23 All 88, *Venkata Krishna Ayyar v. Thiagaraya Chitti* (1900) ILR 23 Mad 521 and *Ram Dhani Sahu v. Lalit Singh* (1909) ILR 31 All 328. It was contended that the Court of first instance taking note of the change in its pecuniary jurisdiction would have forwarded the application to this Court for execution in compliance with the provisions of Sec. 39 of the Code. The said procedure having not been adopted, the proceedings taken in this Court, goes the argument, stood vitiated and the final decree passed

was of no consequence to base a follow-up action on it.

9. With a view to appreciating the contention of the appellant, it would be appropriate to note the provisions of Sections 37, 38 and 39 of the Code.

10. Section 37 defines "Court which passed a decree". It envisages that the said expression or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

11. Section 38 provides that a decree may be executed by the Court which passed it, or by the Court to which it is sent for execution.

12. Section 39 provides for transfer of decree and is as follows:—

"39(1). The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain within the local limits of the jurisdiction of such other court, or

(b) if such person has not property within the local limits of the jurisdiction of the court which passed the decree to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed it, or

(d) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

13. A reading of clause (a) of Section 37 of the Code admits of no difficulty. The question, however, arises what is meant by the expression "where the court of first instance has ceased to exist" contemplated by clause (b) of the said section. The said expression, without doubt, envisages the "abolition or total extinguishment" of the court which passed the decree. In other words, what is required to attract the first part of clause (b) of Section 37 is the complete abolition of the court and not the mere alteration in its pecuniary or territorial jurisdiction. The expression "where the Court

of first instance has ceased to have jurisdiction to execute the decree" envisaged by the second part of clause (b) of Section 37, obviously refers to such a decree where the Court loses jurisdiction to execute the decree according to its tenor. In other words where the court has lost jurisdiction to execute the decree in the manner prayed for, such as if the decree is sought to be executed against a person who actually and voluntarily resides or carries on business or personally works for gain within the local limits of the jurisdiction of another court, or the person against whom the decree is sought to be executed has not property within the local limits of the jurisdiction of the court which passed the decree to satisfy such decree but has property within the local limits of the jurisdiction of another court or in a case where the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which passed the decree. In such cases provision is made in Section 39 of the Code empowering the Court which passed the decree to send it for execution to another Court. A combined reading of Sections 37 and 38 of the Code makes it clear that a decree may be executed by the court which passed it or by the court to which it is sent for execution. That being the position in law, the court which actually passes the decree does not lose its jurisdiction to entertain execution petition by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court in which event normally resort has to be made to the procedure contemplated by Section 39 of the Code. However, with a view to safeguarding the rights acquired under the decree passed by a court which ceases to have jurisdiction to execute it according to its tenor provision has been made in clause (b) of Section 37 of the Code enabling the decree-holder to make an application for execution either to that court or to the Court which, if the suit wherein the decree was passed was instituted at the time of making application to execute it, would have jurisdiction to try the suit.

14. There are authorities in support of the proposition that the Court which actually passed the decree does not lose its jurisdiction to entertain the execution petition notwithstanding the fact that its pecuniary jurisdiction has been altered. The court does not cease to exist merely because of the change in its pecuniary jurisdiction (See *Abdus Sattar v. Mohini Mohan Dass*, AIR 1933 Cal 684; *Suryanarayan Aggarwal v. Maheshwar Keot*, AIR 1950 Assam 115; *Chaudhri Raghunandan Singh v. Narain Dass*, AIR 1960 All 730 and *Masrab Khan v. Debnath Mali*, AIR 1942 Cal 321).

15. Further, the consensus of the judicial opinion is that where a decree is passed in respect of a certain property and subsequent thereto, the area within which

the property is situate is transferred to the jurisdiction of another Court, the court which actually passed the decree nevertheless does not cease to have jurisdiction to entertain an application for execution of the decree. (See *Koduru Lalithamba v. Borra Mangamma*, AIR 1958 Andh Pra 763; *G. Hanumayya v. R. Venkata Subbayya*, AIR 1964 Andh Pra 68; *V. Gopalakrishna v. T. Gavi Sandaraya*, AIR 1964 Mys 34 and *Shah Shiv Lal Bhogi Lal v. Shah Vadi Lal Dip Chand*, AIR 1969 Guj 141).

16. The question, however, is what is the correct import of the provisions of clause (b) of Section 37 of the Code which enables a decree-holder to make an application for execution either to the Court which actually passed the decree or to the court which, if the suit wherein the decree was passed was instituted at the time of making the application to execute it, would have jurisdiction to try the suit. Section 37 gives a wider meaning to the expression "the court which passed the decree" for the purpose of executing the decree. The section empowers the court, which could have passed the decree at the time when the execution application is made, to execute the decree in case the court which actually passed the decree ceased to exist or ceased to have jurisdiction to execute it. The view that we have taken finds support from a Division Bench decision of the High Court of Sindh in case, *Naraindas v. Saindas* AIR 1944 Sindh 173, wherein it was observed that "manifestly, a court other than the court which passed the decree is contemplated by Sec. 37" of the Code. It cannot be debated that the procedure laid down in the Code is intended to facilitate and not to frustrate the execution of decrees. What will be the position if a decree-holder in a decree, on the court which actually passed the decree ceasing to have jurisdiction to execute it, directly files the execution application in the transferee court having power to execute the decree. This question cropped up before a Division Bench of the Madras High Court in case, *V. Balakrishnayya v. N. Linga Rao*, AIR 1943 Mad 449. In that case the territorial jurisdiction in respect of the properties involved in the decree was transferred from the Bapatta Sub-Court to the new Subordinate Judge's Court at Tenali. The decree-holder filed the execution application directly in the court of the Subordinate Judge Tenali. In that connection it was observed,

"the true effect of Section 39 (of the Code) is to recognise the transferee court as having inherent jurisdiction, to sell or deliver properties situate within its territorial limits, but only that the jurisdiction is to be invoked by the machinery provided by the section. From this it follows that the absence of an order of transfer is merely an irregularity in the assumption of jurisdiction by the Tenali Sub-Court when proceedings were commenced in it".

The Supreme Court in case *Merla Ramanna v. Nallaparaju*, AIR 1956 SC 87, approved the view taken by the Madras High Court in *V. Balakrishnanayya's case* (supra). Their Lordships observed that it is settled law that the court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court. The court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer and that if it entertains an execution application with reference thereto it would at the worst be an irregular assumption of jurisdiction and not a total absence of it.

17. In *Udit Narain Chaudhri v. Mathura Pershad*, (1908) ILR 35 Cal 974, it was held that the application for execution can be entertained either by the court which passed the decree or the Court which at the time of the application had jurisdiction with respect to the subject-matter of the suit.

18. Reference may also be made here to a decision of the Full Bench of the erstwhile Punjab High Court in *Mehar Singh v. Kasturi Ram* AIR 1962 Punj 394. In that case one 'A' instituted two separate suits for possession and mesne profits of two separate pieces of land against one 'B' and his sons in the court of Sub-Judge IInd Class, Sangrur. The suits were decreed. Both the villages in which the lands were situate at the time of filing the suits and at the time they were decreed fell within the territorial jurisdiction of the Sub-Judge IInd Class, Sangrur. On the formation of the Patiala and East Punjab States Union in 1948, consequent to the readjustment of the boundaries of the various Tehsils of the Sangrur District, the two villages, in which the land in suits was situated, were attached to Sunam Tehsil under Government notification with the consequence that the said villages ceased to be within the territorial jurisdiction of Sangrur Courts and fell within the territorial jurisdiction of the Sunam Courts. After the aforesaid changes were made, the decree-holder filed execution applications in the Sunam court where judgment debtors pleaded that the court had no jurisdiction to execute the decree. The plea was upheld. The decree-holder remained unsuccessful before the District Judge. In appeal, a learned Single Judge of the High Court held that Sunam Court had jurisdiction to execute the decree. With his leave the judgment-debtors filed Letters Patent Appeal. The Division Bench referred the matter to a larger Bench in view of the conflicting decisions of the various High Courts. Before the Full Bench the question canvassed was whether or not the court to which the local area had been transferred after the passing of the decree can directly entertain an application for execution without an order of transfer by the Court which in fact passed the decrees. Taking note of the observations of the Lordships of the

Supreme Court in *Merla Ramanna's case* AIR 1956 SC 87 (supra) and the provisions of Sections 37, 38 and 39 of the Code the Full Bench observed, "in all cases of loss of jurisdiction whether territorial, pecuniary or on the subject-matter, after a decree has been passed empowers the decree-holder to file an application direct to the Court that can execute it and he is not limited to seek his relief from the decreeing court only" in which event it is not necessary for the decree-holder to comply with the provisions of Section 39 of the Code. We are in respectful agreement with the view taken by the Full Bench of the Punjab High Court. We, however want to make it clear that we have considered the above authorities because of the submission made by the appellant on the above lines but we may not be misunderstood in equating the present I. A. (No. 469 of 1973) with an execution application. The present application is entirely by way of independent proceeding for passing a final decree which lies to this Court because of the provisions of the Act to which aspect we will advert to in a subsequent part of this judgment. The first contention advanced on behalf of the appellant has to be negated in view of the settled law that the Court in whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer and in entertaining an application for follow-up action with reference thereto it would at the worst be an irregular assumption of jurisdiction and not a total absence of it. No help accordingly can be drawn by the appellant from cases of *Sehonarain* (1901) ILR 23 All 88; *Venkata Krishna Ayyar*, (1900) ILR 23 Mad 521; and *Ram Dhan Sahu* (1909) ILR 31 All 328 (supra).

19. Coming to the provisions of the Act, Section 16 thereof prescribes that "all proceedings pending immediately before the appointed day in any subordinate court in the Union Territory of Delhi in or in relation to any such civil suit as is referred to in sub-section (2) of Section 5 shall on that day stand transferred to the High Court of Delhi which shall proceed to try, hear and determine the matter as if it had been pending therein".

Sub-section (2) of Section 5 envisages that "Notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in every suit, the value of which exceeds twenty-five thousand rupees".

It may be noted here that by the Amending Act (Act No. 37 of 1969) the said value has been raised to rupees fifty thousand.

20. In a suit for redemption or foreclosure on the basis of a mortgage the proceedings do not terminate with the passing of the preliminary decree. The suit continues to pend and the lis terminates with the passing of the final decree. In *Abdul*

Karim v. Durga Prasad AIR 1927 All 305 it was observed that

"from the date fixed for payment by the preliminary decree, the suit for redemption continues, and during that period the rights of the mortgagor and the mortgagee are governed by the preliminary decree".

21. In re: Clagett's Estate Fordham v. Clagett, Vol. 20 Law Reports Chancery Division 45 Vict. (1881-82) page 637, Jassel M. R. observed that the words "pending matter in any Court" mean a cause when any proceedings can be taken in it. The test applied was, if one can take any proceedings in a matter it is "pending".

22. On behalf of the appellant it was contended that the preliminary decree passed by the Division Bench of this Court has to be deemed the decree of the Court of the first instance which in fact was required to be passed by it had it decided the case correctly. That being so, the suit continued to be pending in the Court of first instance as the rights and liabilities of the parties were governed by the preliminary decree. The lis did not come to an end between the parties, the final decree was yet to be passed. Since the suit was pending in the trial Court on the enforcement of the Act, the same stood transferred to this Court by virtue of the provisions of Section 16 of Act. Even otherwise sub-section (2) of section 5 of the Act envisages that notwithstanding anything contained in any law for the time being in force the High Court of Delhi shall also have in respect of the Union Territory of Delhi ordinary original civil jurisdiction in every suit, the value of which exceeds twenty-five thousand rupees (now fifty thousand rupees). Since this Court also has ordinary original civil jurisdiction in every suit in respect of the Union Territory of Delhi, the value of which exceeds fifty thousand rupees, the application (I. A. 469 of 1973) was otherwise also entertainable by this Court. Examined from any angle contention sought to be urged by the appellant, being without any merit, has to be rejected.

23. We do not find any substance in the other contention that a final decree should not have been passed and that the proceedings should have been stayed because the appellant has chosen to file a suit (No. 145 of 1974) seeking declaration that he had become full owner of the property in question.

24. In view of our discussion on the various points, noted above, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1975 DELHI 215.

V, S. DESHPANDE AND B. C. MISRA JJ.

Jeevan Industries (P) Ltd., Appellant v. Haji Bashiruddin Madhusudan Dayal, Merchants and Commission Agents, Respondent.
F. A. O. (O. S.) No. 34 of 1969, D/- 8-11-1974.

(A) Arbitration Act (1940), Sch. I Para 8, Section 14 (2) and Section 38 — Fees of arbitrator or umpire — Mode of fixation indicated — Demand of fees before award — Validity of — Objection of misconduct when can be raised stated.

The fees of the Arbitrator or umpire must ordinarily be fixed by an agreement between the parties and the arbitrator or umpire and that should preferably be in writing. There is nothing illegal in the arbitrator or umpire demanding fees before award provided they are reasonable and not extravagant and are demanded from both parties equitably within the knowledge of both the parties and it would not be illegal if on failure of one of the parties to make the payment he either stays the proceedings or directs the other party to pay the whole amount pending the decision of the dispute by arbitration and the arbitrator or umpire would also be justified in waiting till the making of the award and then have the matter of fees determined by court under Section 14 (2) or Section 38. He can be charged with misconduct if he accepts money on any account from one of the parties without the knowledge of the other party or if the amount of fees demanded before award is exorbitant or the manner of demand is exceptional or prejudicial. To avoid such a charge the best course for the arbitrator or umpire is to make a record about his fees and the reasons therefor, if any, in the record of proceedings itself within the knowledge of both the parties and if he does not do so he will be involved in defending himself against the allegations of misconduct, if made. (1963) 2 QB 327 and (1734) 94 ER 620 and AIR 1935 Cal 359 and AIR 1956 Punj 239 and AIR 1955 All 666 Rel. on.

(Paras 7, 10)

(B) Arbitration Act (1940), Section 14 (2) and Section 38 — Recovery of arbitrator's fees — Remedies provided by Sections 14 (2) and 38 are not the only remedies — Voluntary mode of payment is accepted mode. AIR 1956 Punj 239 Dissented.

It is not correct to say that Sections 14 (2) and 38 provide only two remedies for recovering arbitrator's fees because voluntary mode of payment is an accepted mode and the aforesaid provisions do not militate against voluntary payments made by parties to the arbitrator so long as they are not objected to and are reasonable and have not caused any bias in favour of or against any party. 1957 PLR 572 Rel. on; AIR 1956 Punj 239, Dissented.

(Paras 7, 9)

(C) Arbitration Act (1940), Sch. I Para 8 and Section 38 — Delhi High Court Rules and Orders, Vol. V. Chap. 6-1 — Arbitrator's or Umpire's fees — Quantum indicated.

The Scale of fees payable to a legal practitioner by his client laid down in Chap. 6-1 and the scale of fees fixed by the Govt. to be paid to arbitrators and umpires appointed to adjudicate upon disputes between the Supply Department of the Govt. and the private parties afford a satisfactory guidance for the payment of fees to the arbitrator or umpire and though the aforesaid scales are not absolutely binding and may in appropriate cases be departed from but conformity with them will raise a presumption that the fees demanded are not excessive or extravagant. (Para 8)

(D) Arbitration Act (1940), Section 30 — Arbitrator not giving reasons for his conclusion — Court cannot speculate about reasons.

It is not open to the court to speculate where no reasons have been given by the arbitrator as to what impelled him to arrive at his conclusion and on the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning the court cannot proceed to determine whether the conclusion was right or wrong and the court cannot attempt to probe the mental process by which the arbitrator has reached his conclusion when it was not disclosed by the terms of his award — 1968 DLT 93 and AIR 1965 SC 214 and AIR 1923 PC 66 and AIR 1960 SC 588 Rel. on. (Para 13)

Cases	Referred:	Chronological	Paras
1968 DLT 93 = (1968) 70 Pun LR (D) 113			13
AIR 1965 SC 214 = (1964) 5 SCR 480 (1963) 2 QB 327 = (1963) 2 All ER 1			13 7
AIR 1960 SC 588 = (1960) 2 SCR 793 (1957) 59 Pun LR 572 = ILR (1957) Punj 1210			14 7
AIR 1956 Punj 239 = ILR (1956) Punj 428			9
AIR 1955 All 666			9
AIR 1935 Cal 359 = 38 Cal WN 784			9
AIR 1923 PC 66 = 50 Ind App 324 (1734) 2 Barn KB 463 = 94 ER 620			13 9

Bawa Shiv Charan Singh, for Appellant; T. N. Sethi and Y. K. Sabharwal, for Respondent.

MISRA, J.:— This first appeal from order has been filed by the objector M/s. Jeevan Industries Pvt. Ltd. against the judgment and order of the learned single judge of this Court (S. N. Andley, J.), D/- 19-5-1969 by which the learned single judge has dismissed the objections of the appellant and made the award of the umpire dated 8th March, 1966, a rule of the Court. The award has been made by Shri P. N. Khanna who was then an advocate of this court, and later was elevated to the Bench of the High Court and has since retired, and the award directs the appellant herein to pay a sum of

Rs. 39,942/- to Haji Bashiruddin Madhusudan, the respondent.

2. The material facts of the case briefly stated are that the appellant runs a cold storage in which the respondent kept his potatoes amongst others. The agreement for storage is exhibit R-1, dated 10th March, 1955. This agreement contains terms and circumstances in which the liability for damages to the goods stored would arise and it also contains the provisions for reference of disputes to arbitration. Some of the potatoes belonging to the respondent which had been stored in cold storage were spoiled and the disputes arose between the parties. Eventually the disputes were referred under order of Mahajan, J. dated 26th November, 1962, passed in Civil Revisions Nos. 222-D of 1959 and 179-D of 1960, to the arbitration of two arbitrators, one of whom was nominated by each party. On 5-12-1963 they appointed Shri P. N. Khanna, as an umpire. On 6th July 1965, there was difference of opinion between the arbitrators and the matter was referred to the decision of the previously made umpire. The umpire Shri P. N. Khanna, commenced his proceedings on 27th August, 1965 and made and published the award dated 8th March, 1966 within the time extended by the Court. Out of a claim for about Rs. 2,01,524/11/6 preferred by the respondent and a counter-claim of Rupees 41,516/- preferred by the appellant the arbitrator in full and final settlement directed a payment of Rs. 39,942/- by the appellant to the respondent. The award was filed by the umpire in court and notices were issued to the parties and the appellant herein filed objections on 7th May, 1966. A reply to the objections was filed and the following four issues were framed by the Senior Subordinate Judge, who was then dealing with the matter, namely,

1. Whether the award was made after the expiry of due time? If so to what effect?
2. Whether the Umpire was not properly appointed? If so, to what effect?
3. Whether the award is liable to be set aside for the grounds mentioned in the objection petition?
4. Relief.

3. On the advent of the Delhi High Court Act, this case was transferred to the original side of this Court and was registered as an arbitration suit No. 426 of 1966. The appellant produced evidence and the umpire was himself examined as a witness and the respondent did not appear in the witness box. All the issues have been decided by the learned single judge by the impugned order. He found that the award had been made within the extended time and he decided the first issue against the objector. The second issue was also decided against the objector. In answer to the third issue the objections of the objector were repelled and the award has been made a rule of the Court. Aggrieved by this decision the appellant has filed an appeal in this Court. In the appeal he

has not pressed issues Nos. 1 and 2. As a matter of fact a C. M. No. 940/69 was moved on 21st August, 1969 to add a ground to challenge the appointment of the umpire, but Mr. S. C. Singh has not pressed the said application and, has, therefore, abandoned the grounds covered by issues Nos. 1 and 2. His main attack is directed against issue No. 3. The counsel for the appellant has raised the following contentions:

(1) The umpire had misconducted himself in demanding his fees from stage to stage unrelated to the work in hand instead of stating the same at the outset and that after receiving the payment of Rs. 1500/- his further demand for Rs. 500/- prejudiced the umpire against the appellant and the award is therefore biased and vitiated.

2. The second contention is that the notes A and B attached to the award although not formally incorporated in the award state the reasons which show an error of law apparent on the face of the record and the award is therefore invalid.

4. The Material facts bearing on the first contention are that the two arbitrators appointed the umpire at the commencement of the proceedings subject to obtaining his consent and then on the date they discussed the case and recorded a disagreement, and referred the case to the umpire. In this order they stated that the fees of the umpire was fixed at Rs. 200/- provisionally, each party being liable to pay Rs. 100/- to the umpire. The record of the proceedings does not bear out any reference to the demand or payment of any fees to the umpire. Jivan Lal Virmani, Managing Director, of the objector appellant made a statement in the court on 1st August, 1967 and stated his case thus:

"The fee of the Umpire was not fixed by the arbitrators after consulting us. On 18-9-1965 each of the 2 parties paid Rupees 250/- to the umpire as his fees. on 17-11-1965 each of the 2 parties paid an additional amount of Rs. 250/- to the Umpire as his fees. On 4-2-1966 each of the 2 parties paid Rs. 250/- as additional fees to the Umpire. Additional amount of Rs. 500/- was demanded by the Umpire as his fees thereafter. I then declined to pay the fees of the Umpire and he got offended on that account. The Umpire also told me that I would have to bear consequences. The fee was paid on 3 occasions to the Umpire by me. Payment of cross Cheques."

In the later part of his statement in answer to the cross-examination he stated that he never objected in writing to the payment of fees to the Umpire.

"When the last amount of fees to the extent of Rs. 500/- was demanded as the witness told the Umpire not to ask for the fees, the amount was not paid either by me or by the opposite party. No application was filed before the Umpire objecting to the demand of Rs. 500/-."

5. The umpire Mr. P. N. Khanna was examined as R. W. 1. Facts about the demand in payment of fees are deposed by him as follows:

"My fees as an umpire was paid by the parties in three instalments; before starting the case, fees agreed to by the parties provisionally was Rs. 500/- to be paid by them in equal shares; thereafter as the work proceeded they agreed to pay another Rs. 500/- again in equal shares; the proceedings still continued and at the third stage they again agreed to pay me Rs. 500/- for the work and the payments were all through made by the parties at different stages. It is entirely wrong that I ever gave any threat to Mr. Virmani that in case the payment was not made the consequences were likely to be serious."

In cross-examination Mr. Khanna further stated:

"It is not correct that I demanded another sum of Rs. 500/- thereafter and the respondent declined to make the payment. The facts of the matter is that when I had entered on the reference as an umpire I had told the parties that the fees would not come to less than Rs. 1,500/- but they said that they should be allowed to start with Rupees 500/- provisionally. It is correct that at the time when I made assessment of Rs. 1500/- I had on the record the arbitrator's estimate of Rs. 200/- provisionally which I have referred to above. I do not think I put down in writing on the record that my fees would be to the extent of Rs. 1500/-."

6. The above is the entire material on the record from which the appellant wants to find support for his objection. The relevant provisions of law may be examined. Paragraph 8 of the 1st Schedule attached to the Arbitration Act 1940 provides that:

"The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so or any part thereof and may award costs to be paid as between legal practitioner and client." Sub-section (2) of Section 14 of the Act provides:

"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

Section 38 of the Act provides that if in any case an arbitrator or umpire refuses to deliver his award except on payment of the

fees demanded by him, the Court, may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into the court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant. Sub-section (2) provides that any party to the reference may make an application under sub-section (1) unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire.

7. In our opinion, the scheme of the Arbitration Act is that the fees of the arbitrator and/or umpire must ordinarily be fixed by an agreement between the parties and the arbitrator and that should preferably be in writing. In this discussion we would include the umpire within the expression 'arbitrator' as the same provisions apply. The arbitrator has the power to award costs of the arbitration including the fees of the arbitrator between the parties. So far as the payment of fees to the arbitrator is concerned, he is entitled to withhold the filing of the award unless and until his fees are paid. The court, however, has the power to order the arbitrator to file the award on deposit of the amount which was demanded by the arbitrator in the court, and thereafter the court has the jurisdiction and power to determine the dispute with regard to fees between the arbitrator on the one hand and the parties on the other hand and the court will decide what amount of fees is reasonable to be paid to the arbitrator and the balance of the money, if any, is to be refunded to the parties. These provisions however, do not militate against the voluntary payments made by the parties to the arbitrator so long as they are not objected to and are reasonable and have not caused any bias, in favour of or against any party. Bishan Narain J. in *Union of India v. Bakshi Ram*, (1957) 59 Pun L.R. 572, observed at p. 574 that:

"I see nothing objectionable in his endeavours to realise his fees from the Government and his efforts for that purpose do not even suggest that he was biased against the Government."

The demand and payment of the fees before the making of the award may, however, invite the objection of misconduct, if the quantum of the fees demanded were extravagant or the manner of the demand were exceptional or prejudicial. The Court of Appeals observed in *Government of Ceylon v. Chandris*, (1963) 2 QB 327 at p. 334:

"In my judgment, the court would not normally intervene in a motion such as this unless (i) it is satisfied that the fees can properly be described as extravagant; or (ii) it is apparent that the umpire has seriously

misunderstood his duty as regards the assessment of fees which he demands by his award, whether for himself or, through himself, for the arbitrators, or for both." It further observed that:

"Absence of proper assistance from the umpire, in the way of adequate information to the court when the fees *prima facie* appear to be out of relation to the work involved and are challenged as being grossly excessive, may be treated as leading to the conclusion that the umpire has misunderstood his duty. . . . (and therefore) it would be desirable that an umpire or arbitrator, in fixing his fees, should do so by reference to considerations which he can put forward and except to justify as being reasonable."

8. In the instant case Bawa S. C. Singh has not challenged the quantum of the fees realised by the umpire. Chapter 6-I of Volume V of the Rules and Orders of the Delhi High Court lays down the scale of fees payable to a legal practitioner by his client in a taxation between the party and party. That scale is in the absence of special circumstances to the contrary normally accepted and acted upon as a safe guide for payment of fees to an arbitrator in an ordinary case and the payment in conformity with the Schedule can scarcely be called excessive. The Government has also fixed a scale of fees to be paid to arbitrators and umpires appointed to adjudicate upon the disputes between the Supply Department of the Government and the private parties. They lay down a ceiling and a scale for work done by arbitrators or umpires with regard to the time spent and they also afford a satisfactory guidance for the payment of the fees to the arbitrator or umpire. These scales either fixed by the High Court or by the Government are not absolutely binding and may in appropriate cases be departed from. But conformity with them will raise a presumption that the fees demanded are not excessive or extravagant. In the instant case the amount that would be taxable as payment to legal practitioner in a suit of the same valuation, as was the dispute decided by the umpire, would amount to more than Rs. 2000/-. Considered from any point of view, the amount of Rs. 1500/- paid to the umpire in the instant case cannot be said to be exorbitant or extravagant. The arbitration proceedings were held before him on eight or nine hearings. Although, there is no record of the time spent at each hearing, yet whatever time was spent the payment made is justified and no objection had rightly been taken by the counsel for the appellant against the quantum paid.

9. Bawa Shiv Charan Singh has severely criticised the mode of demand. He contends that the arbitrators had provisionally fixed the umpire's fees at Rs. 200/- and the umpire was in error in continuing to raise his demand after every two months and in collecting Rs. 1500/-. It is unfortunate that

the umpire did not record in the proceedings his demand of the fees and its payment by the parties. The amounts have, however, been paid by both the parties simultaneously within the knowledge of each other and whatever inference or prejudice was sought to be drawn from the absence of the mentioning of the demand and payment of fees in the proceedings is not available to the parties in the present case. In an old case *Shepherd v. Brand*, (1734) 2 Barn. K. B. 463, reprinted in 94 ER at p. 620, the court found that the arbitrators insisted upon payment by the parties for their trouble and expenses and the defendant refused to this upon which the plaintiff paid the whole money and thereupon the court held that it may be something dangerous to suffer one side only to give money to arbitrators. This rule of law quoted by Costello J. in *Akshoy Kumar Nandi v. S. C. Dass and Co.* AIR 1935 Cal 359, and the learned judge proceeded to observe

"the principles underlined in the said decision still hold good and it was imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of their having put themselves into a position where it may be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to the adjudication." The observations of Costello J. are certainly a wise and prudent saying worthy of note. In the case before him he, however, held that the question of payment was a matter of mutual arrangement between the parties and so he rejected the objection. A learned single Judge of the High Court of Punjab in the *First National Bank Ltd. Ambala v. Beri Brothers* AIR 1956 Punj 239, lent his support to the aforesaid observations of Costello J. Harnam Singh J. in *First National Bank's case*. AIR 1956 Punj 239 however, proceeded to observe that from the scheme of the Act it appeared that Sections 14 (2) and 38 provided only two remedies for recovering arbitrator's fees. With respect we are unable to agree with this observation of Harnam Singh J. In our opinion, voluntary mode of payment, which is unexceptionable and reasonable, is an accepted mode. Harnam Singh J. in the said case, however found that the arbitrator had accepted the fees from one of the parties without the knowledge of the other and that constituted misconduct. Payment by one without the knowledge of the other is, in our opinion, certainly misconduct. Raghubar Dayal J. as he then was, while delivering the judgment for the Division Bench of the High Court in *Teja Singh Soorma v. Union of India*, AIR 1955 All 666, observed in paragraph 3, that the law did not contemplate that an arbitrator must proceed with arbitration proceedings without payment of his fees in case he wanted them to be paid before acting in the arbitration proceedings and that the demand of fees from only one party by the arbitrator and

refusing to act further on failure to pay did not amount to misconduct on the part of the arbitrator.

10. As a result of the analysis of the provisions of law and the relevant authorities, our conclusion is that there is nothing illegal or improper in the demand made before the award by the arbitrator or umpire of fees and expenses from the parties provided they are fair and reasonable and are not extravagant or excessive and they are made on both the parties equitably within the knowledge of both the parties. It would not be illegal and improper if on the failure of one of the parties to make the payment, he either stays the proceedings or directs the other party to pay the whole amount pending the decision of the dispute by arbitration. The arbitrator would also be justified in waiting till the making of the award and then proceed in accordance with Section 14 (2) or Section 38 of the Act and have the matter determined by the court. The arbitrator, in our opinion, however, is likely to be charged with misconduct for having been illegally induced to make an award if he accepts any money on any account whatsoever from one of the parties without the knowledge of the other party. Such a charge would also be open, if the amount demanded is exorbitant having no relation to the work done or anticipated, nor to the standard of fees normally payable to arbitrators for such a work. In order to avoid such a charge and also to avoid having to give evidence before the court to justify the payment of fees, the best course to adopt for the arbitrator is to make a record about his fees and the reasons therefor if any, in the record of the proceedings itself within the knowledge of both the parties. If he does not do so he will be involved in defending himself against the allegations of misconduct, if made.

11. Luckily in the instant case, the objector has himself stated that the payment was made in three instalments of Rs. 250/- each by each of the parties and the total sum paid was Rs. 1500/-. This amount we have found to be reasonable in view of the valuation of the claim, the number of hearings and the amount of work done. The charge of partiality and misconduct completely fails, when it is admitted that the amount had been demanded from both the parties equally and had been equally paid by both the parties at the same time, though it is a matter of regret that the same was not recorded by the umpire in the proceedings.

12. The last argument of Bawa S. C. Singh is that the umpire demanded an additional sum of Rs. 500/- from the objector. This has not been believed by the learned single Judge and we are unable to differ from him and place any reliance on the statement of the objector. The umpire has candidly admitted the other demands and payments and has denied this demand. We accept the statement of the umpire in agreement with

the learned single Judge. Non-appearance of the respondent is a matter of no consequence in this context. There is no corroborative evidence to support the alleged making of the demand or the inference that failure to make this payment enraged the umpire. Surely the umpire who had already received Rs. 1500/- and who could, if he was so inclined, demand any other reasonable fees by withholding the award, could not be angered by non-payment of Rs. 500/- only and then make an award only for Rs. 39,000/- and odd against a claim of more than 2 lakhs rupees preferred by the respondent. The contention of the appellant is baseless and is rejected.

13. The second contention again has no force. The award after making the recitals does not give any reasons and simply directs the payment of Rs. 39,962/- by the appellant to the respondent. The counsel, however, relies on two notes A and B which are attached to the award. These notes have not been incorporated in the award but they are accompanying the same. Notes A and B appear to contain only some private calculations made by the umpire before he made the award. They do not give nor can we discover from them any reasons at all. The note A states the claim of the respondent herein and says that the cost price of the potatoes was Rupees 130873/- and out of which he deducted the resale price of the damaged potatoes and an amount of Rupees 3500/- on account of balance on pronote, which is fortunately not in dispute before us. No other charge or profit was allowed. In respect of the claim of the appellant the storage charges of Rs. 38146/- have been allowed and no cartage or interest has been allowed. Difference between the two figures, namely, the amount of damage allowed to the respondent and the storage charges has been determined as the amount payable by the appellant to the respondent. In other words, against the total claim of the respondent, the umpire has deducted the resale value of the damaged potatoes and the storage charges and instead of allowing the whole of the claim of the respondent has reduced it by the charges for the storage. We asked the learned counsel to explain what are the reasons that he could discover out of the notes A and B from which an error of law could be apparently found. He failed to give us any satisfactory answer except stating that if the umpire was allowing the appellant full storage charges he negated the claim of negligence on the part of the appellant as a plaintiff. This argument is really very far fetched. There is no reason or finding given about the negligence but this would be implicit in the award as damages have been awarded to the respondent but their quantum has been reduced. No legal infirmity can therefore be found in the award on the face of the record. The learned single Judge in the impugned judgment has relied upon a

passage from a division bench authority of this court in *M/s. The Salween Timber and Construction Co. (India) v. Union of India*, 1968 D. L. T. 93, wherein Tatachari J., (as he then was) sitting with I. D. Dua, J. observed in paragraph 33 :

"It is not open to the Court to speculate or to go into the evidence and try to find out as to what impelled the Umpire to arrive at his conclusion, or to attempt to prove the mental process by which the Arbitrator reached his conclusion."

With respect we agree with the said statement of law. The Supreme Court in *Jivrajbhai Ujamshi Sheth v. Chintamanrao Balaji*, (1964) 5 SCR 480 = (AIR 1965 SC 214) observed at page 493 that:

"An award made by an arbitrator is conclusive as a judgment between the parties and the Court is entitled to set aside an award if the arbitrator has misconducted himself in the proceedings or when the award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid. An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion."

The Supreme Court further observed that it was not open to the Court to speculate where no reasons have been given by the arbitrator as to what impelled the arbitrator to arrive at his conclusion and on the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the court cannot proceed to determine whether the conclusion was right or wrong. It was not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it was not disclosed by the terms of his award. The following rule of law laid down by the Judicial Committee in *Champssey Bhara Co v. Jivraj Baloo Spinning and Weaving Co. Ltd.* AIR 1923 PC 66 was reaffirmed.

"The law has for many years been settled, and remains so at this day, that where a cause or matters in difference are referred to an arbitrator, a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . The only exceptions to that rule are cases where the award is the result of corruption or fraud and one other, which though it is to be regretted is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award."

According to Judicial Committee "an error in law on the face of the award means that one

could find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for one's judgment, some legal proposition which was the basis of the award and which one could say was erroneous; it did not mean that if in a narrative a reference is made to a contention of one party that opened the door to seeing first what that contention was and then going to the contract on which the parties rights depended to see if that contention was sound."

14. This rule of law also found approval of the Supreme Court in *M/s. Alopi Parshad and Sons, Ltd. v. Union of India*, AIR 1960 SC 588. The rule is therefore firmly established.

15. On the facts and the circumstances of the case we are in entire agreement with the learned single Judge who passed the impugned order that there is no error of law apparent on the face of the record in the instant case. The contention of the appellant therefore fails.

16. The appeal is consequently dismissed and the impugned order is affirmed. The learned single Judge in the impugned order left the parties to bear their own costs and we would do likewise. There will be no order as to costs.

Appeal dismissed.

AIR 1975 DELHI 221

S. RANGARAJAN, J.

Shori Lal Jain, Petitioner v. Lt. Governor, Delhi and others, Respondents.

Civil Writ No. 1162 of 1971, D/- 13-8-1974.

(A) Land Acquisition Act (1894), S. 6 — Declaration — Satisfaction that land is required for public purpose — Satisfaction must be personal satisfaction of Lt. Governor — Delegation is not permissible.

The duty of being satisfied cannot be delegated to any Secretary. In the instant case, there was no delegation even by the Lt. Governor to the Secretary. The Secretary had seen the file and the declaration was made without even placing it before the Lt. Governor. The notification was quashed. 1957 AC 488 and (1948) 1 All ER 780, Relied on.

(Paras 4, 5, 7)

Cases Referred: Chronological Paras
1957 AC 488 = (1956) 3 All ER 939 5
(1948) 1 All ER 780 = 64 TLR 290 6

P. N. Lekhi, for Petitioner; Arun Kumar (for Nos. 1, 2 and 11), Mohd. Mian (for Nos. 7 to 10), S. S. Chadha with P. N. Sethi (for No. 12) and Keshav Dayal

with R. K. Khanna (for No. 13), for Respondents.

ORDER:— This judgment will dispose of Civil Writ Petitions 48 to 57 of 1972 also. The petitioner in Writ Petition No. 1162 of 1971 is one of the three partners of the firm known as Messrs. Jain Optical Industries, carrying on business of optical goods as a tenant in shops Nos. 2395/1, 2397 to 2400, Ballimaran, Delhi. The petitioners in the other petitions are tenants in other shops, all housed in building known as Kothi Nawab Loharowali, Bazar Balimaran, Delhi (Nos. 2376 to 2382, 2395 to 2402), which has been acquired for the purpose of running two Government Girls Higher Secondary Schools. The first and second floors of the building were taken on rent by the Government in May, 1957 at a rent of Rupees 1,150 per month for running the school. The ground floor of the property comprises 19 shops/godowns, one of which has been rented to the Government. The annual rental income to the owners from these shops/godowns in the ground floor is stated to be Rs. 1,135 per month. The acquisition of the properties of the entire building was suggested by the Directorate of Education on the ground that there was no prospect of the Government constructing Higher Secondary Schools in that area owing to non-availability of a suitable site and there being no possibility of shifting the schools outside the area since the same were meant to serve the minority community (Muslims) which comprises quite a large population in this densely populated locality. It was pointed out that the Directorate of Education, Delhi Administration had paid, until April, 1968, when the proposal to acquire was made by the Directorate, Rs. 1,51,800 as rent to the owners of the building for the School. The school is being run in two shifts; one in the morning and the other in the afternoon. It was also suggested that it will be profitable for the Government to acquire the entire building with the shops and godowns in the ground floor not only because of the rent it was fetching but also the saving that would result to the Government in not having to pay so much by way of rent.

2. The notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter called the Act) was made on 11-12-1968. The Land Acquisition Collector made a report, on 11-3-1969, under Section 5-A of the Act that no objections had been received to the notification under Section 4 (1) of the Act and that in the absence of any objection the acquisition proceedings may be processed further. It was further suggested by the Collector that a notification under Section 6 of the Act may be made. Such a

notification, under Section 6 of the Act, was issued on 24-4-1969 stating as follows:

"Whereas it appears to the Lt. Governor, Delhi that land is required to be taken by Government at the public expense for a public purpose, namely, for Government school, it is hereby declared that the land described in the specification below is acquired for the above purpose."

(emphasis added)

3. The present Writ Petition as well as the connected Writ Petitions have been filed attacking notifications under Sections 4 and 6 of the Act on various grounds. The delay in the filing of the petitions has been explained on the ground that the petitioners came to know about the acquisition only after the notice under Section 9 of the Act was served in July, 1971. The petitions were filed without any loss of time having regard to the time taken to ascertain the true facts. The award having not been yet passed the petitions cannot be defeated on the ground of delay when, as the present discussion will show, the notification under Section 6 is seen to be illegal.

4. The objection in C. W. 1162 of 1971 is the most comprehensive and the same was argued by Shri P. N. Lekhi, learned counsel for the petitioner, at great length, his arguments being merely adopted in the other petitions. It was contended by Shri Lekhi, inter alia, that there had been no inquiry under Section 5-A of the Act and for that reason itself the acquisition was bad. In the affidavit of return filed by Shri R. N. Puri, Deputy Secretary, Land and Building Department on behalf of Delhi Administration (Respondent 11) it was only mentioned that the allegation in paragraph 35 of the petition concerning the absence of report under Section 5-A was not admitted, it was further stated that "satisfaction" for issuing the said notification was arrived at after due consideration and that no objection under Section 5-A of the Act was received from any quarter. There was a categorical assertion in paragraph 35 of the petition that there was no report, as contemplated by law, on the basis of which the Lt. Governor (Respondent 1) could express his satisfaction. In view of the above allegation and the manner in which it had been traversed, I directed the concerned land acquisition file to be produced. When it was produced it transpired that there was a report by the Land Acquisition Collector, as noticed above, but an even more serious lacuna was seen to exist on a perusal of the file. By a strange coincidence the file does not appear to have been put up at

all before the Lt. Governor for his satisfaction to be expressed under Section 6 of the Land Acquisition Act. Such satisfaction of the 'appropriate Government' is a condition precedent for the issue of the declaration under Section 6 of the Act. It is not disputed for the purpose of Section 6 the Lt. Governor is the "appropriate Government" and that he has to express his satisfaction before a declaration under that section is made. The file shows that when the above said report was received from the Collector stating that no objection had been received against acquisition a note was put up that permission may be accorded. Only the Secretary had seen the file; the file does not appear to have even been placed before the Lt. Governor at all. In view of this serious lacuna there seems to be no other option but to quash the notification issued in respect of the above building under Section 6 of the Act on 24-4-1969 (copy of which is Annexure 4 to the petition).

5. The Lt. Governor has to be satisfied; not any of his Secretaries to whom, under Rule 7 of the Rules of Business of Delhi Administration only the power to authenticate notifications made with his approval and consent are delegated. The Lt. Governor himself could not delegate to any of his Secretaries the duty of being satisfied that any particular property requires to be acquired for a public purpose; the satisfaction has to be by him personally. A similar question arose before the House of Lords in *Vine v. National Dock Labour Board* (1957 AC 488). In that case the Board had lawfully delegated its disciplinary powers over registered dock workers to local boards. The local board, with the approval of the national board, had in turn sub-delegated those powers to a disciplinary committee. In the event *Vine* was dismissed by that committee. The question was whether the sub-delegation was valid; if it was not *Vine's* dismissal was wrongful and ultra vires. The House of Lords pointed out that in deciding whether it is an implied power to delegate one has to consider (a) the nature of the duty, (b) the character of the person on whom the duty is put. As to (a) the House of Lords observed as follows:

"Judicial authority normally cannot of course be delegated..... There are, on the other hand, many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would normally have no authority to delegate. He could take

advice of course but he could not authorise some one to make the appointment without further reference to him..... I am clear that disciplinary powers, whether judicial or not, cannot be delegated."

6. The same question also arose earlier in *Allingham v. Minister of Agriculture and Fisheries*, 1948-1 All ER 780. The Minister in that case had by regulations lawfully delegated to an agricultural committee his powers to give directions concerning the use for agricultural purposes of land specified in the notice of direction. The committee decided that eight acres of sugar beet should be grown by the occupier of certain land but left it to its executive officer to select the acres to which the direction should apply. The officer consulted a local sub-committee appointed to make recommendations to the committee; acting on its advice he served a notice on the occupier specifying the acres. The notice was held to be invalid as the committee had left to the officer the duty of deciding something they had to decide for themselves.

7. In the present case it is not even suggested that there has been any such delegation, as a fact, by the Lt. Governor to the Secretary concerned; even if there was such delegation it would be invalid.

8. Since the notification under Section 4 was made as early as in the year 1968 and more than 3 years have elapsed since then (even the notification under Section 6 was more than 3 years old) it is not possible in law to issue any further notification under Section 6 in pursuance of the abovesaid notification under Section 4 of the Act. In view of this lacuna it is realised on all hands that the other questions which have been debated before me at length in this Writ Petition, do not fall for decision as the notification under Section 6 will have to be quashed. If the Government wishes to proceed further with the acquisition of this building it will have to be necessarily by means of a fresh notification under Section 4 of the Act.

9. Shri P. N. Lekhi, however, requested that at least the more important contentions which he put forward against the acquisition may be briefly set out though it has become unnecessary to consider them in the above view of the present case. Shri Lekhi urged, inter alia, the following: [After setting out the contentions his Lordship proceeded:]

10. It seems proper to repeat that the above contentions of Shri Lekhi have only been set out, at his request, but that no opinion is expressed on all or any of them.

11. In the circumstances the notification under Section 6 of the Act (copy of which is Annexure 4 to the petition) is alone quashed. The Writ Petition is accepted to the above extent. There will be no order as to costs.

Order accordingly.

AIR 1975 DELHI 223

S. N. SHANKER AND H. L. ANAND. JJ.

The State of Andhra Pradesh, Petitioner v. New Delhi Municipal Committee, Respondent.

Civil Writ No. 342 of 1969, D/- 14-3-1975.

(A) Constitution of India, Article 289

(1) — Union taxation — Test to determine — House tax levied by virtue of Punjab Municipal Act (1911) as applicable to the Union territory of Delhi — Nature of — Properties belonging to the States and situated in the Union territory of Delhi — Whether exempt.

The true test to determine if a tax is a Union tax or not is to see the legislative competence so that if such a tax could be imposed by the authority of Parliament it could be a Union tax while if it could be imposed by the authority of the State legislature, it would be a tax imposed by the State. The test as to the fund to which the proceeds go or the entity which ultimately gets such funds would, therefore, be wholly irrelevant. The body which collects these taxes would also not determine the nature of the tax. (Para 26)

The form of Government in 1911 when the Punjab Municipal Act came into force was purely unitary and the concept of State of provincial legislative field as distinct from Central legislative field was unknown to the Constitutional law of India. All statutes then had their source in the Central legislative authority. It would, therefore, be a misnomer to call an Act of 1911 as being a State or a provincial enactment in its inception except that it bore the name of a State or a province and dealt with a part of the geographic territory of the then India known as Punjab. It is true that the continuation of this Act subsequently after the Government of India Act, 1935 gave it the stamp of State legislative enactment and it is the State legislature which amended it from time to time and it may, therefore, be true to say that what was initially a central enactment became, as it were, a provincial enactment after the Government of India Act, 1935 and a State enactment after the promulgation of the Constitution of India. The posi-

tion of this enactment, however, in relation to Delhi would be different. The Act was applicable to Delhi initially by virtue of the fact that until the year 1912, Delhi was only a district of the then Province of Punjab and it is only in 1912 that the Governor General, with the prior approval of the Secretary of State for India, took the territory of Delhi under his immediate authority, and it became a province to be administered by a Chief Commissioner. The various Punjab enactments which were then in force in the territory of Delhi continued to be in force by virtue of the Delhi Laws Act of 1912 and later by the Part C States Laws Act of 1950 and the Union Territories Laws Act of 1950. The application and the later extension of this law to the Union Territory of Delhi was, therefore, not by the authority of the State legislature but that of the Central legislature, that is, the Central legislature under the Government of India Act followed by the Central legislature, under the Constitution of India, that is, the Parliament of India. Thus although at no stage was the Act as such enactment by Parliament still on the extension of the Act to the Union Territory of Delhi by the various Central legislative enactments referred to above, it became a Central Act or an Act of Parliament as if made by virtue of power of Parliament to legislate for the Union Territory of Delhi by virtue of clause (4) of Article 246 of the Constitution of India. (Para 24)

Hence the levy of house tax under the provisions of the Punjab Municipal Act (1911) as extended to the Union Territory of Delhi is a piece of Union taxation and hence the properties of the several States situated in the Union territory of Delhi are exempt from such tax by virtue of Article 289 (1).

(Paras 25 and 36)

(B) Constitution of India, Article 246

(4) — "State" whether includes Union territories.

The answer to the question whether the expression "State" in clause (4) of Article 246 would include the territory comprised in the Union Territories would be the same whether or not the modified definition of the expression "State" under the General Clauses Act would or would not apply to the interpretation of the Constitution of India. If the amended definition does not, and the Union territory is not included in the expression "State" as held by the Supreme Court in AIR 1970 SC 2097 no difficulty arises. Even if the other view is to be preferred, the expression "State" under Article 246 would not include Union territories because there would be an obvious repugnancy in the context in which the expres-

sion "State" is used throughout in Article 246 of the Constitution of India, as was pointed out in AIR 1970 SC 1126. Even though the expression "State" would be regulated by the new definition pursuant to the modification in Art. 372-A of the Constitution of India as including the Union Territory of Delhi there were a number of Articles of the Constitution in which the expression "State" would not be given that meaning. Article 246 was one of such Articles. After the Constitution (Seventh Amendment) Act, 1956, India became a Union of States and the territories thereof specified in the First Schedule. Clause (2) of Article 1 then provided for the Union territories which are mentioned separately. There is, thus, a distinction between a "State" and "Union territory" which cannot be lost sight of. It was pointed out that when the definition could not be made applicable owing to the context or the subject, the word "State" would refer to States in the First Schedule only. (Para 35)

Cases Referred: Chronological Paras

1975 Lab IC 1265 (Delhi)	34
AIR 1974 SC 1596 = (1974) 2 SCC 365	34
AIR 1970 SC 1126 = (1970) 3 SCR 881	32, 35
AIR 1970 SC 2097 = (1971) 2 SCR 197	33, 34
AIR 1969 Delhi 246 = 1969 Lab IC 974	30
AIR 1969 Delhi 330 = ILR (1969) Delhi 426	31
AIR 1968 SC 637 = (1968) 2 SCR 103	35
AIR 1958 SC 682 = 1959 SCR 445	24

P. Ram Reddy, Sr. Advocate with P. Parameshwara Rao, Santosh Chatterji Sr. Advocate with G. S. Chatterji, O. N. Tikku, Advocate General of J. & K. with M. K. Ramamurty, Sr. Advocate with Miss Uma Mehta and Vineet Kumar and M. L. Jain, for Petitioner; Bikramjit Nayyar, for Respondent.

H. L. ANAND, J.:— The principal question that those petitions under Article 226 of the Constitution of India by the States of Andhra Pradesh, Jammu and Kashmir and Punjab, in one of which the State of Orissa was allowed to intervene, raise is whether the immovable property belonging to a state situated in the Union Territory of Delhi is immune from house tax leviable under the provisions of the Punjab Municipal Act, 1911, as applicable to Delhi (hereinafter to be referred to as "the Act") by virtue of the exemption granted to the property of a State from Union Taxation by Article 289 (1) of the Constitution of India.

2. Certain subsidiary questions also arise in the several petitions as to the basis on which house tax should be levied, the method of computation of the annual

value and the quantification of the house tax but in the view that I have taken of the constitutional question, none of the other questions would survive and it is, therefore, unnecessary to give the facts or the circumstances leading to the present petitions save to mention that the properties in dispute were hitherto being assessed to house-tax by the New Delhi Municipal Committee, the respondent herein, and the house-tax was being paid until the States challenged its constitutionality.

3. On behalf of the various States it was argued that by virtue of Art. 289 (1) of the Constitution, the property of a State was exempt from Union taxation subject to the exception incorporated in clause (2) of Article 289; that clause (2) of Article 289 would not operate because the operation of the exception is dependant on legislation by Parliament in that behalf and no such law has been made by Parliament; that "Union taxation" would mean taxes which the Union is empowered to impose; that by virtue of Article 265 of the Constitution of India, every tax must have its genesis in law and that the Union taxation must, therefore be co-extensive with the power of Parliament to make laws; that by virtue of Article 246 (4) of the Constitution of India the power of Parliament to make laws extends not only to the subjects enumerated in the Union List, and the concurrent List but also to matters included in the State List in relation to any part of the territory of India not included in a State as also in respect of residuary subjects by virtue of Art. 248 of the Constitution of India; that by virtue of Part VIII of the Constitution of India, the Union Territory of Delhi is to be administered by the President and the laws of Parliament and any taxation which has its genesis in such a law or in law which is deemed to have been made by Parliament would be "Union taxation"; that the agency through which taxes are collected or the funds to which the proceeds go or the entity to which the funds are ultimately allocated are wholly irrelevant for the determination of the question as to whether a particular tax was part of Union taxation; that tax on property leviable in the Union Territory of Delhi by virtue of the provisions of the Act, though relating to a matter that falls within the State List, would nevertheless be deemed to be Union Taxation because by virtue of the application of the Act to the Union Territory of Delhi, it would be deemed to have been incorporated in law made by Parliament and, therefore, be treated as law made by Parliament by virtue of its power under clause (4) of Article 246 of the Constitution of India; and that properties of the various States

situated in the Union Territory of Delhi would, therefore, be exempt from tax on property.

4. On the other hand, it was contended on behalf of the New Delhi Municipal Committee (hereinafter to be referred as "the Committee") that the test to determine if a tax formed part of Union taxation within the meaning of Article 289 (1) was if the proceeds from it formed part of the Consolidated Fund of India under Article 266 (1) of the Constitution of India; that the proceeds of tax on property under the Act did not form part of the Consolidated Fund of India but were kept by the Committee for its own purpose; that the tax on property was enumerated as one of the subjects in the State List; that the Act was a piece of State legislation and did not, by virtue of its application to the Union Territory of Delhi, become a piece of Central legislation; that by virtue of Article 246 of the Constitution of India the Union legislation and the State legislation are two different fields of legislative action and taxation which has its genesis in any of the matters enumerated in List I or List III alone would form part of Union taxation; that the Act was not made by Parliament by virtue of power under Article 246 (4) of the Constitution of India; that Union had no power to impose tax on property and that the property of the various States in the Union Territory would, therefore, not be exempt from this tax. It was, however, not disputed that clause (2) of Article 289 would not be attracted because Parliament had not made any law in that behalf and that the scope of exemption would depend on the true interpretation of Article 289 (1) of the Constitution irrespective of the use to which the property was being put.

5. What then is the true meaning of the expression "Union Taxation" in Article 289 (1) of the Constitution and what is the precise scope and limit of the exemption provided by it?

6. Article 289 and its complementary Article 285 read as under:—

"289 (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government."

"285 (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

7. The expression "Union taxation" is not defined in the Constitution and is only used in Article 289. Even Art. 285, which is the corresponding provision giving exemption to the property of the Union, is differently worded and uses the expression "all taxes imposed by a State or by any authority within a State" but does not use the expression "State taxation" in contradistinction to "Union taxation."

8. Article 265 of the Constitution of India provides that every tax shall be levied or collected only by the authority of law with the result that the power of the Union and the States to impose taxes within their respective spheres of permissible taxation must be relatable to laws which they are competent to make with the result that the powers of the Union and the States to impose tax must be co-extensive with the powers of their respective legislatures with reference to the distribution of legislative business provided in Part XI of the Constitution read with the Union, the State and the concurrent Lists. Incidentally while the Union and State Lists enumerate matters which deal with taxation, the Concurrent List does not except with certain duties and fees. Article 248, however, when it refers to the residuary powers of legislation and vests it in Parliament, not only provides for Parliament's exclusive powers to make laws with respect to any matter not enumerated in the Concurrent List or State List but takes care to add by clause (2) that "such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

9. It would, therefore, be necessary to examine the scheme of the Constitution with regard to the demarcation of legislative powers between the Union Legislature and the State Legislatures to determine the true meaning and import of the expression "Union taxation."

10. India is a Union of States and its territories comprise the territories of the "States" and the Union territories specified in the First Schedule, including the Union Territory of Delhi, and such other territories as may be acquired by it. This is what Article 1 of the Constitution provides. The Constitution is federal in character and is based on a rigid division of executive powers between the Union and the States executives and a corresponding demarcation of legislative functions of the Union Legislature, that is, the Parliament and the Legislatures of the States. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Article 246, as indeed Chapter I of Part XI of the Constitution, in which this Article occurs, deals with the distribution of legislative powers. Clause (1) of this Article provides that Parliament would have exclusive power to make laws with respect to any of the matters enumerated in the Union List in the Seventh Schedule of the Constitution. Clause (2) provides for the concurrent power of Parliament and State legislatures with regard to matters enumerated in the Concurrent List, in the Seventh Schedule to the Constitution. Clause (3) deals with the power of the Legislature of a State to make laws for such a State or any part of it with respect to matters enumerated in the State List in the Seventh Schedule. Article 248 provides for the power of Parliament to make laws with respect to residuary matters, that is, matters not enumerated in any of the two Lists—the concurrent and the State.

11. Chapter I further provides for exceptions to the general rule of demarcation of legislative powers provided in clauses (1), (2) and (3) of Article 246 and Article 248. One of these exceptions is contained in clause (4) of Article 246 while the other categories of exceptions are contained in Articles 249 to 253 of the Constitution.

12. The exception provided for in clause (4) of Article 246 deals with "any part of the territory of India not included in a State" and extends to such territories power of Parliament to make laws with respect not only to matters enumerated in the Union and the Concurrent List but also to matters enumerated in the State List. The Union Territory of Delhi is one such territory and a provision with regard to its administration, as indeed the other Union territories, is made in Part VIII of the Constitution. Article 239 in this Part provides that every Union Territory shall be administered by the President acting, to such extent as he

thinks fit, through an administrator to be appointed by him with such designation as he may specify. Articles 239-A, 239-B and 240 deal with certain Union territories other than Delhi while Art. 241 deals with the constitution of High Courts in the various Union territories of India. It so happens that of the various Union territories enumerated in the First Schedule to the Constitution, the Union Territory of Delhi does not have a Legislature and it is for this reason that apart from the administration of the Union Territory, which is provided in Part VIII of the Constitution, provision had to be made for the enactment of laws with regard to such a territory and Clause (4) of Article 246 of the Constitution of India is that provision.

13. The exceptions provided for in Articles 249 to 253 of the Constitution, however, are by and large intended to deal with extra ordinary situations. Article 249, for example extends the power of Parliament to make laws with respect of any matter enumerated in the State List if the Council of States declares by a resolution by a requisite majority that such a course would be "necessary or expedient in the national interest." Article 250 however, empowers Parliament to make laws with respect to whole or part of India "with respect to any of the matters enumerated in the State List while a Proclamation of Emergency is in operation." Article 252 then empowers Parliament to make laws with respect to matters enumerated in the State List if the legislatures of two or more States resolve that such a course appears "to be desirable". Article 253 reserves to Parliament exclusive power to make laws for the whole or any part of the territory of India "for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

14. A picture of distribution of legislative powers and demarcation of fields of taxation between the Union and the States and of their corresponding legislatures would be incomplete without a reference to the provisions in Chap. I of Part XII of the Constitution with regard to the financial matters notably Articles 266 to 275. Article 266 provides that all revenues received by the Government of India, all loans raised by that Government and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the consolidated Fund of India," and all revenues received by the Government of a State, all loans raised by that Government and all moneys received by that Government in repayment of loans shall

form one consolidated fund to be entitled "the Consolidated Fund of the State." Article 267 then provides for the Contingency Fund of India and the Contingency Fund of the State. Article 268 provides for the distribution of the revenues between the Union and the States. Article 268 provides that stamp duties and such duties of excise on medical and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected where they are leviable within any Union territory by the Government of India while in other cases by the State within which such duties are respectively leviable and that the proceeds of any such duties leviable within any such State shall not form part of Consolidated Fund of India but shall be sent to that State. Article 269 makes provision with regard to taxes levied and collected by the Union but which would be assigned to the States while Article 270 provides for taxes levied and collected by the Union and distributed between the Union and the States. Article 271 provides for surcharge on certain duties and taxes for purposes of the Union and Article 272 provides for taxes which are levied and collected by the Union and may be distributed between the Union and the State. Article 273 makes provision for grants in lieu of export duty on jute products. Article 275 provides for grants from the Union to certain States. Article 280 provides for appointment by the President of a Finance Commission periodically to make recommendations to the President as to—

"(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be divided between them and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India."

15. It may be useful to mention that the Constitution provides for exemption of income and property of a State from Union taxation and the property of a Union from all taxes imposed by a State or by any authority within a State on a near reciprocal basis. While Article 289 exempts "the property and income of a State" from "Union taxation" except in case the Parliament authorises the imposition of any tax in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. Article 285 provides for exemption to the "property of the

Union" from all taxes imposed by a State or by any authority within a State." Clause (2) of Article 285, however, exempts from the operation of clause (1) of that Article any levy of tax on any property of the Union within a State to which such property was immediately before the commencement of the Constitution liable or treated as liable so long as that tax continues to be levied in that State until Parliament by law otherwise provides.

16. On a review of the various provisions in Part XII of the Constitution, Sinha, C. J., as he then was, summed up the position thus in *Re. The Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944*. 1964 (3) SCR 787:

"It will thus appear that Part XII of the Constitution has made elaborate provisions as to the revenues of the Union and of the States, and as to how the Union will share the proceeds of duties and taxes imposed by it and collected either by the Union or by the States. Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union and collected either by the Union or by the States do not form part of the Consolidated Fund of India but many of those taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of the distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid of revenues of the States out of the Consolidated Fund of India, are matters which have to be decided by a high powered Finance Commission, which is a responsible body designated to determine those matters in an objective way. It cannot, therefore, be justly contended that the construction of Article 289 suggested on behalf of the Union will have the effect of seriously and adversely affecting the revenues of the States. The financial arrangement and adjustment suggested in Part XII of the Constitution has been designed by the Constitution-makers in such a way as to ensure an equitable distribution of the revenues between the Union and the States, even though those revenues may be derived from taxes and

duties imposed by the Union and collected by it or through the agency of the States. On the other hand, there may be more serious difficulties in the way of the Union if we were to adopt the very wide interpretation suggested on behalf of the States. It will thus be seen that the powers of taxation assigned to the Union are based mostly on considerations of convenience of imposition and collection and not with a view to allocate them solely to the Union; that is to say, it was not intended that all taxes and duties imposed by the Union Parliament should be expended on the activities of the Centre and not on the activities of the States. Sources of revenue allocated to the States, like taxes on land and other kinds of immovable property, have been allocated to the States alone. The Constitution-makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities out of the revenues levied and collected by the Union Government. Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made, as already indicated, specific provisions empowering Parliament to set aside a portion of its revenues, whether forming part of the Consolidated Fund of India or not, for the benefits of the States, not in stated proportions but according to their needs. It is clear, therefore, that considerations which may apply to those Constitutions which recognise water-tight compartments between the revenues of the federating States and those of the federation do not apply to our Constitution which does not postulate any conflict of interest between the Union on the one hand and the States on the other. The resources of the Union Government are not meant exclusively for the benefit of the Union activities; they are also meant for subsidising the activities of the States in accordance with their respective needs, irrespective of the amounts collected by or through them. In other words, the Union and the States together form one organic whole for the purposes of utilisation of the resources of the territories of India as a whole."

17. Bearing in mind the scheme of distribution of legislative powers and of taxation between the Union and States and the provision with regard to allocation of funds for the purpose of the Union and the States it becomes obvious that when Article 289 (1) refers to "Union taxation," it means taxes which are leviable by the Union or to put it differently taxes which can be levied by the authority of Parliament and pertain-

ing to matters on which Parliament is empowered to legislate by virtue of the various constitutional provisions. The authority which collects the taxes or the entity to which the proceeds or part of the proceeds from such taxes is eventually allocated either under the Constitution or under the machinery set up by the Constitution would, therefore, be wholly irrelevant for the purpose of a decision as to the true meaning of the expression "Union taxation". It is, therefore, not possible to accept the contention that the test would be as to whether the proceeds would form part of the Consolidated Fund of India.

18. This conclusion is fully borne out by certain observations of the Supreme Court in *Re: The Bill to Amend Section 20 of the Sea Customs Act* (supra). In that case the provision of Article 289 (1) of the Constitution of India fell for consideration before the Supreme Court as a result of a proposal to introduce in Parliament a bill to amend Section 20 of the Sea Customs Act and Section 3 of the Central Excises and Salt Act with a view to applying provision of the said two Acts to goods belonging to the State Governments in regard to which certain doubts arose as to whether the provisions of the Bill were inconsistent with Article 289 of the Constitution of India. The President of India referred under Article 143 of the Constitution of India certain questions for the opinion of the Supreme Court to ascertain if the proposed amendment would be constitutional. The question for the consideration of the Supreme Court was whether the provisions of Article 289 of the Constitution precluded the Union from imposing or authorising the imposition of custom duties on import or export or excise duties on the production and manufacture in India on the property of a State used for purposes other than those specified in clause (2) of the Article. By majority it was held that the provisions of Article 289 (1) the Constitution of India were in the nature of an exception to the exclusive field of legislation reserved to Parliament and were limited to taxes "on property" and on income of a State; that the immunity granted in favour of States had to be restricted to taxes levied directly on property and income and that even though import and export duty or duties of excises had reference to goods and commodities, they are not taxes on property directly and were not within the exemption under Article 289 (1) of the Constitution. The contention before the Supreme Court on behalf of the Union was that Article 289 (1), properly interpreted, would mean that the immu-

nity from taxation granted by it to the State was only in respect of tax on property and on income and that the immunity did not extend to all taxes and should not be interpreted so as to include taxation "in relation to property." The contention on behalf of the States was that in interpreting Article 289 of the Constitution, it must be held that the immunity was extended from "all" Union taxation whether "on property" or "in relation to property". The contention of the Union prevailed and Sinha C. J., as he then was, and who spoke for the majority, observed, "We are, therefore, of opinion reading Art. 289 and its complementary Article 285 together that the intention of the Constitution-makers was that Article 285 would exempt all property of the Union from all taxes on property levied by a State or by any authority within the State while Article 289 contemplates that all property of the States would be exempt from all taxes on property which may be leviable by the Union." (emphasis supplied). The term "Union taxation" was, therefore, considered to be synonymous with taxes "leviable" by the Union so that the determining factor was the competence of the Union to levy the taxes and the corresponding competence of Parliament to make laws incorporating such a tax.

19. It must, however, be pointed out that from what has been said above it does not necessarily follow that taxes having their foundation in laws made by Parliament by virtue of what may conveniently be described as its extraordinary powers provided for in Articles 249 to 253 of the Constitution must be treated as forming part of "Union taxation". This is so because it could be said with some justification that while legislating in exercise of those powers Parliament would not be exercising its own legislative functions but would, as it were, acting as a delegate of the State legislatures concerned or be deemed as if it was functioning as a State Legislature. In such cases different considerations may perhaps apply. It is unnecessary to carry this matter any further as being beyond the scope of the controversy before us.

20. The question that then arises is whether tax on property leviable under the Act could be said to be a tax leviable by the Union. The answer is both in the affirmative and the negative depending on the territory to which it relates and the legislature which authorises its imposition. In so far as tax on property may be imposed in the various States in India by virtue of Entry 41 in the State List by the State legislatures or by statutes which could be deemed to have been

made by such a legislature it could not be considered a Union taxation by any stretch of imagination. The same is, however, not true where such a tax is levied by virtue of the authority of Parliament and, therefore, of the Union to impose a tax as in the case of Union territory of Delhi. It has been noticed above that by virtue of Article 239 of the Constitution of India every Union territory has to be administered by the President through an administrator. By virtue of clause (4) of Article 246 of the Constitution, Parliament has power to make laws with respect to the Union territories and where tax is imposed on property in such territories it would be Union taxation because such a tax would have its genesis in Parliament's power to make laws. In such a case, the Union taxation would not have relation to any particular List but to a particular territory and once it relates to a tax in that territory, it could encompass all the Lists and this is so because the whole scheme of demarcation of taxing power between the Union and the States has relevance between the Union on the one hand and the various States on the other. No such demarcation exists or could be conceived in case of territories which are administered by the Union itself. The demarcation then becomes irrelevant. In such a case, the Union executive, as indeed the Union Legislature, that is the Parliament, becomes a repository of all executive and legislative powers respectively in relation to that territory and all taxation imposed in that territory would have to be under the authority of the Union and by virtue of laws made by Parliament and would, therefore, be the tax of the Union and hence "Union taxation".

21. This conclusion also finds support from the conclusion arrived at by the Supreme Court in the above case. An argument was raised on behalf of the States that Article 289 could not have provided for exemption with regard to tax on property because tax on property legitimately belongs to the field of State Legislation by virtue of Entry 41 in List II and that, therefore, the interpretation canvassed on behalf of the Union could not prevail. This argument was dispelled by the Supreme Court and it was pointed out that such an argument ignored the provision of Article 246 (4) of the Constitution of India. This is how Sinha, C. J. dealt with the argument:

"But it is said that there is no specific tax on property in List I and it is therefore contended on behalf of the States that when property of a State was exempted from Union taxation, the intention of the Constitution-makers must have been to exempt it from all such taxes

which are in any way related to property. Therefore, it is urged that the exemption is not merely from taxes directly on property as such but from all taxes which impinge on property of a State even indirectly, like customs duties, or export duties or excise duties. It is true that List I contains no tax directly on property like List II, but it does not follow from that that the Union has no power to impose a tax directly on property under any circumstances. Art. 246 (4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. This means that so far as Union territories are concerned Parliament has power to legislate not only with respect to items in List I but also with respect to items in List II. Therefore, so far as Union territories are concerned, Parliament has power to impose a tax directly on property as such. It cannot therefore, be said that the exemption of States' property from Union taxation directly on property under Article 289 (1) would be meaningless as Parliament has no power to impose any tax directly on property. If a State has any property in any Union territory that property would be exempt from Union taxation on property under Article 289 (1). The argument therefore that Article 289 (1) cannot be confined to tax directly on property because there is no such tax provided in List I cannot be accepted."

22. This decision is, therefore, a clear authority for the proposition that Union taxation under Article 289 (1) of the Constitution of India means tax leviable by the Union by virtue of the competence of Parliament to make laws and would include laws which Parliament was competent to make for the Union Territory of Delhi by virtue of clause (1) of Article 289 (sic) (clause (4) of Article 246) of the Constitution including laws authorising imposition of tax.

23. Some of the other contentions raised on behalf of the Committee may now be considered.

24. The first contention of the Committee is that the Act was a State enactment, in any event, it could not be said to have been made under Article 246 (4) of the Constitution and the tax imposed by it could not be said to be a Union tax. This contention is based on a fundamental misconception as to the nature of the enactment and the effect of its application and later extension to the Union Territory of Delhi. A reference to the constitutional history of India would show that it is the Government of India Act, 1919 which for the first time declar-

ed "responsible Government as an integral part of the British empire" to be the goal of constitutional development of India and it is this Act which for the first time placed certain subjects under the control of elected ministers and gave to the provinces, also for the first time, a quasi-independence of the Centre by allotting to them sources of revenue of their own and assigning to them separate administrative and legislative spheres. The separation of legislative sphere effected subsequently under the Act was to furnish the basis for the distribution of legislative powers for the Federal Constitution which was introduced later by the Government of India Act, 1935 and still later by the Constitution of India. The form of Government in 1911, therefore, when the Punjab Act came into force as Punjab Act No. 3 of 1911, was purely unitary and the concept of State or provincial legislative field as distinct from Central legislative field was unknown to the Constitutional law of India. All statutes then had their source in the Central legislative authority. It would, therefore, be a misnomer to call an Act of 1911 as being a State or a provincial enactment at its inception except that it bore the name of a State or a province and dealt with a part of the geographic territory of the then India known as Punjab. It is true that the continuation of this Act subsequently after the Government of India Act, 1935 gave it the stamp of state legislative enactment and it is the State legislature which amended it from time to time and it may, therefore, be true to say that what was initially a central enactment became, as it were a provincial enactment after the Government of India Act, 1935 and a State enactment after the promulgation of the Constitution of India. The position of this enactment, however, in relation to Delhi would be different. The Act was applicable to Delhi initially by virtue of the fact that until the year 1912, Delhi was only a district of the then Province of Punjab and it is only in 1912 that the Governor General, with the prior approval of the Secretary of State for India, took the territory of Delhi under his immediate authority, and it became a province to be administered by a Chief Commissioner. The various Punjab enactments which were then in force in the territory of Delhi continued to be in force by virtue of the Delhi Laws Act of 1912 and later by the Part C States Laws Act of 1950 and the Union Territories Laws Act of 1950. The application and the later extension of this law to the Union Territory of Delhi was, therefore, not by the authority of the State Legislature but that the Central Legislature, that is, the Central Legislature under the Government of India Act followed by the

Central Legislature under the Constitution of India, that is, the Parliament of India. This was by virtue of the powers of Parliament under Article 246 (4) of the Constitution of India. It is true that at no stage was the Act as such enacted by Parliament and the provision of Cl. (4) of Article 246 of the Constitution of India was not invoked but that would not change the character of the Statute in relation to the Union Territory of Delhi. This is so because the Act was extended to the Union Territory of Delhi under the various Statutes which were central Statutes. The Delhi Laws Act, 1912, the Union Territories (Laws) Act, 1950 as indeed the Part C States (Laws) Act, 1950 were all central statutes and when a provincial Act or an Act which may be treated as a provincial Act or State Act was extended to a territory by a particular legislature, it would be deemed to be the enactment of such a legislature and this principle is clearly recognised by the Supreme Court in the case of *Mithan Lal v. State of Delhi*, 1959 SCR 445 = (AIR 1958 SC 682), where the Supreme Court was concerned with the constitutionality of the Bengal Sales Tax. The contention before the Supreme Court in that case was that Section 2 of Part C States (Laws) Act, 1950 must be held to be bad as being repugnant to Art. 248 (2) of the Constitution of India in so far as it conferred on the Government authority to extend a taxation Law to Part C States. It was pointed out that this argument proceeded on a misapprehension of the true scope of Article 246. It was further pointed out that Article 248 had reference to the distribution of legislative powers between the Centre and the States mentioned in Parts A and B in the three Lists in Seventh Schedule and it provided that in respect of matters not enumerated in Lists including taxation, it was Parliament that had power to enact Laws and that it has no application to Part C States for which the governing provision was Art. 246 (4). It was also pointed out that when a notification was issued by the appropriate Government extending a law of a Part A State to a Part C State, "the law so extended derives its force in the State to which it is extended from Section 2 of Part C State (Laws) Act enacted by Parliament. The result of a notification issued under that Section is that the provisions of the law which is extended becomes incorporated by reference, in the Act itself, and therefore, a tax imposed thereunder is a tax imposed by Parliament." It is, thus, clear that on the extension of the Act to the Union Territory of Delhi by the various Central Legislative enactments referred to above, it became a Central Act or an Act of Parliament as if made by virtue of power

of Parliament to legislate for the Union Territory of Delhi by virtue of clause (4) of Article 246 of the Constitution of India. This contention must, therefore, be rejected.

25. It is next contended on behalf of the Committee that it does not function under the supervision or control of the Central Government but functions under the Delhi Administration or the Administrator of the Union Territory of Delhi and that this would take the tax in question out of the class of Union tax. This argument betrays total ignorance of the origin of the Committee, the entity which administers the Union Territory of Delhi and amounts, if I may use the expression, to constitutional atheism on the part of the local body. The local body is a nominated body constituted under Section II of the Act and by virtue of S. 12 of the Act, this could be done by the State Government. By virtue of Section 3 (60) of the General Clauses Act, the State Government as respects anything done before the commencement of the Constitution in a Part C State shall be the Central Government, in respect of anything done after the commencement of the Constitution but before the commencement of the Constitution (Seventh Amendment) Act, 1956 for the purpose of a Part C State, the Central Government and as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956 for a Union territory means the Central Government. At all the three relevant stages, therefore, the State Government for the Union Territory of Delhi both after or before it was a Part C State, the State Government means the Central Government. It is the Central Government, therefore, that had brought the local body into existence and the local body is, therefore, a statutory creature of the Central Government. By virtue of the provisions contained in Part VIII of the Constitution of India, the Union Territory of Delhi is to be administered by the President of India through an Administrator and this is what Article 239 provides. The Administrator of the Union Territory of Delhi has no independent constitutional or a legal existence of his own but is only an agent of the President and acts within the scope of such authority as may be conferred on him by the President. It is, therefore, the President or the Union Government which administers the Union Territory of Delhi. To say, therefore, that the local body is administered or is under the administrative control of the Administrator of the Union Territory of Delhi and not the Central Government is to deny the obvious. This contention must, therefore, fail.

26. It is next contended on behalf of the Committee that the various taxes imposed by the local body do not form part of the Consolidated Fund of India but are retained by the local body to meet the budgetary requirements and that the purpose for which these funds are spent would indicate the nature of the tax and be determinative of the question as to whether house tax is the Union tax. This argument is equally unconvincing. It has already been pointed out above that the true test to determine if a tax is a Union tax or not is to see the legislative competence so that if such a tax could be imposed by the authority of Parliament it could be a Union tax while if it could be imposed by the authority of the State legislature, it would be a tax imposed by the State. The test as to the fund to which the proceeds go or the entity which ultimately gets such funds would, therefore, be wholly irrelevant. The body which collects these taxes would also not determine the nature of the tax.

27. There is, however, an aspect of the interpretation of clause (4) of Article 246 of the Constitution which involves an interesting controversy as to the true meaning of the expression "State" used in Article 246 (4) as indeed in various other Articles of the Constitution, the examination of which has led to some interesting results. The question was not raised before us but in view of the importance of the point I have thought it proper to deal with it as well.

28. Clause (4) of Article 246 of the Constitution of India empowers Parliament to make laws with respect to any matter "for any part of the territory of India not included in a State." Prior to its amendment by the Constitution (Seventh Amendment) Act, 1956 the clause read differently and by the clause as then worded, Parliament had been empowered to make laws with respect to any matter for any part of the territory of India "not included in Part A or Part B of the First Schedule." It would be useful to remember here that the Constitution as it stood before the reorganisation of States, provided for Part A States, Part B States and Part C States. The Union territories then did not figure in the Constitution. Clause (4) of Article 246 as then worded, therefore, empowered Parliament to make the laws with respect to the territories of India comprised, amongst others in Part C States. The expression "State" is not defined by the Constitution but the definition of the expression in the General Clauses Act, as it stood before the aforesaid constitutional amendment, also defined "State" as meaning "a Part A State, a Part B State or a Part C State." After the aforesaid con-

stitutional amendment, however, S. 3 (58) of the General Clauses Act was also modified pursuant to the Adaptation of Laws Order, 1956 issued by virtue of the provisions of Article 372-A of the Constitution of India and the amended definition has two parts. Part I deals with the meaning of "State" before the commencement of the aforesaid constitutional amendment as meaning a Part A State, a Part B State or a Part C State while the Part II of the definition, which deals with the period after the aforesaid constitutional amendment, the term "State" means "a State specified in the First Schedule to the Constitution and shall include a Union territory". It may also be useful to remember that the aforesaid constitutional amendment swept away the hitherto known Part A, Part B and Part C States and instead substituted for that the States and the Union territories and Article 1 of the Constitution was accordingly amended by the said constitutional amendment.

29. The question that, therefore, arises is whether the expression "State" used in clause (4) of Article 246 of the Constitution would be regulated by the amended definition of the expression under the General Clauses Act or not. If the expression "State" under Article 246 (4) is to be regulated by the amended definition of the expression "State" by the General Clauses Act, the State shall include a Union territory with the result that the expression "the territory of India not included in a State" in clause (4) of Article 246 would exclude the Union Territory of India and by virtue of Cl. (4) of Article 246 of the Constitution of India, Parliament would have no power to make laws with respect to the Union territories including the Union Territory of Delhi. If, however, the amended definition under the General Clauses Act would not regulate the expression "State", then the Union Territories would be excluded because the State in that event would mean Part A, Part B or Part C States and since the Union territories have ceased to be Part C States those territories would be excluded from the expression "territory of India not included in a State" with the result that Parliament would be competent to make laws with respect to such territories with regard to all matters. It so happens, however, that the expression "State" though conceptually well-known is left undefined by Article 366 of the Constitution of India, which is the constitutional lexicon incorporated in the Constitution itself. Article 367 of the Constitution, however, provides that, unless the context otherwise provides, the General Clauses Act, 1897 shall "subject to any adaptations and modifications that

may be made therein under Article 372 apply for the interpretation of this Constitution" as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Article 372, inter alia, provides that for the purpose of bringing the provisions of any law in force in the territory of India into accord with the provision of the Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment or otherwise. The power to make these modifications was, however, confined by Cl. (3) of Article 372, as it originally stood, to two years but by the Constitution (First Amendment) Act, 1951 was extended to three years with the result that this power of the President expired on the expiry of three years from the date of the commencement of the Constitution. Since the Constitution (Seventh Amendment) Act, 1956 brought about changes in the Constitution which in turn would have to be translated into the existing laws, power had to be found to make adaptations and modifications in those laws since the modification and adaptation could not then be made under Article 372. Article 372-A was, therefore, added to the Constitution which empowers the President to make such adaptations and modifications in the existing laws as may be necessary for the purposes of bringing any provision of any law in force in India and in any part of it immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956 into accord with the provisions of the Constitution as amended by that Act. By Adaptations of Laws Orders, 1956 and 1957, the provisions of the various statutes were accordingly adapted and modified including Section 3 (58) of the General Clauses Act to the effect referred to above. It was, however, ignored that the General Clauses Act was made applicable for the interpretation of the Constitution by Article 367 only to the extent it adapted and modified under Article 372 so that adaptation or modification of any law including the General Clauses Act for purposes of Article 372-A would perhaps not enure for the purpose of interpretation of the Constitution under Article 367 of the Constitution because that Article specifically envisages only such adaptations and modifications as may be made by virtue of the provisions of Article 372. This has resulted in a near anomalous position.

30. In the case of *H. L. Radhev v. Delhi Administration*, AIR 1969 Delhi 246, the question before a Division Bench of this Court was whether the President had power to make rules for Central services in Delhi. The answer to the question in turn depended on the deci-

sion of the question if the Union Territory of Delhi was or was not State. The contention was that after the Constitution (Seventh Amendment) Act, 1956, Section 3 (58) (b) of the General Clauses Act, as modified by the Adaptation of Laws Order issued under Article 372-A of the Constitution of India pursuant to the said Act defines the term "State" as including the Union Territory of Delhi and that Delhi was, therefore, a State with the result that the President had no power to make rules for the Central Services in Delhi. The contention was repelled by the Division Bench on the ground that the definition of the term "State" by Section 3 (58) (b) of the General Clauses Act as adapted under Article 372 by the Adaptation of Laws Order, 1950 could be used to interpret the word "State" used in the Constitution only when a State was a Part A, Part B or Part C State and the Union territory did not figure there at that time and that the definition of the term "State" introduced by the General Clauses Act by the Adaptation of Laws Order, 1956 issued under Article 372-A of the Constitution after the Constitution (Seventh Amendment) Act, 1956 could not apply to the interpretation of the Constitution inasmuch as Article 367 (1) permitted the use of the General Clauses Act as adapted under Article 372 only for such purposes, and that the adaptation under Article 372-A of the Constitution could not enure for the purpose of interpretation of the Constitution. It was, therefore, held that Union Territory of Delhi was not a state. It was further observed that before a Union territory could be said to be a legal entity it must possess the chief attributes of a legal person, namely, the power to enter into contracts and institute suits in its own name and that the Union Territory of Delhi did not possess any of these attributes. It was further observed that the Union Territory of Delhi has been excluded from the definition of the term "Union territory" under Section 2 (1) of the Union Territories Act, 1963 with the result that those provisions did not apply to Delhi. It was also noticed that while some of the Union territories had their Legislative Assemblies with limited legislative powers, Delhi did not have any and that Delhi was, therefore, devoid of this feature of a legal personality. It was, therefore, held that the Union Territory of Delhi was not a State with the result that the President had power to make rules for Central Services in Delhi.

31. In the case of Management of the Advance Insurance Co. Ltd. v. Gurudasmal, AIR 1969 Delhi 330, the same Division Bench reiterated the above legal position in the following words:

"In our recent judgment in C. W. No. 543 of 1968 = (AIR 1969 Delhi 246), H. L. Radhey etc. v. Delhi Administration etc. delivered on the 14th August 1968, we had occasion to point out that the General Clauses Act as adapted under Article 372 of the Constitution only applied to the interpretation of the Constitution. The changes introduced in the said Act by the subsequent adaptation made under Article 372-A consequent on the Constitution (7th Amendment) Act, 1956, were not applicable to the interpretation of the Constitution. Consequently, the definition of a "State" in Section 3 (58) (b) of the General Clauses Act whereby a Union Territory is included in the definition of "State" after the commencement of the Constitution (7th Amendment) Act, 1956, is not applicable to the interpretation of the Constitution."

32. However, in the case of Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal, AIR 1970 SC 1126, on appeal from the decision of the Division Bench of this Court in the case referred to above, the Supreme Court took the contrary view and held that the new definition of the expression "State" in the General Clauses Act pursuant to the Adaptation of Laws Order issued by the President under Article 372-A of the Constitution of India, being appropriate to the purpose applied to the interpretation of the Constitution and the word "State" in Entry 80 of the Union List, therefore, applied to Union territories as well. The contention that the provisions of the General Clauses Act would apply to the interpretation of the Constitution by virtue of Article 367 of the Constitution of India only to the extent it was adapted and modified under Article 372 so as to exclude any adaptation or modification under Article 372-A was repelled on the ground that the argument overlooks the provision of a fresh power of adaptation conferred on the President by Article 372-A and that "this was a fresh power equal and analogous to Article 372 (2)." It was accordingly held that "when the President adapted the General Clauses Act by giving new definition of "State" the new definition appropriate to the purpose applied to the interpretation of the Constitution. The word "State" in Entry 80 of Union List, therefore, applied to Union Territories also."

33. In the case of Shiv Kirpal Singh v. V. V. Giri, AIR 1970 SC 2097, the question whether the Union Territory of Delhi was a "State" and whether the expression "State" would be regulated by the original definition under the General Clauses Act or the one that emerged after the Adaptation of Laws Order, 1956 pursuant to Article 372-A of the Constitution

of India, was, however, answered by the Supreme Court in the negative and it was held that the new definition which was a result of modifications and adaptations under Article 372-A would not apply to the interpretation of the Constitution because Article 367 was not amended and it was not laid down that the General Clauses Act, as adapted or modified under any Article other than Article 372, will also apply to the interpretation of the Constitution. Since, until its amendment in 1956, Section 3 (58) of the General Clauses Act did not define "State" as including Union Territories for purposes of interpretation of Article 54, the Union Territories cannot be treated as included in the word "State." It must, however, be pointed out that Bhargava, J. alone adverted to this matter which was not discussed in the other opinions in that case.

34. We are, thus, faced with two conflicting decisions of the Supreme Court both by Benches comprised of 5 learned Judges and the question would, therefore, be which of the two views should prevail with us. A Full Bench of this Court in the case of *The Management of M/s. Patiala Iron Works v. Union of India*, C. W. P. No. 1495 of 1973, decided on 27-1-1975 = (reported in 1975 Lab IC 1265) (Delhi), was concerned with the question, in the context of a reference to an industrial dispute under Section 10 of the Industrial Disputes Act, as to whether the Union Territory of Delhi was a "State" or not on a reference of the question by this Bench. The Full Bench noticed the aforesaid conflict of opinion and invoked the principle laid down by the Supreme Court in the case of *Mattu Lal v. Radhey Lal*, AIR 1974 SC 1596, and feeling itself free to express its own opinion on what appeared to the Court to be the true meaning of the provision, expressed the view that the decision of this Court in *Radhey's* case (Supra) that Delhi was not a State appeared to be in accordance with the reasoning of Bhargava, J. in the case of *Shiv Kirpal Singh*, AIR 1970 SC 2097 (Supra). The matter was, however, not carried further because in the view that the Full Bench took of the interpretation of the provisions of the Industrial Disputes Act, the constitutional question did not survive.

35. To my mind the answer to the question whether the expression "State" in clause (4) of Article 246 of the Constitution of India would include the territory comprised in the Union Territories would be the same whether or not the modified definition of the expression "State" under the General Clauses Act would or would not apply to the interpretation of the Constitution of India. If the amended definition does not, and the Union

territory is not included in the expression "State" as held by the Supreme Court in one of the two judgments above, no difficulty arises. Even if the other view is to be preferred, the expression "State" under Article 246 would not include Union territories because there would be an obvious repugnancy in the context in which the expression "State" is used throughout in Article 246 of the Constitution of India, as was pointed out by Hidayatullah, C. J., as he then was. In the case of *Advance Insurance Co.*, AIR 1970 SC 1126 (Supra) even though the expression "State" would be regulated by the new definition pursuant to the modification in Article 372-A of the Constitution of India as including the Union Territory of Delhi there were a number of Articles of the Constitution in which the expression "State" would not be given that meaning. Article 246 was one of the Articles pointed out by his Lordship. It was also pointed out that after the Constitution (Seventh Amendment) Act, 1956 India became a Union of States and the territories thereof specified in the First Schedule. Clause (2) of Article 1 then provides for the Union territories which are mentioned separately. There is, thus, a distinction between a "State" and "Union territory" which could not be lost sight of. It was pointed out that when the definition could not be made applicable owing to the context or the subject, the word "State" would refer to States in the First Schedule only. Such an occasion arose in the case of *T. M. Kannian v. Income-tax Officer*, AIR 1968 SC 637, wherein Bachawat, J. explained at page 640 that the definition of the word "State" in two parts in the adapted Section 3 (58) of the General Clauses Act was repugnant to the subject and context of Article 246. The new definition would, therefore, not regulate the provisions of Article 246 of the Constitution of India and that being so, in interpreting clause (4) of Article 246 the distinction between the "States" and the "Union territories" cannot be lost sight of. There is another reason why the expression "State" in clause (4) of Art. 246 of the Constitution of India must be read as excluding the Union territories because Cl. (4) as it stands today was amended by the Constitution (Seventh Amendment) Act, 1956. Before the said amendment the expression "Part A, Part B States" was used which was later substituted by the expression "states". The territories then comprised in Part C States were, therefore, excluded from the expression Part A and Part B with the result that in clause (4) as it then stood, Parliament was competent to make laws for the territories forming part of Part C States of India. The amendment was consistent

with it because while using the expression "State", it excluded the expression "Union territories of India" so that the Parliament may continue to be competent to make laws with regard to the territories forming part of the Union territories.

36. In the result, the petitions succeed. The assessment and demands of house-tax in respect of properties of the petitioners are quashed and the Committee is restrained from levying or claiming any house-tax in relation to the said properties. The petitioners would also have their costs. Counsel's fee is fixed at Rs. 500/- in each case.

S. N. SHANKAR, J.:— I agree.
Petitions allowed.

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FULL BENCH

**T. V. R. TATACHARI, C. J.,
V. S. DESHPANDE AND
YOGESHWAR DAYAL, JJ.**

M. N. Soi, Petitioner v. New Delhi Municipal Committee, and another, Respondents.

Civil Writ No. 374-D of 1966, D/- 30-5-1975.

(A) Evidence Act (1872), S. 90 — Old document — Presumption as to — Valuation of property for realisation of house tax — Order of Rent Controller fixing fair rent produced by A — Document 30 years old and purports to have been sent to A's father — A's custody has to be considered proper and a presumption under Section 90 can be raised. (Para 15)

(B) New Delhi Rent Control Order, 1939. Clauses 3, 4 and 5 — Fixation of fair rent under Clause 5 — Question of recording any finding that the existing rent was excessive does not arise. (Para 19)

(C) Defence of India Rules, 1939, Rule 81 (2) (bb) — New Delhi Rent Control Order, 1939 — Order is operative even after ending of war.

The Rent Control Order could be for maintaining supplies and services essential to the life of the community, and not necessarily for only securing the defence of British India or the efficient prosecution of the war. There is no provision in the New Delhi Rent Control Order limiting its own operation or the operation of the fixation of fair rent thereunder to the duration of the war. It cannot, therefore, be said that the order passed by the Controller fixing fair rent of premises under the New Delhi Rent Control Order ceased to be valid on the ending of the war. (Para 21)

GS/IS/C634/75/MVJ

(D) Punjab Municipal Act (3 of 1911), Sections 3 (1) (b) and 3 (1) (c) — Annual value of building — Computation of — (Delhi Rent Control Act (59 of 1958), Section 6).

Where fair rent is fixed in respect of a house under the New Delhi Rent Control Order, 1939 it should be the "original rent", and the "basic rent" would be the said "original rent" increased by certain percentage as specified in paragraph 3 or paragraph 4 or paragraph 5, as the case may be. According to Section 6 (1) (A) (1) (b) of Delhi Act, the aforesaid basic rent together with 10% of such basic rent would be "standard rent" for the petitioner's house or building. Thus, Section 6 (1) (A) (1) (b) read with the paragraphs in the Second Schedule statutorily determined the standard rent for the petitioner's house or building. Therefore, it is a case in which agreed rent is not legally recoverable, as the standard rent has been statutorily determined. Consequently the Committee had to fix the annual value on the basis of the aforesaid standard rent statutorily determined under Section 6 (1) (A) (1) (b) read with the Second Schedule of the Delhi Rent Control Act, 1958, and on the basis of the actual or agreed rent between the petitioner and his tenant. In doing so, the Committee would not be fixing the standard rent under the Act as between the landlord and the tenant taking up the function of the Controller, but would only be assessing the annual value, and for that assessment it would merely be adopting the standard rent which had been statutorily determined as a basis. (Paras 35, 36)

Further, the omission on the part of the petitioner to rely upon the order of the Controller and take the benefit of it during some years, does not and cannot estop him from relying upon the same in subsequent year. (Para 40)

Cases Referred: Chronological Paras
ILR (1973) 1 Delhi 363 = 1973 Ren CR 93 (FB)
(1972) Civil Revn. No. 31 of 1966, D/- 14-7-1972 = ILR (1972) 2 Delhi 665

28, 30
AIR 1971 SC 353 = (1970) 2 SCC 803 28
AIR 1970 SC 1417 = (1970) 2 SCC 44 28
(1970) 2 SCR 390 = (1970) 1 SCC 14
30, 31, 32, 37
(1970) 72 Bom LR 461 = 1970 Mah LJ 866
37
AIR 1962 SC 151 = (1962) 3 SCR 49

26, 27, 28, 30, 37
F. C. Bedi, for Petitioner; Bikramajit Nayyar, for Respondents.

T. V. R. TATACHARI, C. J.:— This Civil Writ Petition came up initially for hearing before B. C. Misra, J. who considered that it should be heard by a larger Bench. The Civil Writ Petition then

came up before a Division Bench consisting of V. S. Deshpande and B. C. Misra, JJ. who referred it to a Full Bench. Although the Division Bench framed certain questions, which will be referred to later, for consideration by the Full Bench, the counsel are agreed that the entire Writ Petition has been referred for being heard and decided by the Full Bench.

2. The Civil Writ Petition has been filed by the petitioner, M. N. Soi, praying that certain orders passed by the New Delhi Municipal Committee assessing the annual value of the petitioner's house for purposes of house-tax for the years 1963-64, 1964-65 and 1965-66 be quashed. The respondents to the Writ Petition are (1) The New Delhi Municipal Committee, and (2) Shri S. C. Vaish, Additional District Magistrate, Delhi.

3. It is necessary at this stage to state the facts in a chronological order gathered from the Writ Petition, the counter-affidavit filed on behalf of the first respondent, the annexures to the said Writ Petition and counter-affidavit, and certain documents which the petitioner was allowed to place on record subject to just exceptions by an order, dated August 27, 1974, in C. M. No. 1441 of 1974, filed by him.

4. The petitioner is the owner of House No. 15, Prithvi Raj Road, New Delhi, bearing Municipal No. III-P/H/46 (old number being M. C. 8389), which devolved on him from his father, late Rai Bahadur M. R. Soi. The petitioner stated in his application, C. M. 1441 of 1974, that prior to 1939, the house was let out to the Reserve Bank of India for the residence of its Manager at Rs. 200/- per month inclusive of house-tax and charges for unfiltered water supply, that in May, 1939, a new arrangement was entered into with the Reserve Bank of India by his father, who was the then landlord, by which the house was taken by the Reserve Bank of India on lease for a period of three years with effect from September 1, 1939, with an option for extension for another two years, and the rent was reduced from Rs. 200/- per month to Rs. 185/- per month including house-tax and unfiltered water charges, that the petitioner's father, in reply to a letter, dated October 26, 1940, from the Controller enquiring about the rate of rent for the house in question, wrote a letter (Annexure N) dated November 1, 1940, to the Controller, mentioning the reduced rate of rent of Rs. 185/-, that the petitioner's father thereafter received a letter (Annexure O), dated August 8, 1941, from the Controller with which was forwarded an extract from the list of rents published under clause 10 (1) of the Notification No. B. 52, (i.e. the New Delhi Rent

Control Order, 1939), showing the fair rent that had been fixed for the house in question, that the petitioner's father was required by that letter to make a representation if he had any objections to the fair rent fixed, and was also informed that any rent charged in excess of the said fair rent would make the petitioner's father liable to prosecution under Rule 81 (4) read with Rule 5 of the Defence of India Rules, but the petitioner's father did not do anything further as he had already supplied the information regarding the rate of rent, that it was on the basis of the rate of rent of Rs. 185/-, that the then Controller fixed the fair rent for the house under clause 10 (1) of the New Delhi Rent Control Order, 1939, at Rs. 170/- per month exclusive of house-tax and irrigation water charges, and that thereafter the petitioner's father was sent an order, dated September 25, 1941, to that effect. According to the petitioner, the original order, i.e., a copy of the order of the Controller signed by the Controller was shown to the second respondent and also to B. C. Misra, J. On our asking for the same, he produced before us the copy of the order signed by the Controller. We directed the same to be kept on the record of this Writ Petition for reference.

5. According to the petitioner, the New Delhi Municipal Committee (hereinafter referred to as the Committee) which came into existence in 1957, assessed the building at an annual value of Rupees 2,673.75 np. for purposes of house-tax for the years 1956-57, 1957-58 and 1958-59, and the tax levied on the basis of that value was paid by the petitioner. However, the Committee later issued three notices, dated December 4, 1958, under Section 67 of the Punjab Municipal Act, proposing to increase the annual value of the building from Rs. 2,673.75 to Rupees 24,000/- for each of the periods, November 1, 1956 to March 31, 1957, April 1, 1957 to March 31, 1958, and April 1, 1958 to March 31, 1959. The petitioner filed objections to the said proposal to increase the value with retrospective effect, and also pleaded that in any case the tenant at the time of the objections, M/s. Mitsubishi Shoji Kaisha Ltd., was paying rent at the rate of Rs. 1,500/- per month, and on that basis the annual value would be Rs. 18,000/- minus 10% on account of repairs, i.e. Rs. 16,200/-. The Committee, by three separate resolutions Nos. 95, 96 and 97, for the three aforesaid periods respectively, passed in its Ordinary Meeting held on February 20, 1959, fixed the annual value at Rs. 22,008/- for each of the three periods.

6. Against the said assessment, the petitioner preferred appeals to the Court of Shri Yousuf Zai, Additional District

Magistrate, under Section 84 of the Punjab Municipal Act. The appeals were dismissed by the Additional District Magistrate on February 24, 1959. The Committee assessed the annual value at Rs. 22,008/- for the next two years 1959-60 and 1960-61 and levied a house-tax of Rs. 2,023.92 np. The petitioner then filed a suit No. 64 of 1960, in the Court of the Senior Subordinate Judge, Delhi, challenging the validity of the assessment and levy and praying for a permanent injunction restraining the Committee from realising the tax demands at the enhanced rate for the aforesaid periods from April 1, 1956 to March 31, 1961. By his judgment, dated July 29, 1961, Shri Joginder Singh Mander, Subordinate Judge 1st Class, Delhi, held (1) that he had jurisdiction to try the suit and the suit was not barred by Section 86 of the Punjab Municipal Act, (2) that the Committee had no jurisdiction to assess the annual value with retrospective effect, and (3) that the gross annual rent of the building was Rs. 18,000/- and not Rupees 24,000/- as assessed by the Committee. The Subordinate Judge accordingly issued an injunction restraining the Committee from realising the house-tax at the enhanced rate for the years 1956-57, 1957-58 and 1958-59. As for the years 1959-60 and 1960-61, the Subordinate Judge ordered that house-tax be realised for those two years also on an annual value of Rs. 18,000/- less 10% on account of repairs.

7. Against that judgment and decree, the Committee filed Regular Civil Appeal No. 375 of 1961 in the Court of the Senior Subordinate Judge, Delhi. By his judgment, dated December 26, 1963, Shri K. S. Sidhu, Senior Subordinate Judge, Delhi, held that except for the years 1956-57 and 1957-58, the Committee was entitled to realise house-tax from the petitioner at the increased value of Rs. 22,008/- and accordingly allowed the appeal in part.

8. There is no material on the record to show what the assessments were for the years 1961-62 and 1962-63.

9. The assessments for the years 1963-64, 1964-65 and 1965-66 are the subject-matter of the present Writ Petition. Acting under Section 3 (1) (b) of the Punjab Municipal Act, 1911, the Committee assessed the annual value at Rs. 24,000/- for the years 1963-64 for the purposes of house-tax by a resolution passed on March 30, 1963, and levied a tax of Rupees 2,529.90 np. It is stated in the Writ Petition that the said assessment was made without notice to the petitioner. The petitioner filed an appeal against the said assessment order in the Court of the Additional District Magistrate, Delhi. Again,

the Committee assessed the annual value at Rs. 24,000/- for the year 1964-65 by resolution No. 110 passed on March 20, 1964, and levied a tax of Rs. 2,259.90 np. The petitioner filed objections to the said assessment and later filed an appeal against the said assessment order in the Court of the Additional District Magistrate, Delhi. Similarly, for the year 1965-66 also, the Committee assessed the annual value at Rs. 24,000/- by a resolution passed on March 15, 1965, and levied a tax of Rs. 2,529.90. The petitioner filed objections, and later an appeal against the said order of assessment in the Court of the Additional District Magistrate, Delhi. By a common order, dated February 11, 1966, Shri S. C. Vaish, Additional District Magistrate, Delhi, allowed the three appeals partly, and held that in view of the fact that the house was admittedly let out during the years in question for rent at Rs. 1,500/- per month, the annual value of the house in question would be Rupees 18,000/- minus 10% for maintenance.

10. According to the petitioner, by an order, RC/1361, dated September 25, 1941, the Controller, New Delhi, had fixed the fair rent for the house in question under the New Delhi Rent Control Order, 1939, at Rs. 170/- per month exclusive of house-tax and irrigation water charges, and the Committee could not fix the annual value for purposes of house-tax at a figure determined otherwise than on the basis of the fair rent fixed for the house under the Rent Control legislation applicable to Delhi. It is stated in the Writ Petition that the original order of the Controller fixing the fair rent at Rs. 170/- per month was shown to the Additional District Magistrate during the course of the arguments in the appeals, and the Court asked the petitioner to place a copy of the said order on the record in the appeals. It is stated in the Writ Petition that on the next date of hearing the Additional District Magistrate called upon the petitioner to file an affidavit in support of the fair rent and the actual rent received by him, and accordingly the petitioner filed an affidavit, dated September 1, 1965. A typed copy of the order of the Rent Controller, dated September 21, 1941, and a copy of the affidavit, dated September 1, 1965, have been filed with the Writ Petition as Annexures D and F. The petitioner stated in that affidavit (a) that the fair rent was fixed for the house by Mr. F. T. Jones, the then Controller, under the New Delhi House Rent Control Order, 1939, at Rs. 170/- per month, a copy of which was filed along with the affidavit, and that the name of the landlord was shown in that copy as R. B. M. R. Soi, father of the petitioner, who was the then owner of the house, and (b) that on the date of the

affidavit, the house had been let out to M/s. Mitsubishi Shoji Kaisha Ltd. at a rental of Rs. 1,500/- per month, that the tenant wrote a letter to the Committee stating the said fact, and that a letter obtained by the petitioner from the tenant showing the rate of rent had been filed with the affidavit. In his common order, dated February 11, 1966, passed in the appeals, the Additional District Magistrate observed that the appellant before him (the petitioner herein) had pressed upon him an order alleged to have been issued by the Court of the Controller, Delhi, on September 25, 1941, assessing the fair rent of the premises at Rs. 170/- per month, that it was a mere typed copy, and that he could not rely upon it.

11. Aggrieved by the said common order in the three appeals, the petitioner has filed the present Writ Petition praying—

(1) that the three orders of the Committee assessing the annual value at Rs. 24,000/- for purposes of house-tax for the years 1963-64, 1964-65, and 1965-66, and the common order of the Additional District Magistrate assessing the annual value at Rs. 18,000/-, be quashed, and

(2) that the respondents i.e. the Committee and the Additional District Magistrate, Delhi, be directed to assess the annual value of the said house at the rate of the standard rent, viz. Rs. 2,818/- minus 10%.

12. In opposition to the Writ Petition, the first respondent filed a counter-affidavit of Mr. P. S. Saxena, Secretary, New Delhi Municipal Committee. It was stated in the counter-affidavit that prior to the year 1963-64, the building of the petitioner was assessed at an annual value of Rs. 22,008/- for the years 1958-59, 1959-60 and 1960-61, calculating on the basis of a monthly rent of Rs. 2,000/-, and that the same was confirmed by the Court of the Senior Subordinate Judge in his judgment, dated December 26, 1963, in Appeal No. 375 of 1961. It was also stated that in the suit No. 64 of 1960, filed by the petitioner against the Committee challenging the assessments for the years 1956-57, 1957-58 and 1958-59, 1959-60 and 1960-61, the petitioner did not plead or agitate that the standard rent of the premises had been fixed by the competent authority. It was further stated that in all his objections filed before the Committee up to the year 1964-65, the petitioner never agitated the question of standard rent, and had been only pointing out that the annual value be calculated at the rate of Rs. 1,500/- per month as per his letters, dated September 8, 1962, April 24, 1963 and July 17, 1963, and that even while filing the objections before the Committee for the year 1965-66, the petitioner never filed the certified

copy of the alleged order of the Controller and never showed the original order of the Controller to the Committee, and the same was, therefore, not taken into consideration by the Committee. It was pleaded that since the petitioner never substantiated his allegation with respect to the fixation of the standard rent by any cogent proof before the appellate authority (respondent 2), and since the petitioner had been admittedly getting a rent of Rs. 1,500/- per month, he was estopped from agitating the matter regarding the standard rent for the purpose of the assessment for the years up to 1965-66. It was submitted that the alleged order of the Controller on which the petitioner wanted to rely was not in consonance with the provisions of law and was without jurisdiction, and, therefore, not binding on the respondents, and that the petitioner was not entitled to any of the reliefs prayed for in the Writ Petition.

13. The questions framed by the Division Bench for consideration by this Full Bench are as follows:—

"1. Whether standard rent fixed by the Rent Controller under the Delhi Rent Control Order, 1939, is a decisive or only a persuasive consideration in determining the gross annual rent at which the premises are reasonably expected to be let within the meaning of Section 3(1) of the Punjab Municipal Act, 1911, in the same way as standard rent fixed under the Delhi Rent Control Act, 1958?

2. Whether the actual rent paid by a willing lessee to a willing lessor is a consideration which prevails over the standard rent in determining the fair letting value of the premises?

3. Whether the standard rent will prevail over the agreed rent in the determination of the fair letting value only if either the tenant or the landlord wishes to avail himself of it?

4. What is the effect of the illegality of the agreement to pay rent in excess of standard rent on the determination of fair letting value?

5. Whether the order of Mr. Jones, Rent Controller, was in the circumstances of the case without jurisdiction, void and ineffective?

6. Whether the petitioner is in the circumstances of the case, particularly in view of their failure to raise this plea before the Municipal authorities, entitled to have the annual letting value assessed on the basis of the order of Mr. Jones?"

We shall consider these questions in the course of our dealing with the contentions of the parties in the Writ Petition.

14. As stated earlier, the case of the petitioner is that the Controller, by

his order. R. C./R/1361, dated September 25, 1941, had fixed the fair rent for the house in question under the New Delhi Rent Control Order, 1939, at Rs. 170/- per month exclusive of house-tax and irrigation water charges, and the Committee could not, therefore, fix the annual value for purposes of house-tax at a figure determined otherwise than on the basis of the fair rent fixed for the house under the Rent Control legislation applicable to Delhi.

15. The first question that arises for determination is as to whether the Controller had in fact fixed the fair rent at Rs. 170/- per month under the New Delhi Rent Control Order, 1939. As pointed out in the course of the narration of the facts, the petitioner's counsel has produced a document which purports to be a copy of the order passed by the Controller on September 25, 1941, and forwarded to the father of the petitioner. It reads as under:—

"RENT CONTROL OFFICE

No. RC/1361

Dated, New Delhi, the
25th Sept. '41.

ORDER

After the consideration of all the facts and circumstances a fair rent of Rs. 170/- (Rupees one hundred and seventy P. M. (unfurnished) on annual tenancy, exclusive of House Tax and Irrigation Water charges, is hereby fixed for House No. 15, Prithvi Raj Road, New Delhi, under clause 5 of the Rent Control Order, 1939.

Sd/- F. T. Jones,
Rent Controller.

Copy forwarded to R. B. M. R. Soi, 22, Darya Ganj, Delhi, with reference to his No. dated the 14th August, 1941, in continuation of this office letter No. RC/..... dated the 8th August, 1941.

Sd/- F. T. Jones,
21-9-41

Rent Controller
Sd/- 20/9 "

The document purports to bear the signature of F. T. Jones, Rent Controller. It also purports to have come into existence on September 25, 1941, and it bears the impress of an old document. The document purports to be 30 years old and has been produced by the petitioner from his custody. His custody has to be considered as proper as the document purports to have been sent to his father. In the circumstances, we are satisfied that a presumption can be drawn under Section 90 of the Evidence Act that the signature of the Controller thereon is that of the Controller. We, therefore, proceed on the basis that the document is a genuine one and is the copy of the order of the Con-

troller forwarded to the petitioner's father, and that it establishes that a fair rent of Rs. 170/- per month exclusive of house-tax and irrigation water charges was fixed for House No. 15, Prithvi Raj Road, New Delhi, under clause 5 of the New Delhi Rent Control Order 1939.

16. The next question for consideration is whether the said order of the Controller was a valid order. Mr. Birkramajit Nayyar, learned counsel for the Committee, contended that even assuming that the Controller passed the aforesaid order on September 25, 1941, it was not valid for five reasons.

17. The first reason mentioned by the learned counsel is that the order is silent as to whether the house was let out and was under the tenancy of any tenant at the time of the order. The petitioner has placed on record a letter (Annexure P) dated August 8, 1941, written by the Manager of the Reserve Bank of India, Delhi to the petitioner's father, in which it was clearly stated that the petitioner's father had agreed to let out the house to the bank for a period of three years from September 1, 1939. The house was thus under tenancy in 1941 when the order of the Controller was passed, and there is thus no substance in the reason mentioned by Mr. Nayyar.

18. The second reason mentioned by Mr. Nayyar is that the order does not show as to who had applied for the fixation of the fair rent. This reason also has no force since the Controller could act suo motu under clause 5 of the New Delhi Rent Control Order, 1939, and in fact it was stated in the order that the Controller fixed the fair rent under clause 5.

19. The third reason suggested by the counsel is that even if the Controller is assumed to have acted suo motu under clause 5 of the New Delhi Rent Control Order, 1939, the order does not contain a finding that the rent of the house was excessive as required under clause 3. This reason also is not tenable. Clause 3 of the Rent Control Order provided that when the Controller, on a written complaint or otherwise, had reason to believe that the rent of any house was excessive, he should hold a summary inquiry and record a finding. Clause 4 of the Rent Control Order provided that if the Controller found, on a consideration of all the circumstances of the case, that the rent of the house was excessive he should determine the fair rent to be charged for the house. Clause 5 of the Rent Control Order provided that without prejudice to the provisions of clauses 3 and 4, the Controller might, after making such inquiry as he thinks fit, determine the fair rent of any house. In the present case,

made in the process of the making of the town planning scheme, it has resulted into the reconstitution of the plot (see Section 2 (9)) and upon such reconstitution the right of the petitioner to the land in question would stand determined under clause (b) of Section 53. The determination of the title in the present case has, therefore, taken place under clause (b) and not under clause (a) of Sec. 53 and the entire basis of the petitioner's case is ill-founded. Furthermore, as pointed out by the Supreme Court in Shantilal's case, AIR 1969 SC 634 (supra), there is no option under the Act to acquire the land under the Land Acquisition Act. Once the draft town planning scheme is sanctioned and the land becomes subject to the provisions of the Act, the title of the various owners is readjusted by statutory operation. The power of summary eviction under Section 54 could, therefore, be straightway invoked by the local authority for evicting a person who has ceased to be entitled to occupy the land under the final scheme. It must be remembered that the local authority is exclusively entrusted with the duty of the framing and implementation of the town planning scheme and to that end it has been invested with almost plenary powers. Since development and planning is primarily for the benefit of the public, the local authority is under an obligation to perform its duty in accordance with the provisions of the Act (see *Advance Builders' case*, AIR 1972 SC 793 (supra)). The impugned notice at Annexure 'F' was, therefore, validly issued by the respondent concerned and no objection can possibly be raised against it.

29. The provisions to which reference has been made on behalf of the petitioner have no application. They relate to a stage prior to the sanction of the final scheme when the scheme is still in its formative stages. However, once the scheme is framed, as pointed out earlier, there is no question of acquisition of title by an outside process. The title stands transferred under the provisions of Section 53 itself. We are, therefore, of the opinion that on a true construction of Section 53, in the present case, the petitioner ceased to be entitled to occupy the land in question upon its reconstitution under Section 53 (b) and that as such he was liable to be evicted under Section 54. The first ground urged on behalf of the petitioner must also, therefore, be rejected.

30. When confronted with this position, Mr. K. S. Nanavati urged that it was not permissible to hold that the title of the petitioner to the land in question has determined under Section 53 (b). In this connection he invited our at-

tention to paragraph 38 of the affidavit-in-reply of K. S. Mehta wherein it has been stated that upon the allotment of the land in question to the Post-Master General, clause (a) of Section 53 was attracted. It was urged that this averment made in the affidavit implied that according to the respondents the land was required by the local authority and had vested absolutely in it under Section 53 (a) of the Act and that Section 53 (b) was not at all attracted. It was also urged that since a different case was being placed for the consideration of the Court for the first time at the hearing of the petition and after the arguments were concluded, opportunity should be given to the petitioner to meet that case. We are unable to accede to these submissions. As stated earlier, in paragraphs 9 and 10 of the affidavit of K. S. Mehta, respondents have clearly come forward with the case that under the final scheme the land in question was allotted to the postal authorities and that compensation was awarded to the petitioner for the determination of his right in the said land. The relevant actual data was, therefore, already furnished in the affidavit. The Redistribution and Valuation Statement was produced at the hearing only in support of this averment. The statement is a part of the final varied scheme and is, therefore, a public document. In fact, it is in the nature of a legislative enactment in the sense that it takes effect as if it were enacted in the Act. Therefore, no objection can possibly be taken to its production at the hearing or to a reference being made to it. We have held, while construing the word "allotment" that it means that the land has been assigned as an owner to the postal authorities and consequently there has been a reconstitution of the plot. In these circumstances, even if a wrong provision of law is referred to in the affidavit filed on behalf of the respondents, it cannot preclude them or the Court from arriving at the right conclusion on the basis of the statutory language. Law is not required to be pleaded and even if a wrong provision of law is pleaded, it would always be open to a party litigant to correct the mistake and to advert to the right provision of law at the hearing of the cause. We are, therefore, not impressed by the argument that there is any change of front on the part of the respondents on the question of determination of title of the petitioner to the land in question. At any rate, the change, if any, is not of such a nature as would prejudice the petitioner. There is also no question of granting further time to the petitioner to meet the case. No affidavit-in-rejoinder was filed by the petitioner challenging

the specific version of the respondents that the land was allotted to the postal authorities. Besides, in view of the Redistribution and Valuation Statement produced at the hearing there is little that could be urged by the petitioner on the point and giving of an opportunity for filing a further affidavit for the interpretation of the provisions of the scheme would be a futile exercise. In these circumstances, the request for time is also rejected.

31. We might mention that on the view which we are taking, even some of the grounds on which the challenge to the constitutionality of the relevant provisions of the Act was based, would seem to be ill-founded. The challenge was founded on the assumption that the land in question had vested in the local authority under Section 53 (b). The assumption is not warranted and to that extent the said challenge was misconceived.

32. These were the only grounds urged at the hearing of the petition and since there is no merit in any of them, the petition fails and is dismissed. Rule discharged with costs.

Petition dismissed.

AIR 1975 GUJARAT 194

J. B. MEHTA AND B. K. MEHTA, JJ.

S. Dayal and another, Appellants v. Ambalal Kuberdas Patel, Respondent.

Letters Patent Appeal No. 118 of 1972, D/- 2-5-1974.*

(A) Gujarat Panchayats Act (6 of 1962), Ss. 155 (2), 206 (2) — Transferred employee of the dissolved District School Board — Disciplinary authority would be the Administrative Officer.

The provisions of the Act like Sections 155 (2) and 206 (2) and 203 (3) have given a statutory guarantee of the conditions of service and that statutory protection cannot be nullified by any rule or regulation. There is an additional guarantee in S. 70 and R. 69 that those employees would be dealt with by an independent statutory authority who is a Government servant i.e. Administrative Officer with a right of appeal to an independent tribunal under S. 24. This statutory protection cannot be whittled down by any interpretation put on the rules made under S. 203 (3) when the rule making power itself is made subject to these statutory provisions in S. 155 (2) and S. 206 (2) as it ignores and gives no effect to the opening words that the rule

making power itself is made subject to these specific provisions in S. 155 (2) and S. 206 (2). Hence it could never be urged that disciplinary action against the transferred employee in violation of the plain terms of the statutory guarantee could be by any person other than the Administrative Officer in accordance with R. 63 of the Gujarat Panchayat Service (Discipline and Appeal) Rules (1964).

(Para 6)

(B) Gujarat Panchayats Act (6 of 1962), Ss. 155, 203, 206, 207 — Sections whether impliedly repeal S. 24 of the Bombay Primary Education Act, 1947.

There is no implied repeal of S. 24 of the Bombay Primary Education Act, 1947 by the provisions of the Panchayat Act, 1961. If S. 24 applies along with Rule 63, it is only the Administrative Officer who can take disciplinary action against the petitioner. So long as that statutory guarantee continued in force by reason of the order issued under Section 155 (2), which has a force of law and which pro tanto amends the Primary Education Act, this administrative machinery with all provisions for security of tenure of the staff maintained under Section 20 (1) would clearly continue. Instead of any repugnancy, the legislative intention is specified to the contrary and is in terms so expressed by continuing the relevant provisions of the Primary Education Act, including Sec. 24, without abolishing the post of the Administrative Officer, or without amending Section 21 (2) of the said Act. In fact by enacting S. 203 (3) the legislature has incorporated the settled rule of construction that in case of conflict between the specific provision and the general provision, the specific provision prevails over the general provision and the general provision would not cover the subject dealt with by special provision.

(Para 7)

(C) Gujarat Panchayats Service (Discipline and Appeal) Rules (1964), R. 4 — Applicability to allocated employees of the dissolved District School Board.

It cannot be contended that R. 4 does not save rights of employees transferred from a dissolved District School Board to the Panchayat service. The very application of the rules in the context of such allocated employees is subject to the exception provided in the rules and one of the exceptions laid down by R. 4 is the protection of rights and privilege conferred by any law. Therefore if S. 24 of the Primary Education Act has conferred a right or privilege of disciplinary action only by specified statutory officer with a right of appeal to an independent Tribunal, that statutory right or privilege is clearly saved by this exception in

* (Against decision of B. J. Diwan, J. in Spl. Civil Appln. No. 1921 of 1971.)

Rule 4, so far as such allocated employees like the petitioners are concerned.

(Para 8)

Cases Referred: Chronological Paras

AIR 1972 SC 2452 = 1972 Lab IC 1619	6
AIR 1971 SC 815 = 1971 Cri LJ 689	7
AIR 1964 SC 648 = (1964) 5 SCR 294	4
AIR 1961 SC 1170 = (1961) 3 SCR 183	7
AIR 1937 PC 27 = 64 Ind App 40	6
(1883) 11 QBD 120 = 52 LJQB 282	7
(1859) 53 ER 1032 = 26 Beav 606	7

D. V. Shah with S. T. Zumkhavala, for Appellants; N. H. Bhatt, for Respondent.

J. B. MEHTA, J.:— The District Development Officer and the Ahmedabad District Panchayat, hereinafter referred to as 'the Panchayat', have filed this appeal as the learned Single Judge quashed the order of the District Development Officer removing the petitioner on August 21, 1971, and gave a declaration that he continued in service and was entitled to all emoluments and other benefits arising from his said appointment. The respondent originally joined service as a clerk in July 15, 1941, and thereafter he was made Assistant Accountant in the Ahmedabad District School Board from December 2, 1961. The Gujarat Panchayats Act, 1961, hereinafter referred to as 'the Panchayat Act' came into force from April 1, 1963 under which the Ahmedabad District School Board was dissolved. Therefore, the petitioner was allocated to the District Panchayat from August 1, 1963, by the order, dated July 8, 1966. The D.D.O. transferred the petitioner to Agricultural branch under the District Panchayat and that too as senior clerk in the lower grade of Rs. 145-8-185 although his pay scale as Assistant Accountant in the school board was Rs. 145-8-185-10-195. The petitioner therefore filed Special C. A. No. 1524 of 1969 in this Court challenging the transfer order. In that petition an assurance was given that the petitioner's seniority would not be affected. His emoluments were also maintained. Thereafter he was sought to be further transferred after the withdrawal of this petition on January 17, 1970 as senior clerk in the Panchayat service. The petitioner did not join service to this new post on the ground that that was not equivalent post and, therefore, disciplinary action was taken against the petitioner and he was finally removed for his misconduct by the impugned order of the D.D.O. on August 21, 1971. This order having now been quashed by the learned Single Judge, the D.D.O. and the Panchayat have filed this appeal.

2. Mr. Shah has raised four points in this appeal:—

(1) that the petitioner being finally allocated to Panchayat service,

under Section 203 it was only D.D.O. that had jurisdiction to take disciplinary action under the Gujarat Panchayat Service (Discipline and Appeal) Rules, 1964, hereinafter referred to as 'the Rule';

- (2) That the scheme of Sections 131, 142, 143, 155, 203, 206 and 207 make it clear that the present scheme overrides Section 24 of the Bombay Primary Education Act, 1947, hereinafter referred to as the "Primary Education Act", and in any event, there is clear legislative intent that there is implied repeal of S. 24 (1);
- (3) That Rule 4 was not applicable in the present case so as to save the alleged rights of the petitioner under Section 24;
- (4) That in any event, as the Panchayat had decided to abolish this post, the petitioner could not be deemed to be one who was maintained as a staff member under Section 20 of the Primary Education Act who can be dealt with by the Administrative Officer.

3. At the outset we would consider the relevant scheme of the two Acts. The Primary Education Act has been enacted, as stated in its preamble, to secure the development and expansion of primary education, it being a declared policy of the Government to reach universal, free and compulsory primary education by a definite programme of progressive expansion. Therefore, this Act was enacted to make better provision for the management, expansion and control of primary education in the State. Under Section 2 (1) Administrative Officer was defined as an officer appointed under Sections 21 and 22. Under Section 2 (10) District School Board was defined as a school board constituted for a district under Section 3. Under Section 2 (19), the school board was defined as a district school board or a municipal school board, as the case may be.

Under Section 3 (1) it is provided that there shall be a school board for each district. Under Section 11, the school board is made a corporate entity. Under Section 13 powers, duties and functions of the school board are provided, wherein Section 13 (2) (d) provides for the duty to maintain adequate staff of Assistant Administrative Officers, supervisors, attendance officers, clerks, teachers, inferior servants and other staff as may in the opinion of the State Government be necessary. This is made subject to the provisions of the Act and the Rules made thereunder and so far as it (sic) of the Primary Education fund would permit. The

administrative machinery is laid down in Chapter V. Section 20 (1) provides that every school board with the approval of the State Government and every authorised municipality shall maintain an adequate staff of Assistant Administrative Officers, supervisors, officers, attendance clerks, primary school teachers and inferior servants and other staff as may in the opinion of the State Government be necessary for the administration, management and control of approved schools within its area..... Under Section 20 (2) the staff maintained under sub-section (1) shall be servants of the district school board or of the authorised municipality, as the case may be, and shall receive their pay, allowances, gratuities and pensions from its primary education fund. Under Section 20 (3) the rates of allowances and terms of employment in respect of the members of the staff so maintained shall be fixed from time to time by the State Government. Under Section 20 (4) the State Government may from time to time prescribe the duties to be performed by the staff maintained under sub-section (1). Section 21, which is material provides

- (1) For every school board there shall be an Administrative Officer. He shall be the chief executive officer of the board, and his powers and duties shall be as prescribed.
- (2) The Administrative officer shall be appointed and shall be a servant of the State Government. He shall draw his pay and allowances from the State revenues.

Section 22 (1) enacts that notwithstanding the provisions of Section 21, the State Government may by notification in the official gazette delegate the power to appoint an Administrative Officer to an authorised municipality. Section 23 deals with the staff selection committee which shall consist of the educational inspector of the district or any other officer designated by the Director and whose secretary shall be the administrative officer. Section 24, which is material for our purpose, lays down the powers of the Administrative Officer over school board staff, as under:—

- "(1) The Administrative Officer shall have power, subject to such general instructions as may be issued from time to time by the Director, to promote, transfer and take all disciplinary action (including removal or dismissal) against the staff maintained under Section 20.
- (2) Any person aggrieved by an order of dismissal, removal, reduction or any other order involving disciplinary action made under sub-section

(1), may submit an appeal to a tribunal, consisting of the chairman of the school board and the Educational Inspector of the district. The Tribunal shall follow the prescribed procedure for the disposal of its business. In the event of a difference of opinion, between the members of the Tribunal the appeal shall be referred to the Director, whose decision shall be final".

Section 24 (4) provides for revisional jurisdiction, in cases of disciplinary action against the staff to be exercised by the State Government. Section 63 provides for the power to make rules and Rule 63 provides for the powers and duties with regard to the staff of a district school board or authorised municipality. Under Rule 63 (2) the Administrative Officer has the power to supervise, control and co-ordinate the work of the staff maintained by the district school board under Section 20 of the Act, to confirm, promote, transfer, censure, fine, withhold increments of, reduce, suspend, remove or dismiss any member of such staff, subject to such general instructions by the Director in this behalf; provided that no order or reduction, removal or dismissal shall be passed unless an enquiry has been made into the conduct of such members by the Administrative Officer or by a person authorised by him in this behalf in accordance with the procedure laid down in the Bombay Civil Service Conduct, Discipline and Appeal Rules.

4. When the Panchayat Act came into force on April 1, 1963, the functions of the school board stood transferred to the Panchayats in terms of the express provision made in the Panchayat Act in Section 155. That material provision of the Panchayat Act dealing with the cessation of the district school board and the consequences which would ensue, is as under:—

"155 (1) Notwithstanding anything contained in the Bombay Primary Education Act, 1947, and the Saurashtra Primary Education Act, 1956, or any other corresponding law for the time being in force, on and with effect from such date as the State Government may by notification in the official gazette appoint (hereinafter referred to in this chapter as 'the said date') every district school board constituted under the Bombay Primary Education Act, 1947, or as the case may be, the Saurashtra Primary Education Act, 1956, (hereinafter referred to in this Chapter as 'the relevant Act') functioning immediately before the said date (hereinafter referred to in this chapter as 'the existing school board') shall stand dissolved and on such dissolution, the fol-

lowing consequences shall ensue, that is to say—

- (a) the chairman, vice-chairman and other members of the existing school board shall be deemed to have vacated their office;
- (b) the powers exercised and the functions and duties performed by the existing school board in the local area for which it was functioning immediately before the said date shall be exercised and performed by the taluka panchayats and the district panchayat functioning in that local area in accordance with the order made by the State Government under sub-section (2) (hereinafter referred to in this section as 'the said order');
- (c) all primary schools with their lands, records and equipment and other properties, movable and immovable vesting in, held by or under the control of the existing school board immediately before the said date shall vest in, be held by or be under the control of the taluka panchayats and the district panchayat in accordance with the distribution made in that behalf under the said order,
- (d) the assets, rights and liabilities of the existing school board shall stand transferred to the taluka panchayats and the district panchayats in accordance with the distribution thereof made under the said order.
- (e) the employees of the existing school board shall stand transferred to the panchayats and the district panchayats in accordance with the distribution made in that behalf and on such terms and conditions as may be provided in the said order.

Provided that the terms and conditions of service of any such employee shall not be less favourable than those applicable to him while in service of the existing school board:

Provided further that nothing in this clause shall entitle any employee to claim the same cadre or designation on such transfer.

(2) For giving effect to the proviso of sub-section (1), the State Government having regard to the Panchayat Functions List, shall by an order published in the official gazette provide for—

- (a) the distribution of powers, functions and duties of the existing school board under the relevant Act and of the assets, rights, liabilities of the existing school board, and of the properties vested in,

held by or under the control of the employees of the existing school board, among the taluka panchayats and the district panchayat.

- (b) the saving of anything done or any action taken by the existing school board before the date and continuance and disposal of pending proceedings;
- (c) all incidental, consequential and supplementary matters as may be necessary to give effect to the provisions of sub-section (1) and for the proper and just distribution of assets, rights and liabilities between taluka panchayats and the district panchayat; and
- (d) the adaptation and modifications of the relevant Act, or of any other law whether by way of repeal or amendment as may be necessary to give effect to the provisions of sub-section (1)."

Therefore, Section 155 (1) has not only dissolved the district school board as a corporate entity under the Primary Education Act but it has made provision in Section 155 (1) (b) that the powers exercised and the functions and duties performed by the existing school board shall be exercised and performed by.....the district panchayat functioning in that local area of the district school board in accordance with the State Government order published under Section 155 (2). Section 155 (1) (c) deals with the vesting of properties of the schools and sub-clause (d) deals with the transfer of assets, rights and liabilities. Sub-clause (e) provides that the employees of the existing school board shall stand transferred to the district panchayat in accordance with the distribution made in that behalf and in accordance with the terms and conditions laid down in the order published under Section 155 (2). The first proviso is that the terms and conditions of service shall not be less favourable than those which were applicable to such employees while in service of the existing school board, and second proviso enacts that nothing in the clause would entitle any employee to claim the same cadre or designation on such transfer. The order contemplated by Section 155 (2) which is passed by the State Government having regard to the Panchayat Functions List is for giving effect to the statutory provision made in Section 155 (1). Under clause (a) such an order has to lay down the mode of distribution of powers, functions and duties and to provide for transfer of the assets, rights and liabilities of the existing school board and for the transfer of the employees of the existing school board to the concerned Panchayat. Clause (d) which is material

for our purpose, provides that such an order may also provide for the adaptation and the modification of the relevant Act or of any other law whether by way of repeal or amendment as may be necessary to give effect to the provisions of sub-section (1). Therefore, the legislature by its own mandate in Section 155 (1) has delegated powers to the State Government to issue an order for implementing this statutory provision of dissolution of the district school board and transfer of its functions and its employees to the district panchayat under Section 155 (1) and such an order is given force of law by in terms enacting in Section 155 (2) (d) that for giving effect to the provisions of Sec. 155 (1) necessary adaptations and modifications can be made by the State Government in the Primary Education Act or of any other law by way of repeal or amendment. In *Jayantilal Amratlal v. F. N. Rana*, AIR 1964 SC 648 at p. 658, their Lordships in terms considered the effect of such entrustment by the legislature of the authority to make such consequential amendments in law. In that case such executive power was exercised by the Central Government under Article 258 (1) under which a blanket provision was made enabling the President by a notification to exercise power which the legislature could exercise by legislation to entrust functions to the officer to be specified in that behalf by the President and subject to the conditions prescribed thereby. Therefore, their Lordships held that once a presidential notification was issued substituting for the expression "appropriate Government", the words, "appropriate Government or Commissioner of the Division having territorial jurisdiction over the area in which the land is situated", the Land Acquisition Act was deemed to be pro tanto amended and such an amendment in the Land Acquisition Act was by force of law. This type of order was not a purely administrative order. Such an order issued under the legislative mandate even if issued by an Executive Authority was in effect exercise of legislative power and, therefore, in substance it modified or added to this statute which had the force of law. That is why the present order which has been issued on April 1, 1963, under Section 155 (2) has added the new relevant Section 70 in the Primary Education Act as under:—

"70. (1) Subject to the provisions of sub-section (3) in this Act, except in Sections 2 (10), 3 (1), 4, 5, 6, 6-A, 7, 7-A, 8, 9, 9-A, 10, 10-A, 11, 14, 41 (1), 42, 43, 44 (2) (d) and 57 all references to a District School Board shall be, with effect on and from the 1st April, 1963, construed as references to a taluka panchayat or district panchayat constituted under the Gujarat Panchayats Act, 1961 according as the powers, functions and

duties of a District School Board vest in the taluka panchayat, or as the case may be, district panchayat in accordance with an order made under sub-section (2) of Section 155 of the Gujarat Panchayats Act, 1961, hereinafter referred to as the 'said order'.

(2) In Section 12, sub-section (2), for the words "every district school board" substitute the words, "such taluka panchayats in a district or as the case may be, such district panchayat as the State Government may determine having regard to the distribution of powers, functions and duties between taluka panchayats and district panchayat under the 'said order'".

(3) Notwithstanding anything contained in Section 155 of the Gujarat Panchayats Act, 1961, the provisions contained in Sections 2 (10), 3 (1), 4, 5, 6, 6-A, 7, 7-A, 8, 9, 9-A, 10, 10-A, 11, 14, 41 (1), 42, 43, 44 (2), (d) and 57 shall not apply to a taluka panchayat or as the case may be, a district panchayat, exercising the powers and performing the functions and duties of a district school board under this Act."

The order also provides in clause (1) that the powers exercised and the functions and duties performed under the Bombay Primary Education Act, 1947, by each district school board so dissolved (hereinafter referred to as 'the dissolved school board', in the local area for which it was functioning immediately before the said date shall be exercised and performed by the taluka panchayats and district panchayat functioning in that local area in accordance with the distribution of powers, functions and duties between such taluka panchayats and district panchayats specified in Schedule I appended thereto. Clauses (2) and (3) make provision for the vesting of the property in the district panchayat and transfer of assets and liabilities to the District Panchayat. Clause (4) which is material provides as under:—

"(4) The employees of the dissolved school board shall be transferred to the taluka panchayats and the District Panchayat functioning in that local area in the manner specified in Schedule IV appended hereto on the same terms and conditions of service as were immediately before the said date applicable to them while in service of the dissolved school board."

Section 70, which is the amendment introduced by this order of the State Government issued under Section 155 (2), in terms provides in clause (1) that except for the sections enumerated therein, all references to a District School Board with effect on and from the 1st April, 1963, shall be construed as references to a district panchayat. That is why in Section 70 (3) it is in terms enacted that

notwithstanding anything contained in Section 155 of the Act, the provisions contained in the sections enumerated therein, shall not apply to a taluka panchayat district panchayat exercising the powers and performing the functions and duties of a district school board under the Act. Those sections which are made inapplicable are Section 2 (10) defining 'district school board' as one constituted under Section 3, Sections 3 (1), 4, 5, 6, 6-A, 7, 7-A, 8, 9, 9-A, 10, 10-A, dealing with the constitution of the district school board, Section 11 which had made the school board a corporate entity, Section 14 which deals with the relinquishment of the powers and duties of the district school board, Section 41 (1) and Section 42 which deal with payments to be made by the district school board and the contribution by the State Government, Section 43 which deals with the school board budget, Section 44 (2) (d) which provides for certain portion of the district school board income as fixed by the State Government to be paid into primary education fund and Section 57 which deals with the dissolution of the district school board and its reconstitution on alteration of the limits of the district. They are the provisions which by their very nature would become inapplicable, once the district school board as a corporate entity is dissolved. That is why all the other provisions, except those enumerated provisions which by their very nature become inapplicable in the changed set up, when the Panchayat Act transferred the functions of the district school board to the said Panchayat are continued, including the relevant provisions of the administrative machinery in Chapter V. The powers, duties and functions of the District School Board which as per the provisions in Section 13 included the duty to maintain staff under Section 13 (2) (d) read with Section 20, and the provisions regarding the pay, allowances and emoluments and other terms of employment of that staff maintained under Section 20 (1) who were the servants of the district school board and the provision in Section 44 (1) regarding the maintenance of primary education fund and, particularly continuance of Section 21 (1) would show that the same administrative machinery is continued, even when the functions of the District school board are transferred to the District Panchayat because in Section 21 (1) we have to read the reference to the District School Board as reference to the District Panchayat, and for which also, therefore, for the purpose of the Primary Education Act there is a post of the Chief Executive Officer provided viz., the Administrative Officer with the prescribed powers as laid down in Rule 63. It is true that Mr. Shah had argued that the reference in Section 20

(1) is not to the District School Board but to the School Board. In this contention Mr. Shah ignores statutory definition which is provided in Section 2 (19) that the school board means a District School Board or a Municipal School Board, as the case may be. Therefore, the reference in Section 21 (1) to the District School Board has to be interpreted by reason of Section 70 (1) as reference to the District Panchayat, and there is no escape from the conclusion that the District Panchayat has for the purpose of these powers, functions and duties under Section 155 (1) of the existing District School Board to maintain the Chief Executive Officer with the prescribed powers and duties as the Administrative Officer. Another essential feature of Section 21 (2) is that the Administrative Officer has to be appointed by the State Government and he is to be a servant of the State Government drawing his pay and allowances from the State Government. This provision is the key provision for the control of the State Government in the matter of primary education and that is why it is enacted that the Chief Executive Officer in the District Panchayat while he is exercising these functions, i.e., the Administrative Officer shall continue to remain the State Government servant so that the State control remains completely effective and the administration remains in the hands of this statutory officer who is given various powers in respect of the staff required to be maintained under Section 20 (1). In that context Section 24 (1) would have material bearing as it is the Administrative Officer who has power to transfer and to take disciplinary action against the staff maintained under Section 20 and against the order of the statutory officer including one of disciplinary action, the provision is made of an appeal to the independent Tribunal consisting of the chairman of the school board and the educational inspector in Section 24 (2). There is also a revisional jurisdiction conferred on the State Government itself under Section 24 (4). It is this scheme which must be borne in mind to find out what the legislature has achieved by the delegation when it contemplated the dissolution of the District School Board and transfer of its functions from the District School Board to the District Panchayat. Not only the employees obtained statutory guarantee under this clause (4) of the order that on transfer to the District Panchayat they would have the same terms and conditions of service as they were existing immediately before April 1, 1963, while they were in the service of the dissolved school board, but that the salutary provisions for security of that service were also kept intact by in terms continuing the existing provisions, by enacting the statutory guar-

antee in Section 70 to the effect that all these remaining provisions shall continue to apply even when the functions of the District School Board had been on its dissolution transferred to the relevant panchayat. In view of this statutory guarantee of continuance of the same terms and conditions of service and of the continuance of the relevant provisions especially in Sections 21 and 24, it is obvious that Rule 63 in the Panchayat Education Act would be clearly applicable and it would be the Administrative Officer who alone would have the jurisdiction to pass orders as regards disciplinary action, including the removal, against the petitioner, who was admittedly a person on the staff maintained under Section 20 (1). The petitioner stood transferred to this District Panchayat in the manner specified in Schedule IV, where clearly ministerial staff has been in terms specified. The Note in Schedule IV mentioned that the posting and allocation orders of the above personnel would be made and issued by the Government under Sections 206, 207 and 321 of the Panchayats Act. Therefore, if this statutory transfer has carried the guarantee of this relevant condition and has kept these conditions intact, on a plain reading of Section 155 it could never be urged that disciplinary action against this transferred employee in violation of the plain terms of the statutory guarantee could be by any person other than the Administrative Officer, in accordance with the relevant Rule 63. Such an action by any other officer would deprive an employee of his statutory right under Section 24 (2) of appeal to another independent Tribunal created under Section 24 (2). That is the view which has been rightly accepted by the learned Single Judge and which is now sought to be assailed on the aforesaid four grounds by Mr. Shah.

5. As regards the first contention of Mr. Shah, it would be relevant to refer to the relevant provisions of the Panchayats Act in this connection. Section 131 deals with the constitution of the various Panchayat committees and its powers, functions and duties. It provides for education committee in Section 131 (10) which in the discharge of its functions shall exercise all the powers and discharge the duties of the Panchayat. Chapter XI deals with the provisions relating to services. Section 203 (1) provides that for bringing about uniform scales of pay and uniform conditions of service for persons employed in the discharge of functions and duties of panchayats, there shall be constituted a panchayat service in connection with the affairs of panchayats which shall be distinct from the State service. Sub-clause (2) provides that the Panchayat service shall consist of such classes, cadre and

posts and the initial strength of officers and servants in each such class and cadre shall be such as the State Government may by order from time to time determine; provided that nothing in this sub-section shall prevent a District Panchayat from altering, with the previous approval of the State Government, any class or cadre or number of posts so determined by the State Government. Under Section 203 (3) it is provided that subject to the provisions of the Act, the State Government may make rules regulating the mode of recruitment either by holding examinations or otherwise and conditions of servants appointed to the panchayat service and the powers in respect of appointments, transfer and promotions of officers and servants in the Panchayat Service and the disciplinary action against any such officers or servants. S. 205 provides that subject to the rules made under Section 203 appointments to the posts in the Panchayat service shall be made—

- (i) by direct recruitment,
- (ii) by promotion, or
- (iii) by transfer of a member of the State service to the Panchayat service.

Section 206 (1) (ii) provides that the State Government shall by a general or special order allocate to Panchayat service — all officers and servants in the service of the District Local Boards and District School Boards immediately before the dissolution under the Act and transferred to the panchayats under Section 155. Section 206 (2) then provides that the officers and servants allocated to the Panchayat service under sub-section (1) shall be taken over by such panchayats in such cadre and on such tenure, remuneration and other conditions of service as the State Government may by general or special order determine:

Provided that the conditions of service of any such officer or servant shall not be less favourable than those applicable to him immediately before such allocation, and

Provided further that nothing in the aforesaid proviso shall entitle an officer or servant to claim the same cadre and designation which he had before allocation.

Section 206-A (1) provides as under:—

"Notwithstanding anything contained in Section 206, the allocation to the Panchayat Service made under Section 206 of officers or servants allotted or transferred to a panchayat under Section 157 or 158 shall initially be provisional and it shall be lawful for the State Government to review their allocation within a period of four years from 1st April, 1963.

Under Section 206-A (2) an officer or servant who is not reallocated under sub-

section (1) and continues in the Panchayat service immediately before the expiry of the aforesaid period of four years shall be deemed to be finally allocated to the Panchayat service. Section 207 (1) provides for the posting under panchayats of officers and servants in State service. It is under this provision that the Administrative officer who under Section 21 (2) was the person appointed by the State Government is posted on deputation to the Panchayat service and he is mentioned in Schedule IV of the State Government order under Section 155 (2). Section 211 (3) (a) provides that in addition to the District Panchayat Service Selection Committee the State Government may appoint in each district a District Primary Education Staff Selection Committee for the recruitment of primary teachers and such other staff in connection with the primary education as may be prescribed.

6. These provisions would show that while constituting Panchayat service as distinct service from the State service, under Section 203 (1) it is provided that the State Government shall determine the cadre posts and initial strength in the Panchayat services which can be altered by the District Panchayat only with the approval of the State Government. It is true that under Section 203 (3) the State Government has power to make rules regarding conditions of service of persons appointed to Panchayat service, including in the matters of disciplinary action against such servants, but that power is specifically made subject to the other provisions of the Act. So far as the petitioner is concerned, his mode of appointment was not under Section 205 either by direct recruitment, promotion or transfer from State service to the Panchayat service. He was an allocated servant under Section 206 (1) (ii) which specifically provides for allocation of such servants in the service of the District School Board immediately before the dissolution on transfer to the District Panchayat under Section 155. Such allocated servants are guaranteed under Section 206 (2) also that their conditions of service shall not be less favourable and they would be taken over on such conditions as the State Government may determine by general or special order; subject to the proviso that he would not be entitled to claim the same cadre and designation which he had before the allocation. That proviso is not relevant for the question which arises in this matter. The question which we have to answer is as to who is the disciplinary authority, so far as the allocated servant, who is now deemed to be finally allocated on expiry of four years from April 1, 1963, under Section 206-A (2). This being specific provision in Sections 155 and 206 (1) (ii), the whole power of making

rules under Section 203 (3) shall be subject to the statutory guarantee provided both in Sections 155 and 206, when these servants were statutorily allocated on dissolution of their school boards. As earlier pointed out on a bare perusal of Section 155 (2) such servants like the petitioners are guaranteed the same terms and conditions of service which were immediately before April 1, 1963, applicable to them while they were in the service of the dissolved school board under the specific clause (4) in the Government order under Section 155 (2), and their further guarantee is by reason of the continuance of the provisions of the Primary Education Act so far as these servants are concerned, even after they are statutorily transferred on the dissolution of the board with the transfer of the school board's functions to the District Panchayat under Section 155. In *Delhi Transport Undertaking v. Hajelal*, AIR 1972 SC 2452, at pages 2454-55, after following the settled legal position as laid down in *Rangachari's case* AIR 1937 PC 27, their Lordships in terms held that a protection which is given to an employee by statute could not be nullified by rules and regulations authorised by the statute itself. In that case when the *Delhi Transport Undertaking* was statutorily transferred to the *Delhi Municipal Corporation*, there was a guarantee given by the relevant enactment for protection of their service as they were made unremovable by an authority subordinate to that by which they were appointed. Therefore, even though the Corporation may by a regulation prescribe the authorities to punish municipal employees, the statutory guarantee in Section 95 (1) was held to place an embargo on any subordinate of the appointing authority from removing or dismissing the transport employee from service. Therefore, no regulation could be enacted which would nullify the statutory guarantee. In the present case, even Section 203 (3) also provides an adequate safeguard that the rules can be made in the matter of disciplinary action against a panchayat servant by the State Government, but that would always be subject to the provisions of the Act. Therefore, if the provisions of the Act like Sections 155 (2) and 206 (2) have given a statutory guarantee of the conditions of service, that statutory protection could not be nullified by any rule or regulation. In fact, under Section 155 (2) and clause (4) of the Government order statutory guarantee was of the same terms and conditions of service which prevailed before the school board was dissolved on April 1, 1963. There was an additional guarantee in Section 70 and Rule 69 that those employees would be dealt with by an independent statutory authority who is a Government servant.

i.e., the Administrative Officer with a right to appeal to an independent Tribunal under Section 24. Therefore, this statutory protection could not be whittled down by any interpretation put on the rules made under Section 203 (3) when the rule making power itself is made subject to these statutory provisions in Section 155 (2) and Section 206 (2) as it ignores and gives no effect to the opening words that the rule making power itself is made subject to these specific provisions in Sections 155 (2) and 206 (2) so far as these servants are concerned of the dissolved school board.

7. The second contention of express repeal has obviously no force when a plain reading of the order under Section 155 (2) makes it abundantly clear in clauses (4) and (7) that these transferred employees were guaranteed the same terms and conditions of service as they were prevailing before April 1, 1963, when they were in the service of the dissolved school board, and those provisions for their protection in the Primary Education Act are in terms continued and have not been repealed. The statutory intention in fact is expressed to the contrary by their continuance of these relevant provisions. The doctrine of implied repeal could hardly be canvassed in a case like the present one in view of the settled position as pointed out in *Delhi Municipality v. Shiv Shanker*, AIR 1971 SC 815 at page 817. Their Lordships restated broadly the general rule laid down in *Paine v. Slater*, (1883) 11 QBD 120:—

"that when two Acts are inconsistent or repugnant the later will be read as having impliedly repealed the earlier. As the legislature must be presumed in deference to the rule of law to intend to enact consistent and harmonious body of laws, a subsequent legislation may not be too readily presumed to effectuate a repeal of existing statutory law in the absence of express or at least clear and unambiguous indication to that effect. This is essential in the interest of certainty and consistency in the laws which the citizens are enjoined and expected to obey. The legislature, which may generally be presumed to know the existing law, is not expected to intend to create confusion by its omission to express its intent to repeal in clear terms. The Courts, therefore, as a rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must if not express, flow from necessary implication as the only intendment. The provisions

must be wholly incompatible with each other so that the two provisions operating together would lead to absurd consequences, which intention could not reasonably be impugned to the legislature. It is only when a consistent body of law cannot be maintained without abrogation of the previous law that the plea of implied repeal should be sustained. To determine if a later statutory provision repeals by implication an earlier one it is accordingly necessary to closely scrutinise and consider the true meaning and effect both of the earlier and later statute. Until this is done it cannot be satisfactorily ascertained if any fatal inconsistency exists between them. The meaning, scope and effect of the two statutes, as discovered on scrutiny, determines the legislative intent as to whether the earlier law shall cease or shall only be supplemented. If the objects of the two statutory provisions are different and the language of each statute is restricted to its own object or subject, then they are generally intended to run in parallel lines without meeting and there would be no real conflict though apparently it may appear to be so on the surface. Statutes in *pari materia* although in apparent conflict, should also so far as reasonably possible, be construed to be in harmony with each other, and it is only when there is an irreconcilable conflict between new provisions and the prior statute relating to the same subject-matter, that the former being the later expression of the legislature, may be held to prevail, the prior law yielding to the extent of the conflict. The same law of irreconcilable repugnancy controls implied repeal of a general by a special statute. The subsequent provisions treating a phase of the same general subject-matter in a more minute way may be intended to imply repeal *pro tanto* of the repugnant general provision with which it cannot reasonably co-exist. When there is no inconsistency between the general and the special statute the latter may well be construed as supplementary."

This contention of implied repeal could only be raised if such necessary implication would be the only intendment on the ground that these two provisions were wholly incompatible and irreconcilably repugnant. In fact, Mr. Shah ignores the basic fact that when Section 155 (2) made such a blanket provision enabling the State Government to amend or repeal the relevant provision of the Primary Education Act, they have not resorted to the process of express repeal, but on the other hand they have in terms continued the relevant provisions of the Primary Education Act. That was the only way in which section 155 could be implemented because the purpose of Section 155 was only to transfer the functions of

the District School Board to the Panchayat and, therefore, what was necessary to be done was to transfer those powers, functions and duties of the school board to the District Panchayat and to vest those properties in the District Panchayat by transferring the assets, rights and liabilities and taking over the existing employees on the same terms and conditions. But so far as the rest of the administrative machinery was concerned, it was retained intact. Mr. Shah further ignores the whole object of the Primary Education Act which is to retain the control of the State Government in the matter of primary education and therefore even when the State Government had opportunity to amend the Primary Education Act while implementing Section 155 by issuing order under Section 155 (2) it did not destroy the post of Administrative Officer nor made any change in the language of Section 21 (2) by changing his status of a Government servant to the status of a panchayat employee. Therefore, the whole argument of Mr. Shah that in the new set up of a Panchayati Raj, with its whole scheme of decentralisation, such continuance of the Administrative Officer who is the servant of the State Government, could not have been intended misses the whole salutary purpose of the Bombay Primary Education Act. Even when these employees are transferred to the Panchayat, the administrative machinery has been specifically retained so that the Administrative Officer retained all the powers under Section 24 (1) and that is why that guarantee of the employees being dealt with in the matter of disciplinary action by this independent statutory officer who is State Government employee, with the right of appeal to an independent Tribunal, are clearly preserved. These are the specific provisions so far as these particular employees are concerned who are not employees appointed to the Panchayat service under Section 205, but who had special guarantee because of the statutory allocation on dissolution of the school board under Section 206 (2) read with Section 155 (2). Therefore, even the normal principle of the special provision taking precedence over the general provision would be clearly applicable, especially when that alone would harmonise the entire scheme and when it is the only interpretation that flows from the express language under Section 203 (3) which makes the entire rule making power subject to the other specific provisions in the Act. In *J. K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U. P.*, AIR 1961 SC 1170 at p. 1174, their Lordships in terms pointed out that in the interpretation of statutes Courts always presumed that the legislature should have inserted every part thereof for a purpose and

the legislative intention is that every part of the statute should have effect. This presumption will always have to be made in the case of the rule-making authority also. Their Lordships in terms pointed out that the rule that the general provision should yield to specific provisions is not arbitrary principle made by the lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions — one covering a large number of matters in general and the other to only some of them, his intention is that this latter direction should prevail as regards themselves while as regards the rest, the earlier direction should have effect. In *Pretty v. Solly*, (1859) 53 ER 1032, quoted by Craies on Statute Law, at page 206, 6th Edition, Romilly M. R. mentioned this rule. The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter taken in its most comprehensive sense would overrule the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. The rule has been applied as between different provisions of the same statute in numerous cases. Therefore, applying this settled rule of construction, in case of a conflict between the specific provision and the general provision, the specific provision prevails over the general provision and the general provision would not cover the subject dealt with by special provision. Their Lordships harmonised the general provision in that case by excluding from the scope of the general provision the special provision for resolution of the industrial disputes. In the present case, this principle is even incorporated by the legislature by enacting Section 203 (3) itself by making the rule making power subject to the specific provisions in the Act, viz., Section 155 (2) and Section 206 (2), which would specifically cover only these allocated school board employees, who are distinct from the other Panchayat servants. Therefore, there is no substance even in the second contention of any express or implied repeal merely by comparison of general provisions, when we have to answer the question by reference to the special provisions of the Act and the guarantee given to the servants who stood transferred under Sections 155 (2) and 206 (2). We need not dilate on various provisions which Mr. Shah had mentioned to point out that there would be some apparent conflict. To illustrate, he even mentioned that selection committees would have to be constituted under Section 211 (3) in the manner prescribed, while Section 23 provided the statutory composition of the

staff selection committee. It is not necessary to go into the question as to how far there is conflict between these other provisions as the narrow question which we have to answer is whether in so far as the present statutory guarantee is concerned to these employees, the provisions of Section 24 are repealed. If Section 24 applies along with Rule 63, it is obvious that it is only the Administrative Officer who can take disciplinary action against the petitioner. So long as that statutory guarantee continued in force by reason of the order issued under Section 155 (2), which has a force of law and which pro tanto amends the Primary Education Act, this administrative machinery with all provisions for security of tenure of the staff maintained under Section 20 (1) would clearly continue. Instead of any repugnancy, the legislative intention is specific to the contrary and is in terms so expressed by continuing the relevant provisions of the Primary Education Act, including Section 24, without abolishing the post of the Administrative Officer, or without amending Section 21 (2) of the said Act. It is hardly necessary to refer to other provisions as they would have no bearing on this question which arises in this appeal. Mr. Shah had also argued that there is a non obstante clause in Section 155 (1), but the non obstante clause would only mean that nothing contained in the Bombay Primary Education Act, 1947, shall come in the way, so that the object was sought to be achieved of dissolving the school board and transferring its functions to the Panchayat after taking of the employees with a guarantee of statutory protection of the service conditions. Therefore, that non obstante clause could not be interpreted to operate as an independent enactment abolishing the post of Administrative Officer or making him a Panchayat employee. Similarly, provision in Section 207 (1) could hardly help Mr. Shah merely because this Government officer statutorily appointed under Section 21 (2) of the Bombay Primary Education Act is deputed in the Panchayat service under Section 207 (1). If the employees have guarantee of disciplinary action by this independent officer who is an employee of the State Government although deputed to the Panchayat, and if the employees have a further right of appeal to the Tribunal, these statutory provisions could never be whittled down by any process of interpretation.

8. There is clearly no substance in the third contention of Mr. Shah that Rule 4 never saved rights of these employees. The Gujarat Panchayat Service (Discipline and Appeal) Rules, 1964, which have been enacted in the exercise of rule-making power under Section 323 (1), in terms provide in Rule (1) (c) that

these rules shall apply to all persons appointed and allocated to the Panchayat service and persons holding posts in the Panchayat service, except as provided by or under these rules. Therefore, the very application of these rules in the context of such allocated employees is subject to the exception provided in the rules, and one of the exceptions laid down by Rule 4 is the protection of rights and privileges conferred by any law. That rule enacts that nothing in that rule shall deprive any member of the Panchayat service of any right of privilege — (a) by or under any law applicable to him. Therefore, if Section 24 of the other law i.e., the Primary Education Act has conferred a right or privilege of disciplinary action only by specified statutory officer with a right of appeal to an independent Tribunal, that statutory right or privilege is clearly saved by this exception in Rule 4, so far as such allocated employees like the petitioners are concerned. Mr. Shah argued that Section 24 merely prescribed procedure for disciplinary action. Mr. Shah forgets that the disciplinary proceeding is a quasi-judicial proceeding and when Section 24 prescribed a protection for these servants that they would be dealt with by a particular officer who is a State Government servant with a right of appeal to an independent Tribunal, it is clearly a substantive Rule and such a statutory privilege was clearly saved by reason of Rule 4. Therefore, on that aspect the learned Single Judge was right in holding that even if these rules were deemed to be applicable to persons like the petitioners, they were clearly exempted under Rule 4.

9. Mr. Shah made a faint attempt to raise a point which was never raised and which could not be permitted in the Letters Patent Appeal. That point was that the petitioner's post having been retrenched, he cannot be deemed to be a person on the staff maintained under Section 20 (1). This contention could not be urged for the first time in the Letters Patent Appeal. Even otherwise the point is thoroughly misconceived. The petitioner was not sought to be retrenched but he was sought to be removed on the ground of misconduct that he did not join the service to the post to which he was transferred on the ground that it was not an equivalent post. The order dated 8-7-1958 transferring him from service mentioned that for administrative smoothness and in the interest of the public the transfer and appointment was made of the petitioner to the Agriculture Branch. It was however in terms mentioned that the post of the senior clerk, Education Branch, was for the time being kept vacant for the purpose of economy. There is nothing to show that the post was permanently retrenched. On the contrary

there is a statement that it was kept vacant for the purpose of economy. Therefore, the petitioner was a person on the staff maintained under Section 20 (1) and he can be dealt with only under Section 24 (1) by the Administrative Officer and he would have a right to appeal even against that order to the independent Tribunal under Section 24 (2). Therefore, even in the last contention there is no substance. Therefore, the learned Single Judge was right in holding that the District Development Officer had no jurisdiction to pass this order removing the petitioner from his service. Therefore, this appeal fails and is dismissed with costs.

10. Mr. Shah asks for a certificate for appeal to the Supreme Court under Article 133 (1) (c). We do not find any question of law involved in the present case of such general importance as would require in our opinion, to be decided by the Supreme Court. Therefore, we refuse the certificate.

Appeal dismissed.

AIR 1975 GUJARAT 205*

S. H. SHETH, J.

Jekisondas Maganlal, died, by his heirs and L. Rs. and others, Petitioners v. Abdul Rehman Haji Ahmedbhai and others, Opponents.

Civil Revn. Applns. Nos. 480 and 481 of 1972, D/- 9-8-1974.†

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (e) — Sub-letting — Meaning of — Sub-letting postulates two distinct persons, the head-tenant and the sub-tenant. (T. P. Act (1882), Section 105).

Sub-letting indeed means that the premises which are in the possession of a person as a lessee are sub-let to a third person. Unless there are two distinct persons who can be described as a head-tenant and a sub-tenant, there cannot be sub-letting. Further, sub-letting or sub-tenancy must mean transfer of exclusive possession from a head-tenant to a sub-tenant either of the whole premises in the occupation of the tenant or a part thereof. (Para 39)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947),

*(Only portions approved for reporting by High Court are reported here).

†(From decision of C. C. Morkhiya Extra Asst. J., Surat in Civil Appeals Nos. 189 and 194 of 1969.)

AS/AS/A51/75/LGC

Section 13 (1) (e) — Eviction — Sub-letting — Statutory tenant cannot sub-let — If he parts with possession he is liable to be evicted.

There is no transferable interest which a statutory tenant has and which he can sub-let. A statutory tenant forfeits his right to the protection of the statute if he parts with possession and the person in whose favour he parts with possession cannot claim any rights in respect thereof. AIR 1965 SC 414, Followed. (Para 41)

Where the suit premises were let out to three partners of a firm but one of the statutory co-tenants had parted with possession of half the area in favour of his two other statutory co-tenants and two strangers for valuable consideration;

Held that the tenants i.e., all the three partners had forfeited the protection of the statute and had, therefore, rendered themselves liable to be evicted from the suit premises. (Para 41)

(C) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (e) — Eviction suit — Sub-letting — "Unlawful assignment" or "unlawful transfer" — What amounts to.

The expression "unlawfully sub-let the whole or part of the premises" in Section 13 (1) (e) is one single expression and does not govern the expression "assigned or transferred in any other manner his interest therein." The careful scanning of the language of Section 13 (1) (e) leads to the only conclusion that whereas unlawful sub-letting can be in respect of the whole or a part of the premises, there cannot be unlawful assignment or transfer of a part of the interest in the premises. (Para 45)

Therefore, where one of the partners of a firm to whom the premises were let out retained half of the suit premises and parted with possession of half in favour of persons amongst whom there were strangers, there is neither unlawful assignment nor unlawful transfer because there is no assignment or transfer of the entire interest by the tenants in the suit premises to anyone else. (Para 45)

(D) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (b), Explanation — Permanent structure — Expression 'as can be removed without serious damages to the premises' if governs only the expression 'such other alterations' — Mere construction of a partition wall if amounts to permanent structure.

The tenant by virtue of the provisions contained in the explanation to Section 13 (1) (b) is given liberty by the legislature to make any of the specified alterations in the premises in his occupation and any other kinds of alterations.

But it cannot be said that the legislature has given him liberty to do all those things or carry out all those alterations and to damage the suit premises without incurring the liability of being evicted therefrom. Therefore, the expression "as can be removed without serious damage to the premises" governs not only the residuary expression "such other alterations" but also governs the four other specified categories of alterations which the Explanation names. (Para 50)

In light of what the Explanation to Section 13 (1) (b) provides the mere construction of a partition wall cannot be regarded as a permanent structure within the meaning of Section 13 (1) (b) so as to render the tenants liable to be evicted from the suit premises. (Para 50)

Where what the tenants have done is to remove the site of the partition wall a few feet away from its original site and to construct it with cement and bricks in place of the original one which was made of iron sheets fixed in wooden frames but the landlords have not proved that its removal and reconstruction of the partition wall at its original site will cause any serious damage to the suit premises;

Held that though it was a permanent structure it did not answer the requirements of Section 13 (1) (b). The partition wall constructed by the tenants would support the first floor much better and more strongly than the original partition wall made of iron-sheets fixed in wooden frames. (Para 52)

(E) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (b) — Eviction suit — Waste in premises — To construct a partition wall cannot be said to cause waste in the premises let out. (Para 52)

(F) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (b) — Permanent structure — Test to determine — Objective test to be applied.

What is required to be shown is that the structure must have an element of permanence in it. It must be intended to be a lasting structure and whether it is a lasting structure or not will depend on the nature of the structure. The permanent or temporary character of the structure is to be determined having regard to the nature of the structure and the nature of the materials used in the making of the structure and the manner in which the structure is erected and not on the basis of how long the tenant intended to make use of the structure. AIR 1965 Guj 152. Followed. (Para 59)

Removability cannot per se be a test in the matter. The expression "permanent structure" in Section 13 (1) (b) has been used to denote some work which is

not of a temporary nature. The character of the structure—whether it is permanent or not—is a mixed question of fact and law and the intention of the party who puts up the structure is a factor to be considered in determining the character of the structure in question and the nature of the construction, the nature of the material used, the manner in which the structure is erected and the purpose thereof are also material factors in arriving at a proper conclusion in the matter. (1967) 8 Guj LR 665, Followed. (Para 59)

The nature of the structure is to be found out by looking to the nature of the construction and by applying objective test. The intention of the tenant is also a relevant factor. AIR 1973 Guj 110, Followed. (Para 60)

The rooms in question constructed with bricks and mortar on the terrace of the premises were held to be permanent structures within Section 13 (1) (b). Such a structure was not easily removable. Such a structure was intended by a tenant to be of lasting duration for his use. Such a structure could not be called a temporary structure as distinguished from a permanent structure. (Para 61)

(G) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 13 (1) (e) — Eviction suit on ground of splitting up of tenancy — Mere splitting up of tenancy amongst the co-tenants is no ground of eviction.

If the tenants split up the tenancy inter se amongst themselves for the purpose of more beneficial enjoyment of the suit premises, they cannot be evicted because that is not a ground of eviction under the Bombay Rent Act. Secondly, where there are two or more co-tenants the splitting up of the tenancy only amongst themselves for the purpose of beneficial enjoyment of the property cannot be said to be objectionable in principle because such an inter se arrangement amongst themselves only is not binding upon the landlord. So far as the landlord is concerned, all the co-tenants are his tenants in respect of the entire suit premises. How they enjoy the suit premises is a matter for the co-tenants to decide. Even after the co-tenants split up their tenancy for more beneficial enjoyment of the suit premises if any one of them in respect of a particular premises occupied by him commits an act by which he renders himself liable to be evicted from the suit premises, indeed all will be evicted from the entire suit premises. Such an arrangement arrived at between the co-tenants for more beneficial enjoyment of the property is not a matter to which the landlord can take an exception. The question, however, will assume different aspect when they introduce strangers to

tenancy rights or to possession of the premises. (Para 64)

Cases Referred: Chronological Paras

AIR 1974 SC 471 = (1974) 2 SCR 544	64
(1974) Civil Revn. Appln. No. 947 of 1971,	
D/- 26-6-1974 = 16 Guj LR 481	62
AIR 1973 Guj 110 = 13 Guj LR 81	60
AIR 1972 Guj 6 = 12 Guj LR 487	39
(1967) 8 Guj LR 665	59
AIR 1965 Guj 152 = 6 Guj LR 27	59
AIR 1965 SC 414 = 5 Guj LR 111	41

N. R. Oza, for Petitioners (in both the Appeals); A. H. Mehta with I. C. Bhatt, for Opponents (in both the Appeals).

ORDER:— The plaintiffs filed Regular Civil Suit No. 265 of 1966 against the defendants for recovering possession of the suit premises on the grounds that the defendants Nos. 1, 2 and 3, the original tenants, had unlawfully sub-let a part of the suit premises to the defendants Nos. 4, 5 and 6, that the defendants Nos. 1, 2 and 3 had constructed permanent structures in the suit premises without obtaining the permission of the plaintiffs in writing, that the defendants had committed waste in the suit premises, that the plaintiffs require the suit premises reasonably and bona fide for their occupation and that the defendants Nos. 1, 2 and 3 had split up the original tenancy in two parts. The plaintiffs also pleaded that the defendants had been denying the plaintiffs' title and have not been observing the terms of the tenancy.

2. The defendants in their turn challenged the validity of the statutory notice served by the plaintiffs upon the defendants Nos. 1, 2 and 3.

3. The learned Trial Judge held that the statutory notice served by the plaintiffs upon the defendants Nos. 1, 2 and 3 was valid. So far as unlawful sub-letting was concerned, he negatived the plaintiffs' allegation in that behalf. He, however, upheld the plaintiffs' contention that the defendants had constructed permanent structures in the suit premises without obtaining the plaintiffs' permission in writing. He negatived the plaintiffs' grounds of eviction that the defendants had committed waste in the suit premises, that the plaintiffs require reasonably and bona fide the suit premises for their occupation and that the defendants have committed breach of the terms of the tenancy. Next he found that the plaintiffs had not proved that the defendants had committed waste in the suit premises. In view of his finding on the plaintiffs' ground of eviction relating to the construction of permanent structures by the defendants in the suit premises, he passed in favour of the plaintiffs decree for possession.

4. The defendants Nos. 1, 2 and 6 challenged the decree in Civil Appeal

No. 189 of 1969 which they filed before the District Court. The defendants Nos. 3, 4 and 5 challenged that decree in Civil Appeal No. 194 of 1969 which they filed in the District Court. Both the appeals were heard together by the learned Appellate Judge. He allowed both the appeals, set aside the decree for possession passed by the learned Trial Judge and dismissed the plaintiffs' suit. The findings recorded by the learned Appellate Judge are as follows:— The defendants have not constructed any permanent structures in the suit premises. There is no unlawful sub-letting of a part of the suit premises. The defendants have not committed any waste in the suit premises. The plaintiffs do not reasonably and bona fide require the suit premises for their occupation. The defendants had not denied the plaintiffs' title nor have they committed any breach of the terms of the tenancy.

5. Those two appellate decrees are challenged by the plaintiffs in these two Civil Revision Applications. Since they arise out of one suit and require examination of common contentions in light of the evidence on record and in light of the findings recorded by the Courts below, I decide them by a common judgment.

6. Mr. Oza, appearing for the plaintiffs, has raised before me the following six contentions.

1. The defendants Nos. 1, 2 and 3 have unlawfully sub-let a part of the suit premises or assigned their interest in the suit premises to the defendants Nos. 4, 5 and 6.

2. The defendants have constructed permanent structures in the suit premises.

3. The defendants have committed waste in the suit premises.

4. The plaintiffs require the suit premises reasonably and bona fide for their occupation.

5. The defendants have committed breach of the terms of the tenancy.

6. The defendants have split up the tenancy and rendered themselves liable to be evicted from the suit premises.

* * *

39. The third aspect of the case which Mr. Mehta has raised before me is that if the defendants Nos. 1, 2 and 3 are found to be statutory tenants, they have not sub-let a part of the premises to anyone. He has tried to base his argument on the deed of dissolution, Ex. 205. He has advanced two arguments. According to him, if the case pleaded by the plaintiffs is accepted, it will mean that the defendants Nos. 1, 2 and 3 created sub-tenancy in their favour. It can never be done. Relying upon the decision of this

Court in *Mehta Jagjivan Vanechand v. Doshi Vanechand Harakchand*, 12 Guj LR 487 = (AIR 1972 Guj 67) he has argued that sub-letting postulates two distinct persons — the head-tenant and the sub-tenant. Their rights and obligations are different. One cannot be one's own sub-tenant. The proposition laid down in that decision is, in my opinion, eminently correct. No exception can be taken to the principle which Mr. Mehta has tried to state to me. Sub-letting indeed means that the premises which are in the possession of a person as a lessee are sub-let to a third person. Unless there are two distinct persons who can be described as a head-tenant and a sub-tenant, there cannot be sub-letting. He has also tried to argue that the deed of dissolution, Ex. 205 does not show that if any more persons were brought into Ahmed and Co. and if the business of Ahmed and Co., was later on divided amongst these persons, there was any sub-letting. Sub-letting or sub-tenancy, according to him, must mean transfer of exclusive possession from a head-tenant to a sub-tenant either of the whole premises in the occupation of the tenant or a part thereof. This principle which Mr. Mehta has tried to enunciate before me also cannot be controverted.

xx xx xx xx

41. The first argument which Mr. Mehta has raised is that whereas tenancy rights in respect of premises other than the suit premises have been expressly dealt with and partitioned as evidenced by the recitals contained in paragraph 4 and paragraph 8, the tenancy rights in respect of the suit premises have not been dealt with at all. What has been dealt with in paragraph 3 of the deed of dissolution, Ex. 205, is only the possession and enjoyment of the suit premises. The difference in language which Mr. Mehta has tried to point out to me indeed is there. It cannot be gainsaid. So far as the possession is concerned, whereas the defendant No. 3 has been given exclusive possession of half the portion by the defendants Nos. 1 and 2, the defendant No. 3 has given exclusive possession of other half to the defendants Nos. 1, 2 and some other persons whose names have been stated in paragraph 3 of the deed of dissolution, Ex. 205. On these premises Mr. Mehta has sought to argue that none has given exclusive possession of any part of the suit premises. Secondly, he has also argued that so far as one part of the suit premises is concerned, the defendant No. 3 who is one of the co-tenants is in possession. So far as another part of the suit premises is concerned, the defendants Nos. 1 and 2 who are co-tenants are in possession thereof. What he has tried to argue is that the defendants other than the defendants Nos. 1, 2 and 3 have

been merely admitted to partnership business. There is no parting of possession in their favour by the defendants Nos. 1, 2 and 3. On these premises he has asked me to apply the principle laid down by Mr. Justice M. P. Thakkar in the case of *Mehta Jagjivan Vanechand* (supra). As held by the Supreme Court in the case of *Anand Nivas Private Ltd.* (supra) there is no transferable interest which a statutory tenant has and which he can sub-let. Since I have held that the defendants Nos. 1, 2 and 3 have been the statutory tenants of the plaintiffs, the question of their transferring any estate or interest in the suit premises to anyone else, properly so-called, does not arise. A statutory tenant forfeits his right to the protection of the statute if he parts with possession and the person in whose favour he parts with possession cannot claim any rights in respect thereof. It is in light of that principle that I have to judge the recitals contained in paragraphs 3 and 7 of the deed of dissolution, Ex. 205. Those recitals which I have reproduced above leave no doubt in my mind that for valuable consideration specified in paragraph 7 of the deed of dissolution, Ex. 205, the defendant No. 3 had retained possession only of half the area of the suit premises and the defendants Nos. 1 and 2 and certain other persons had got possession of the remaining half. If it was a purely inter se arrangement between the defendants Nos. 1, 2 and 3, it could have probably been said with some justification that what they had done was merely a method of working out the best terms of enjoying their premises. It is the introduction of some persons other than the defendants Nos. 1, 2 and 3 which has created the difficulty. When the recitals contained in paragraphs 3 and 7 are read together, it is quite clear that the defendant No. 3, one of the statutory co-tenants, had parted with possession of half the area in favour of his two other statutory co-tenants and some other persons. The defendants Nos. 1, 2 and 3 as statutory co-tenants were jointly in possession of the entire suit premises. That position has been altered for valuable consideration. The defendants Nos. 1, 2 and 3 and some other persons have divided the suit premises and retained to each of themselves possession of the half and parted with the rest. The persons other than the defendants Nos. 1, 2 and 3 are amongst those who constituted one section of persons. It cannot be said that they have parted with possession of that part which is now in possession of the defendant No. 3 because they did not have any possession at all. Really speaking, therefore, the defendants Nos. 1 and 2 have parted with possession of half the area in favour of their statutory co-tenant (defendant No. 3). That does not seem to

agricultural lands from a trespasser or from a mortgagee on redemption of a mortgage, but that if the defendant to the suit pleads that he is a tenant or a protected tenant or a permanent tenant, and an issue arises whether he is such a tenant, the Court must refer the issue to the Mamlatdar for determination and must stay the suit pending such determination and dispose of the suit after the Mamlatdar decides the issue in the light of the decision of the Mamlatdar. After considering the combined effect of Ss. 29, 70, 85 and 85-A of the B. T. & A. L. Act, it was held that independently of Section 85-A and under the law as it stood before S. 85-A came into force, the Civil Courts were bound to refer to the Mamlatdar the decision of the issue whether the defendant is a tenant under such circumstances.

8-A. The contention of the plaintiffs in the present case is that the Court in O. S. 111/51 should have raised an issue as to the tenancy rights of the present plaintiffs, who were defendants 8 and 9 in that suit, and referred the same to the Mamlatdar for his decision and thereafter decided the suit in the light of the said decision of the Mamlatdar. The Court had no jurisdiction to pass a preliminary decree for delivery of possession of the suit properties without following the said procedure and that therefore, the preliminary decree is null and void. It is not pleaded in the present suit by the plaintiffs that they had raised the plea as to their tenancy rights in O. S. 111/51. Ext. P-6 shows that there was no reference to the tenancy rights of the present plaintiffs in the plaint in O. S. 111/51. Ext. P-8 shows that Dadibi had stated during the course of her evidence that the husband of the present plaintiff and plaintiff 2 had been inducted on to the suit lands. But this evidence of Dadibi does not amount to a statement that defendants 8 and 9 in that suit were tenants of the suit land on the date of suit and that they continued to be so on the date of the preliminary decree. Moreover, Dadibi was only one of the plaintiffs in that suit. It cannot therefore be said that all the parties to the suit admitted that defendants 8 and 9 were tenants. Hence, merely on the basis of Ext. P-8, it cannot be said that the Court was bound to raise an issue as to the tenancy of defendants 8 and 9 in that suit. In fact, there was no occasion for the Court to raise such an issue in the absence of any controversy between the parties to that suit in that regard. In (1966) 7 Law Rep 151 (Mys) (Malappa Rangappa Chikkannavar v. Parappa Bandeppa Yamni), in a suit for recovery of possession filed by the respondent, the appellant pleaded that he was a tenant of the suit land, the question of tenancy

was made the subject of an issue by the Civil Judge and was referred to the Tahsildar under Section 85-A of the B. T. and A. L. Act. The Tahsildar held that the appellant was not a tenant. On receipt of that finding the trial Court decreed the suit for possession but made it conditional, the condition being that if the Assistant Commissioner or any other higher appellate Court holds in the appeal that the defendant is a tenant in respect of the suit lands, the decree would be inoperative. The appellant took the Tahsildar's order in appeal to the Assistant Commissioner who confirmed the order of the Tahsildar. Thereafter, the respondent took out execution of the decree. During the pendency of the execution proceeding, the appellant approached the Revenue Appellate Tribunal in revision against the Assistant Commissioner's order. The Revenue Appellate Tribunal, following the Full Bench decision of this Court, held that neither the Tahsildar nor the Assistant Commissioner had jurisdiction to decide the issue as to the tenancy of the suit land and set aside the orders of both those authorities. It was contended before this Court that the delivery of possession effected under the decree was illegal and inoperative. It was contended that the Civil Court had no jurisdiction to pass the decree. Rejecting that contention it was observed as follows while referring to the matters dealt with under Section 85-A of the Bombay Tenancy and Agricultural Lands Act:—

".....The primary jurisdiction to deal with the suit rests with the Civil Court and is never taken away from it. Only one of the issues concerned in the suit, namely, the issue as to the status of the defendant or plaintiff, as the case may be, as a tenant under the Act, is removed from the decision of the Civil Court and placed within the competence of Special Revenue Courts under that Act. The exercise of the primary jurisdiction by the Civil Court in respect of the suit cannot therefore be said to depend to any extent upon a finding given by the Revenue Courts in the same way as a final decree may be said to flow directly from a preliminary decree passed by a Civil Court. The substance of the matter is that the jurisdiction of the Civil Court rests with it and only so much of it as is expressly removed from its ambit and placed within the competence of Special Courts must be taken to have been taken away from it. The Civil Court does not depend upon the Revenue Court for the jurisdiction which it has for disposing of suits. I do not accept therefore the argument that although the decision or final conclusion of the Civil Court must be, according to the statute, in accordance with law on the finding returned by the tenancy Tahsildar the jurisdiction in ex-

ercise of which the Court passed a decree is the original jurisdiction which it possessed by virtue of Section 9 of the Code of Civil Procedure. A similar situation is that under the present Code of Criminal Procedure in which a Criminal Court, functioning under Section 145, is required in certain circumstances to refer an issue as to possession to a Civil Court and then proceed to dispose of the matter on its file in accordance with the finding of the Civil Court. For that reason it does not mean that the jurisdiction of the Magistrate is derived not from the Criminal Procedure Code but from the Civil Court functioning under the Civil P. C. The jurisdictions are distinct and clearly relatable to two different statutes under which the two courts function."

In ILR (1969) Guj 291, (Ahmedabad Municipal Corporation v. Joitaram Ganesh) the question was whether a consent decree passed by the court in a previous suit was a nullity. The respondents in the previous suit contended that the Bombay Tenancy and Agricultural Lands Act 1948 applied to the suit lands and their tenancy and claimed an injunction in that suit against the Municipal Corporation of Ahmedabad. The Corporation contended that the lands were exempted from the provisions of that Act. The suit was ultimately compromised and a consent decree was passed. It was held that it is only an objection as to the powers of the court over the subject-matter to try the suit or over the parties which cannot be waived and which would therefore render a decree a nullity in the true sense and such an objection alone can be raised before the executing court or even in collateral proceedings, and that the other objections as to the defect of jurisdiction were those which would be capable of waiver. Following the decision in AIR 1962 SC 199, (Hiralal Patni's case), it was held that the court never lacked in competence over the subject-matter of the compromise and it had jurisdiction to pass the consent decree and that such a decree could not be attacked on the ground that it is a nullity.

In AIR 1958 Andh Pra 1, (Venkateshayya v. Virayya) certain service inam lands were sold in execution of a mortgage decree. The question of inalienability of service inam lands was not raised in the suit or in execution. Section 5 of the Madras Hereditary Village Offices Act (3 of 1895) prohibited the sale of service inam lands. It was held that it was not open to the Inamdar to treat the Court sale as null and void and recover possession of the lands from the purchaser at a Court sale or resist the claim of the purchaser to be put in possession of the lands, and it was observed as follows:—

"There is no conflict between the principle of *res judicata* and that of prohibited alienation of particular properties on the ground of public policy. An alienation of properties prohibited by public policy or statute may be void. But the said prohibi-

tion cannot have the effect of depriving the jurisdiction of Courts to decide in a particular suit whether the alienation is void or not.

Nor can it override the principles of *res judicata*. The former belongs to the domain of substantive law and the latter to the rule giving finality to decrees of competent Courts. The sanctity of final judgments is as much based on public policy as prohibition against the alienation of properties annexed to certain public offices. The fundamental question in each case, therefore, is whether the Court has inherent jurisdiction to entertain a particular suit.

A duty is cast upon a Court to raise relevant issues arising on the pleadings and give definite finding on each of the issues. The question whether a carpenter service inam is alienable raises a mixed question of fact and law which is certainly within the jurisdiction of the Court to decide. When it decides the question one way, the finding will be *res judicata* in another suit."

It was held that since the validity of the mortgage on the ground of public policy was not raised in the earlier suit or in the execution proceedings, the decree and the order confirming the sale would operate as *res judicata* in the subsequent suit.

9. In the present case also, defendants 8 and 9 in O. S. 111/51 failed to raise the necessary issue as to their tenancy. Hence, it is not open to them to contend that the decree passed in that suit is a nullity. Both the lower courts were therefore justified in coming to the conclusion that the claim of the present plaintiffs is barred by *res judicata*.

10. Mr. Bhatta, appearing for the appellants, relied on several decisions in support of his contention that the record in the earlier suit can be looked into for the purpose of determining the question whether the court had jurisdiction to pass the decree. But it is not necessary to consider them since the appellants have to fail even if the contents of Exts. P-6 and P-8, the only material produced in that regard, are taken into consideration, as stated already.

11. The trial court held that the plaintiffs were not in possession of the suit properties on the date of suit. But the lower appellate court has not given any finding in that regard. Since the decree passed in O. S. 111/51 is binding on the plaintiffs, no injunction could be granted in their favour even if it is to be found that they were in possession of the suit properties on the date of suit since such an injunction would defeat the rights of the decree-holders who are entitled to obtain possession.

12. I. A. IV is an application under Order 22, Rule 10, Civil P. C. praying that the Deputy Commissioner, Belgaum District, may be impleaded as supplemental respondent No. 19. This application is opposed by the respondents. According to the contention of the appellants, they continue to be tenants and the suit lands have vested in the State Gov-

ernment but according to the respondents the State has become the owner of the suit lands and the appellants have no locus standi to file the application. Since it has already been held that it is not open to the plaintiffs to urge that they were tenants of the suit lands the application is dismissed.

13. This appeal fails and is dismissed with costs.

Appcal dismissed.

AIR 1975 KARNATAKA 211

D. M. CHANDRASHEKHAR AND

E. S. VENKATARAMIAH, JJ.

Indian Telephone Industries, Dooravani-Nagar, Bangalore and others, Appellants v. Regional Transport Officer, Bangalore and others, Respondents.

Writ Appeals Nos. 413, 414 and 417 of 1974, D/- 13-6-1975.*

(A) Motor Vehicles Act (1939), S. 2 (3) — Omnibus maintained by Factory owner for transporting employees between their houses and the Factory — Is not 'Contract carriage' — But is only an omnibus for purposes of taxation under the Karnataka Motor Vehicles Taxation Act (35 of 1957). (Karnataka Motor Vehicles Taxation Act (35 of 1957), S. 3, Sch., Part A, Item 7). (1974) 2 Kant LJ 310, Reversed.

An omnibus maintained by the owner of the factories, for transporting the employees of the factory from their houses to the factory is not a "Contract Carriage" within the meaning of Section 2 (3) as one of the essential ingredients in the definition of 'contract carriage' is wanting, namely the contract should be for the use of the vehicle as a whole. The vehicle can be taxed under the Karnataka Motor Vehicles Taxation Act, 1957 only as an 'omnibus' (Paras 28, 32)

The fact that the vehicle had been running on a permit styled as 'contract carriage' permit, but to which a condition was attached that only the Company's employees should be transported is really not a contract carriage permit and cannot render the vehicle a contract carriage vehicle. (1974) 2 Kant LJ 310, Reversed. (Para 30)

Cases Referred : Chronological Paras
AIR 1965 SC 991 = (1965) 1 SCR 841 17

B. P. Bopanna, for Appellant in W. As. Nos. 413 and 414 of 1974, P. R. Ramachandra Rao, P. R. Srinivasan and Kashinath, for Appellant in W. A. No. 417 of 1974; K. S. Puttaswami, Addl. Govt. Advocate, for Respondents.

JUDGMENT:— In these three appeals, the question that arises for determination is whether an omnibus engaged by an employer for transporting exclusively his employees be-

tween their houses and his factory, for which service he (the employer) collects fares from his employees, should be treated as a contract carriage or merely an omnibus for the purpose of levy of tax under the Karnataka Motor Vehicles Taxation Act, 1957, (hereinafter referred to as the Act).

2. The appellants who were the writ petitioners (hereinafter referred to as the Companies) are Government Companies in which all the shares are held by the State. Their factories are located in the outskirts at Bangalore. Each of them has been maintaining a fleet of omnibuses to provide transport facility to its employees between their houses and its factory. For providing such transport facility, they collect fares from their respective employees by deducting such fares from their salaries or wages. Such fares are small compared to the cost of providing such transport facility and the Companies subsidise their respective transport services.

3. For these vehicles, the Companies had obtained contract carriage permits under the Motor Vehicles Act, 1939. The Regional Transport Authority which granted such permits, had endorsed on each of the permits three conditions, one of which reads as follows:

"Only the bona fide Employees of the Factory and no other than these employees should be carried."

The taxing authority has been levying taxes on these vehicles on the footing that they are contract carriages. The Companies made applications to the Regional Transport Authority, Bangalore, and the Commissioner of Transport to alter the classification of these vehicles from contract carriages to omnibuses. Those applications were rejected by them. When such orders had been made by the Regional Transport Authority, the Companies had preferred appeals to the Commissioner of Transport who dismissed them.

The Companies presented Writ Petitions, W. P. No. 542 of 1972 and W. Ps. Nos. 2124 and 2180 of 1973, assailing the decisions of the Regional Transport Officer and the Commissioner of Transport and had prayed for issue of writs in the nature of Mandamus directing the Regional Transport Officer to classify these vehicles as 'omnibuses'.

4. Jagannatha Shetty, J., by his common order dated 29-5-1974, dismissed the writ petitions holding that the taxing authority was justified in treating these vehicles as contract carriages for the purpose of the Taxation Act. Feeling aggrieved by the decision of the learned single Judge, the Companies have preferred these appeals.

5. Mr. P. R. Ramachandra Rao, learned Counsel for the appellant in W. A. No. 417 of 1974, addressed the leading arguments. Mr. B. P. Bopanna, learned Counsel for the appellants in Writ Appeals Nos. 413 and 414 of 1974, adopted those arguments and supplemented them. The learned Government Advocate argued in support of the decision of the learned single Judge.

*(Against order of this court reported in (1974) 2 Kant LJ 310).

6. In order to appreciate the rival contentions of learned Counsel, it is necessary to set out the relevant portions of the Taxation Act and the Motor Vehicles Act.

7. Section 3 of the Taxation Act which is the charging Section, provides that a tax at
(Contd. on Col. 2)

the rates specified in Part A of the Schedule shall be levied on all motor vehicles suitable for use on roads, kept in the State.

8. The relevant portions of Item 4 in Part A of the Schedule to the Taxation Act, as it stood prior to 1-7-72, read as follows:

SCHEDULE
PART 'A'
Motor Vehicle Tax

Classes of Vehicles	Quarterly	
	Vehicles fitted with pneumatic Tyres	Other Vehicles
1	2	3
* * * * *		
4. Motor vehicles plying for hire and used for the Transport of passengers and in respect of which permits have been issued under the Motor Vehicles Act, 1939 :—		
* * * * *		
(2) Vehicles permitted to carry more than five persons and the total mileage of which does not exceed 97 kilometres per day :—		
(a) for every seated passenger (other than the driver and conductor) which the vehicle is permitted to carry.	30-00	45-00
(b) For every passenger (other than a seated passenger, the driver and the conductor) which the vehicle is permitted to carry.	5-75	8-50
(3) vehicles plying on routes other than those mentioned at (1) and (2) above :—		
(a) For every seated passenger (other than the driver and the conductor) which the vehicle is permitted to carry.	35-00	52-50
(b) For every passenger (other than a seated passenger, the driver and the conductor) which the vehicle is permitted to carry.	10-00	15-00
9. Item 4-A in Part 'A' of the Schedule to the Taxation Act, inserted by the Mysore (Karnataka) Motor Vehicles Taxation (Amendment) Act, 1972, which came into force on 1-7-1972, reads:		
4A. Motor vehicles plying for hire or reward used for transport of passengers in respect of which contract carriage permits have been issued under the Motor Vehicles Act, 1939 and permitted to carry more than five persons excluding the driver, for every passenger which the vehicle is permitted to carry.	100-00	150-00
10. Item 7 in Part 'A' of the Schedule to the Taxation Act, reads:		
7. Omnibuses (other than those liable to tax under the foregoing provisions of this schedule) for every person (other than the driver) which the vehicle is constructed or adapted to carry.	10-00	15-00

11. Clause (j) of sub-section (1) of S. 2 of the Taxation Act provides that the words and expressions used but not defined in that Act shall have the meaning assigned to them in the Motor Vehicles Act, 1939.

12. We shall now set out the relevant definitions in the Motor Vehicles Act.

13. Sub-section (18-A) of S. 2 of the Motor Vehicles Act defines 'omnibus' as any motor vehicle constructed or adapted to carry more than six persons excluding the driver.

14. Sub-section (25) of S. 2 of the Motor Vehicles Act defines 'public service vehicle' as any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward. Contract carriage and stage carriages are included in that definition of public service vehicle.

15. Sub-section (3) of S. 2 of the Motor Vehicles Act which defines 'contract carriage' reads:

(3) 'contract carriage' means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum—

- (i) on a time basis whether or not with reference to any route or distance, or
- (ii) from one point to another, and in either case without stopping to pick up or set down along the line of route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares.

16. Sub-section (29) of S. 2 of the Motor Vehicles Act defines 'stage carriage' as a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey.

17. In *Roshanlal Goutham v. State of U. P.*, (AIR 1965 SC 991 at page 994), the Supreme Court explained the distinction between a contract carriage and a stage carriage thus:

"The distinction between the two is this: the contract carriage is engaged for the whole of the journey between two points for carriage of a person or persons hiring it but it has not the right to pick up other passengers en route. The stage carriage on the other hand, runs between two points irrespective of any prior contract and it is boarded by passengers en route who pay the fare for the distance they propose to travel."

18. It is common ground that the Companies' omnibuses cannot be regarded as stage carriages. As stated earlier, these vehicles are used exclusively for transporting the Companies' employees only between their houses and the respective factories. No member of the public other than such employees, can travel in these vehicles even if he is prepared to pay fare for travelling in them. As stated earlier, one of the conditions endorsed on the permits granted to them, is that only employees of the factory and none else should be carried in them. If these vehicles cannot be regarded as contract carriages, it is common ground that they can be taxed as omni-

buses under Item 7 of the Schedule to the Taxation Act. Hence, the real question is whether or not these vehicles can be regarded as contract carriages.

19. From the definition in Section 2 (3) of the Motor Vehicles Act, the following ingredients are necessary for a motor vehicle being regarded as contract carriage:

- (i) It should carry passengers;
- (ii) Such carrying should be for hire or reward;
- (iii) Such carrying should be under a contract, express or implied;
- (iv) Such contract should be for the use of the vehicle as a whole;
- (v) Such hire or reward should be at fixed or agreed rate or sum—
 - (a) on a time basis whether or not with reference to any route or distance; or
 - (b) from one point to another; and
- (vi) The vehicle should not pick up or set down along the line or route, passengers not included in the contract.

20. As regards the first of the above ingredients, learned Counsel for the Companies contended that the employees of the Companies who travel in these vehicles, cannot be regarded as 'passengers' travelling in a public service vehicle. On the other hand, the learned Government Advocate contended that as those employees are not transported in these vehicles in the course of their work, but in order to reach the factories and to return therefrom to their houses, there is no reason why they should not be regarded as passengers.

21. As regards the second ingredient, learned Counsel for the Companies argued that fares charged by the Companies to their employees, cannot be regarded as hire or reward, firstly because there is no soliciting or waiting to secure passengers nor any general invitation to the public to travel in these vehicles, secondly because such fares are insufficient to meet even the cost of fuel and other consumable articles in operating these vehicles, and thirdly because the Companies have no profit or business motive and do not earn any profit, but incur losses in operating those services. It was explained by learned Counsel for the Companies that these vehicles are run to enable their employees to come to the factories in time and to return home after the factory hours without having to queue up at bus stops and to wait for long period without being certain of getting accommodation in public buses.

22. On the other hand, the learned Government Advocate contended that so long as the Companies do not carry their employees gratuitously, the fares charged by the Companies to them should be regarded as hire or reward, that the fares being low and inadequate to meet the expenses of the services, is irrelevant and that the existence of the profit or business motive is equally irrelevant. It

was also contended by the learned Government Advocate that even if there is no invitation to the public to travel in these vehicles, there is no reason why fares charged to the Companies' employees should not be regarded as hire or reward.

23. As regards the third ingredient, learned Counsel for the Companies contended that there is no contract between each Company and its employees for such transport and that there is no legal obligation on the Companies to provide such transport, nor have the employees any right to insist upon such transport facility being provided by the Companies.

24. The rival contention of the learned Government Advocate was that though there was no express contract between each Company and its employees, when an employee travels in a vehicle run by the Company and the fare payable by him is deducted from his salary or wages, there is an implied contract between him and the Company in regard to such transport facility.

25. As regards the fourth ingredient, learned Counsel for the Companies contended that assuming that there is a contract under which the employees of a Company are provided such transport facility, such contract is distinct and separate as between each of the employees travelling in such vehicle and the Company and that there is no contract as between the Company and the entire body of its employees or even the entire body of employees travelling in each vehicle, for the use of the vehicle as a whole.

26. The learned Government Advocate sought to meet the above contention by arguing that a contract between each of these Companies and the entire body of its employees using such transport services or at any rate between the Company and the body of employees using each of such vehicles, must be implied and that such contract is for the use of the vehicle as a whole.

27. It has not been shown that the entire body of employees of each of the Companies, represented by the trade union or any other association, has entered into a contract with that Company and has been paying the Company a consolidated fare for the use of each vehicle as a whole. Nor has it been shown that the entire body of employees using each of such vehicles have been paying such consolidated fare. On the other hand, each of the employees who avails himself of such transport facility pays to the Company the fare for himself only, such payment being made by deduction from his salary or wages. Hence, the implied contract is between the company and each individual employee who avails himself of such transport facility, and there is no contract between the Company and the entire body of employees travelling in a vehicle for the use of that vehicle as a whole.

28. Thus, one of the essential ingredients of the definition of contract carriage,

namely, that the contract should be for the use of the vehicle as a whole, is absent in the cases of these vehicles run by the Companies. It follows that these vehicles cannot be regarded as a contract carriage as defined in Section 2 (3) of the Motor Vehicles Act. In this view, it becomes unnecessary to pronounce upon the rival contentions of learned Counsel as to the first three of the aforesaid ingredients. It is also unnecessary to decide whether the 5th and the 6th of the aforesaid ingredients, are present in these cases.

29. However, the learned Government Advocate urged that the Companies themselves applied for contract carriage permits which were granted by the Regional Transport Authority, that since the Companies were operating these vehicles under those contract carriage permits, they came within the ambit of Item 4-A of the Schedule to the Taxation Act and that as long as these vehicles are operated under such permits, they cannot escape liability to tax at the rates provided in that Item.

30. The relevant words in Item 4-A, of the Schedule to the Taxation Act are "Motor Vehicle plying for hire or reward and used for transportation of passengers and in respect of which contract carriage permits have been issued under the Motor Vehicles Act, 1939." Though the Companies applied for contract carriage permits and the Regional Transport Officer purported to grant such permits, can those permits be regarded as contract carriage permits? We should not be carried away by the label attached to these permits, but we should ascertain the true nature of the permits. As stated earlier, the Regional Transport Authority had endorsed on the permits issued in respect of each of these vehicles a condition that only the Company's employees and none else should be carried in it. There is nothing in the definition of contract carriage which warrants such a restriction. When such a restriction is imposed and the permit holder is prohibited from carrying the public who may desire to travel therein under a contract for the use of the vehicle as a whole, it cannot be said that the permit granted to any of these vehicles, is a contract carriage permit. Hence, such permits cannot be said to fall within the ambit of Item 4-A of the Schedule to the Taxation Act to attract levy at the rates mentioned in that Item.

31. The learned single Judge has overlooked the aspect that none of these vehicles operates under a contract for the use of the vehicle as a whole and that unless this requirement is satisfied, these vehicles cannot be regarded as contract carriages. Hence, we are unable to uphold his decision.

32. If these vehicles cannot be taxed either as contract carriages or stage carriages, they can only be taxed as omnibuses under Item 7 of the Schedule to the Taxation Act.

Hence, the relief claimed by the Companies should be granted.

33. The next question is from what date such relief should be granted. The Companies had addressed letter to the Commissioner of Transport or the Regional Transport Authority asking for reclassification of their vehicles as omnibuses. Those authorities rejected the request for reclassification of those vehicles. The Companies had not pursued proper proceedings for redress of their grievance until they presented the writ petitions. Hence, the relief should be granted to them only from the respective dates on which they presented the writ petitions.

34. In the result, we allow these appeals, reverse the common order of the learned single Judge and issue writs in the nature of mandamus directing the respondents to treat the Companies' motor vehicles used for transporting their employees, as omnibuses and not as contract carriages for the purpose of tax under the Taxation Act. If the respondents have collected from these Companies tax on these vehicles as contract carriages subsequent to the respective dates on which the writ petitions were presented, the excess tax so collected shall be refunded to the respective Companies. We disallow the claims of the Companies in respect of the period prior to the respective dates of presenting the writ petitions.

35. In the circumstances of these cases, we direct the parties to bear their own costs in these appeals as well as in the writ petitions.

36. Before concluding, we wish to point out that there is need for amendment of the Motor Vehicles Act and the Karnataka Motor Vehicles Taxation Act so as to introduce a separate classification of motor vehicles which are used by employers for providing transport facility to their employees exclusively. When the Motor Vehicles Act was enacted in the year 1939 this class of motor vehicles were negligible as our country was still in its infancy in industrialisation. With establishment of large industries and rapid growth of cities, this class of vehicles have assumed importance. It is desirable to provide for issue of a separate category of permits for such vehicles. It is for the State Legislature to consider whether such vehicles should be taxed as a separate class and if so, at what rate.

Petition allowed.

AIR 1975 KARNATAKA 215

E. S. VENKATARAMIAH, J.

Ramappa Bhimappa Kulgod, and others, Petitioners v. Union of India and others, Respondents.

Writ Petns. Nos. 1102 and 1115 of 1972 and 4653 and 5606 of 1974, D/- 4-6-1975.

GS/GS/C405/75/SSG

(A) Essential Commodities Act (1955), S. 3 (1) — Cotton Textiles (Control) Order (1948), Cl. 20 — Notification dated 9-11-1966 taking away exemption extended under Notification dated 15-4-1950 to owners having less than five powerlooms — Validity of.

On 15-4-1950 the Textile Commissioner under clause 20 of the Order issued notification whereby he prohibited owners of powerlooms from manufacturing coloured sarees. However, the owners having less than five powerlooms were excluded from the operation of the aforesaid restriction. The effect of the said notification was that coloured sarees could be manufactured after the issue of the said notification by weavers in the handloom sector and powerloom owners owning less than five powerlooms. The Additional Textile Commissioner issued a notification under clause 20 on 9-11-1966 modifying the notification issued on 15-4-1950. By this notification he took away the exemption which had been extended to the powerloom establishments having less than five powerlooms by the notification dated 15-4-1950. The result was that the owners of establishments in which there were less than five powerlooms could not manufacture coloured sarees. On writ petition by such owners:

Held (1) that the notification dated 9-11-1966 was not outside the scope of Section 3 of the Act and/or clause 20 of the Order. If the powerloom sector which had the benefit of improved technology was allowed to manufacture coloured sarees, the magnitude of the competition would be such as to totally destroy the handloom industry. The reservation of the production of coloured sarees to the handloom sector could not be considered to be improper. (Para 10)

(2) that coloured sarees having a definite market and belonging to a specified classification, by reserving the production of coloured sarees for the handloom sector the Textile Commissioner had not violated clause 20 of the Order. (Para 11)

(3) that mere non-specification of time during which the notification dated 9-11-1966 would be in force would not by itself render the notification invalid. The notification would be in force until rescinded or superseded. (Para 12)

(B) Constitution of India, Art. 226 — Jurisdiction of High Court to interfere — Authority under clause 20 of the Cotton Textiles (Control) Order prohibiting owners of powerlooms from manufacturing coloured sarees — Absence of any other material — High Court would not interfere in exercise of its power under Art. 226. (Cotton Textiles (Control) Order (1948), Cl. 20). (Para 10)

(C) Constitution of India, Art. 14 — Classification of objects or things — Validity — Determination — Test — Notification under Cl. 20 of Cotton Textiles (Control) Order — Not violative of Art. 14. (Cotton Textiles (Control) Order (1948), Cl. 20).

A court while considering the validity of a classification of objects or things for special treatment should bear in mind two factors—

(i) whether there is an intelligible differentiation between persons and things which are included in a class and persons and things which are excluded from the class; and

(ii) whether there is a reasonable nexus between the object to be achieved by the classification and the classification itself.

(Para 13)

Notification under Cl. 20 of the Order reserving manufacture of coloured sarees to the handloom sector only does not violate Article 14 of the Constitution. That the powerloom sector and the handloom sector belong to two definite classes in textile industry cannot be denied. The object of the issue of the notification was to maximise the production of textiles by reserving certain categories of cloth to be manufactured by one or the other of the sectors and in order to sub-serve the above purpose, the notification has been issued reserving manufacture of coloured sarees to the handloom sector. The classification is not in any way opposed to Article 14 of the Constitution.

(Para 13)

(D) Constitution of India, Art. 19 (1) (g) and (6) — Notification issued under clause 20 of the Cotton Textiles (Control) Order — Prohibition imposed on owners of powerlooms from manufacturing coloured sarees — In view of history of textile industry and advantages enjoyed by different sectors, prohibition held to be in the public interest and as such protected by Art. 19 (6). (Cotton Textiles (Control) Order (1948), Cl. 20).

(Para 14)

B. V. Deshpande (In W. Ps. Nos. 1102 and 1115 of 1972) and C. N. Kamath (In W. Ps. Nos. 4653, 5606 of 1974), for Petitioners; U. L. Narayana Rao, Sr. Central Govt. Standing Counsel (for No. 1 and No. 2 in all Writ Petns.), M. Ramakrishna, H. C. G. P. (for No. 3) in Writ Petns. Nos. 1102 & 1115 of 1972 and (for Nos. 3 to 5) in Writ Petns. Nos. 4653 and 5606 of 1974, for Respondents.

ORDER :— The petitioners in these four writ petitions are manufacturers of cloth on power-looms belonging to them. The number of power-looms owned by each of the petitioners is less than five. Aggrieved by the notification issued by the Textile Commissioner on November 9, 1966, which had the effect of prohibiting the petitioners from manufacturing coloured sarees, the petitioners have filed these petitions for the issue of a writ quashing the said notification to the extent it prohibited them from manufacturing coloured sarees and directing the respondents not to enforce the said notification as against them.

2. Before the commencement of the Constitution, there was a law in force in British India dealing with the production and distribution of essential commodities by the

name the Essential Supplies (Temporary Powers) Act, 1946. Cotton and Woollen textiles were listed as one of the essential commodities under Section 2 (a) (i) of the said Act. Section 3 of the said Act provided that the Central Government so far as it appeared to be necessary for maintaining or increasing the supply of any essential commodity or for securing its equitable distribution and availability at fair price might by a notified order provide for regulating or prohibiting its production, supply and distribution and trade and commerce therein. In exercise of the power conferred on it by Section 3 referred to above, the Central Government promulgated the Cotton Textiles (Control) Order, 1948 (hereinafter referred to as the Order), providing for the regulation of production and distribution of cotton textiles in British India. Clause 20 of the order authorised the Textile Commissioner to issue directions in writing to any manufacturer or class of manufacturers or the manufacturers generally regarding the production of cloth. It reads as follows :—

"20. (1) The Textile Commissioner may from time to time issue directions in writing to any manufacturer or class of manufacturers or the manufacturers generally, regarding the classes or specifications of cloth or yarn, and the maximum or the minimum quantities thereof, which they shall or shall not produce during such periods as may be specified in the directions, and they shall comply with such directions.

(2) In the exercise of the powers conferred upon him by sub-clause (1) the Textile Commissioner shall have regard to the capacity of the producer to produce cloth and yarn of different descriptions or specifications and to the needs of the general public."

By virtue of Article 369 of the Constitution, the Essential Supplies (Temporary Powers) Act, 1946, continued to be in force even after the commencement of the Constitution. Article 369 further provided that notwithstanding the fact that the topics referred to in Cl. (a) thereof were in List II of the Seventh Schedule to the Constitution, it was open to the Parliament to make any law in respect of those topics during the period of five years from the commencement of the Constitution as if the said topics were within the concurrent list. Production, supply and distribution of cotton and woollen textiles was one of the topics referred to in Article 369 (a). In exercise of the power conferred by Article 369, an ordinance, the Essential Commodities Ordinance, was issued by the President of India on January 26, 1955, providing for the effective control of the production and distribution of the essential commodities dealt with by the said Ordinance. The Ordinance was replaced by the Essential Commodities Act, 1955. The Order which had been issued under the Essential Supplies (Temporary Powers) Act, 1946, however continued to be in operation even after it ceased to be in operation.

3. After the Order was promulgated by the Government of India, the Textile Com-

missioner in exercise of the power conferred on him by Clause 20 thereof issued a notification on 15-4-1950 whereby he prohibited owners of power-looms from manufacturing coloured sarees. The said notification, however, excluded from the operation of the above restriction owners of power-looms who owned less than five power-looms. The effect of the said notification was that coloured sarees could be manufactured after the issue of the said notification by weavers in the hand-loom sector and power-loom owners owning less than five power-looms.

4. In order to review the condition prevailing in the power-loom industry, the Government of India appointed on January 8, 1963, a committee presided over by Sri Ashok Mehta (hereinafter referred to as the Committee) to enquire into the problems of the power-loom industry. One of the terms of reference was that the Committee should consider and report on the relative role to be played by the power-loom industry vis-a-vis that of the handloom and mill industry and to recommend the targets of production. In the month of May 1964 the Committee submitted its conclusions and recommendations to the Government of India. One of the recommendations made by the Committee was that the production of coloured sarees should be reserved exclusively for handlooms. The relevant part of the recommendation reads as follows:—

"We also recommend that the production of coloured sarees should be reserved exclusively for hand-looms. Small powerloom establishments with four looms and below at present are free to manufacture these sarees. It will be necessary to take positive measures for increasing the protection offered to those who would still continue to ply the handlooms by preventing the production of coloured sarees by the small powerlooms also whether they are in the co-operative fold or outside. We recommend that Government may take all the steps necessary to ensure that adequate facilities to obtain sized beams are provided within a period of three years for the weavers in Burhanpur, Malegaon and Jabalpur so that the powerlooms in these centres, whether in the co-operative sector or outside, simultaneously could change over to the weaving of fabrics other than coloured sarees."

After taking into consideration the recommendations made by the Committee, the Government of India passed a resolution on the above question on June 2, 1966. The relevant part of the resolution reads:

"31. With a view to afford protection to the handloom industry, the Committee has recommended that:

- (a) production of dhoties and sarees by textile mills should be pegged at the 1963 level; and
- (b) that the production of coloured sarees should be reserved exclusively for handloom and that even small powerlooms

establishments with four looms and below should not be allowed to produce coloured sarees. In certain centres where there is large scale production of coloured sarees by powerlooms at present the restriction on production of coloured sarees and change over to other varieties should be brought about gradually within a period of three years and the existing units should be assisted in obtaining the requirements of sized beams.

Government accept these recommendations."

After the above resolution was passed, the Additional Textile Commissioner issued a notification under clause 20 of the Order on November 9, 1966, modifying the notification issued on 15-4-1950. By this notification he took away the exemption which had been extended to the powerloom establishments having less than five powerlooms by the notification dated April 15, 1950. The result was that the petitioners who were owners of establishments in which there were less than five powerlooms could not manufacture coloured sarees. Aggrieved by the notification dated November 9, 1966, the petitioners have filed these writ petitions.

5. Three principal contentions were urged by Sriyuths B. V. Deshpande and C. N. Kamath, learned counsel for the petitioners, in support of these writ petitions: (i) that the prohibition imposed on the petitioners by the impugned order was outside the scope of Section 3 of the Act, and, therefore, was ultra vires of the statute under which it was issued; (ii) that the notification was violative of Article 14 of the Constitution as it brought about a hostile discrimination between the owners of power-looms on the one hand and persons functioning in the handloom sector; and (iii) that the impugned notification was violative of Article 19 (1) (g) of the Constitution.

6. Section 3 (1) of the Essential Commodities Act, 1955 which is in pari materia with Section 3 (1) of the Essential Supplies (Temporary Powers) Act, 1946, reads as follows:—

"If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein."

7. It was argued by the learned counsel for the petitioners that the imposition of the prohibition on the petitioners, namely, that they should not manufacture coloured sarees did not advance the object of Section 3 (1) of the Act. It was contended that such prohibition would not assist either in maintaining or increasing the supplies of the cotton textiles. On the other hand, according to the petitioners it would only check the pace of production

of cotton textiles in India. In the counter-affidavit filed on behalf of respondents 1 and 2 which is sworn to by an officer working in the Office of the Textile Commissioner, it is stated as follows :—

"I say that both under the Essential Supplies (Temporary Powers) Act 1946 and the Essential Commodities Act, 1955, the Central Government were, and are, empowered to make orders to provide for prohibiting or regulating the production, supply and distribution of any essential commodity which in the present case is cotton textiles and trade and commerce therein so far as it appears to the Central Government to be necessary or expedient for maintaining or increasing the supplies of such commodity or for securing their equitable distribution and availability at fair prices. I say that the textiles produced by handlooms and textiles produced by factories using power are both essential commodities, the production and supply of which are to be maintained and increased. With a view to maintain the supplies of cotton textiles produced by organised sector, namely, mills and powerloom factories and decentralised sector, namely; handlooms, targets of production of cotton textiles by the different sectors have been fixed from time to time. I say that if the mills and powerlooms factories are not permitted to produce coloured sarees or to dye sarees, the result will be that the handlooms could produce them. I say that in such a case the mills and powerlooms factories can produce grey cloth and any other varieties of cloth. I say that the handloom sector would continue to play a prominent role in the field of production of cloth for some decades. An unrestricted growth or encouragement of powerlooms would make a sizeable number of handlooms go out of production which will have adverse effect on the total supply position of cotton textiles fabrics. The impugned order has, therefore, been necessitated to maintain the supplies of handloom cloth."

8. It is very well known that the production of cotton textiles is concentrated in three main sectors in India, namely, (i) textiles mills; (ii) powerlooms; and (iii) handlooms. For the first time in 1950 by the notification dated April 15, 1950, reservation in certain field of production i.e. production of coloured sarees by handlooms as a measure of helping that industry which was in need of such help, was made. At the same time establishments having less than five powerlooms were allowed to manufacture coloured sarees. Subsequent to the issue of that notification, there was an abnormal growth in the number of powerlooms that were installed in different parts of India. It was noticed that many of them had been installed even without the necessary permits or licenses.

On account of the prevalence of certain unhealthy practices such as establishing powerlooms benami in the names of persons who did not in fact own them, and partition of

existing powerloom establishments amongst the members of a family even though in fact there was no such partition, come into vogue in order to defeat either the excise law or the rules and notifications issued by the competent authorities for the purpose of regulating and controlling the establishment of powerlooms. The consequence was that the handloom sector which was considered to be the main sector in which coloured sarees had to be manufactured suffered considerably on account of the competition of powerloom manufacturers. It was at that stage the Government of India appointed the Committee. In the course of its report the committee observed as follows :

"Even with the phased programmes of introduction of powerlooms in the handloom sector, the handloom sector would continue to play a prominent role for some decades. It will be necessary therefore to ensure that this sector is given assistance by a further reservation of field of production. It has been explained to us that the total production of dhoties by the textile mill industry has been going down. Against 682 million metres of dhoties produced in the year 1952, the present production is of the order of about 330 million metres only. A similar reduction in the manufacture of sarees also has taken place. The total production has declined from 536 million metres in 1952 to about 317 million metres currently. The fall in production of dhoties by the textile mill sector would seem to have been filled mainly by powerlooms. We recommend that the production of dhoties and sarees by the textile mills may be pegged at the 1963 level. We also recommend that the production of coloured sarees should be reserved exclusively for the handlooms. Textile mills and large powerloom establishments are already prohibited from producing these types of sarees as a measure of protection to the handloom industry. However, small powerloom units with four looms and below are free to manufacture these sarees. In view of our recommendation to instal powerlooms in the handloom sector in a big way, it will be necessary to take positive measures of increasing the protection offered to those who would still continue to ply the handlooms by preventing production of coloured sarees by the small powerlooms also whether they are in the co-operative fold or outside."

It is seen from the report of the Committee extracted above that on account of increased production of dhoties in the powerloom sector it was not necessary to continue to exempt small powerloom establishments from the operation of the prohibition contained in the notification of April 15, 1950. It was also felt by the Committee that having regard to the conditions prevailing at the time when it made the report it was necessary in order to maintain supplies that the production of coloured sarees should be exclusively entrusted to the handloom sector. A perusal of the report of the Committee clearly establishes that there was a case for the imposition of the prohibi-

tion in the larger interests of the Indian economy.

9. The question which however arises for consideration in these cases is whether it was open to the Textile Commissioner exercising his powers under Clause 20 of the Order and the provisions of the Act to issue the notification dated November 9, 1966. It was contended on behalf of the petitioners that the notification was defective for the following reasons:—

- (1) the prohibition imposed by the notification instead of advancing the object of the Essential Commodities Act, defeated it;
- (2) the classification of sarees into coloured sarees and non-coloured sarees was not warranted by the provisions of Cl. 20 of the Order; and
- (3) that the omission to specify the period during which the notification would be in force was fatal.

10. It was argued that the prohibition of production of coloured sarees by the powerloom sector would only result in the reduction of supply of such sarees, and, therefore, would not be in the public interest. As a simple problem of arithmetic, probably what is argued on behalf of the petitioners would be true. We are not here dealing with a mathematical problem. We are concerned with the economic life of the community which is very complex. The handloom sector has been in existence from ages. It cannot be denied that it has an essential role to play in the economy of the country. The Committee was rightly of the opinion that if the powerloom sector which had the benefit of improved technology was allowed to manufacture coloured sarees, the magnitude of the competition would be such as to totally destroy the handloom industry. Looked from that angle, I do not think that the reservation of the production of coloured sarees to the handloom sector can be considered to be improper.

The very provisions of the Act on which reliance is placed show that it is necessary in certain cases to prohibit the production of certain essential commodity in order to maintain or increase the supplies of essential commodities. In order to explain the above proposition the following illustration may be given: Let us assume that the production of paddy in the country is not sufficient to meet the requirements of the country and that bulk of the wet lands in the country is diverted by the farmers for growing sugarcane. In order to maximise the production of paddy in the country, it is necessary for the Government to impose a ban on the cultivation of sugarcane. Similarly to see that a sector in an industry does not languish and ultimately go out of existence it may be necessary, as in this case, to prevent competition from other sectors to enable it to maintain optimum production level. This may have to be done to maintain supplies from that sector.

It is not for the court in cases of this type to examine the question whether there

was or whether there was not the need for prohibiting the manufacture of coloured sarees by the powerlooms. A decision on that question has to be taken by the Central Government or any other authority to whom the power has been delegated. When the Central Government or the authority empowered comes to the conclusion that there is a need to impose a prohibition on the production of certain commodity by a certain sector, there is hardly any ground for interference by the court in the exercise of its powers under Article 226 of the Constitution in the absence of any other material.

It is significant to note that powerloom establishments having five or more powerlooms are prohibited from 1950 from manufacturing coloured sarees. The report of the Committee shows that the imposition of such prohibition has not in any way interfered with the growth of powerloom industry in India. There is no reason to reject the report and any action taken on its basis cannot be treated as one taken on irrelevant or improper considerations. It is difficult to accept the argument urged on behalf of the petitioners that the imposition of the ban by the notification on small powerloom establishments would take the notification out of the purview of the provisions of the Essential Commodities Act and the Order.

11. Clause 20 of the Order authorises the Textile Commissioner to issue direction in writing to any manufacturer or class of manufacturers or the manufacturers generally regarding the classes or specification of cloth or yarn which they shall or shall not produce. It was argued that whereas saree can be considered as a specification of the cloth, coloured sarees would not come within the scope of the specification of cloth. The expression 'specification' means description or detail. It is clear from the report of the Committee that coloured sarees have a definite market in India and they belong to a specified classification. Hence, I do not find any substance in the contention that by reserving the production of coloured sarees for the handloom sector the Textile Commissioner had violated clause 20 of the Order.

12. It was next urged that the non-specification of time during which the notification would be in force was fatal. Clause 20 (1) of the Order does not say that the period during which the notification issued thereunder would be in force should always be specified in it. It only authorises the Textile Commissioner, if he wishes to do so, to mention the period during which the notification would be in force. If no such period is mentioned, the notification would be in force till it is rescinded or until it is superseded by any means known to law. The non-specification of the time during which the notification would be in force, does not, therefore, affect the validity of the impugned notification.

13. I shall now advert to the argument based on Article 14 of the Constitution.

It is well settled that a court while considering the validity of a classification of objects or things for special treatment should bear in mind two factors—

- (i) whether there is an intelligible differentiation between persons and things which are included in a class and persons and things which are excluded from the class; and
- (ii) whether there is a reasonable nexus between the object to be achieved by the classification and the classification itself.

That the powerloom sector and the handloom sector belong to two definite classes in textile industry cannot be denied. The first test is therefore satisfied. As already mentioned the object of the issue of the notification was to maximise the production of textiles by reserving certain categories of cloth to be manufactured by one or the other of the sectors and in order to subserve the above purpose the notification has been issued reserving manufacture of coloured sarees to the handloom sector. I do not think that the classification is in any way opposed to Article 14 of the Constitution.

14. There is no substance in the last contention urged by the petitioners that the notification is violative of Article 19 (1) (g) of the Constitution. The validity of the Essential Commodities Act is not in issue. Similarly, the validity of clause 20 of the Order is not questioned in these proceedings by the petitioners. The history of textile industry in India can be gathered from the report of the Committee. The particular types of advantages which the different sectors in the industry are enjoying, the marketability of the goods manufactured by them and the technological advancement made by each of the sectors, would show that the prohibition imposed by the notification is in the public interest. The notification, is, therefore, protected by clause (6) of Article 19 of the Constitution. Hence the above contention also fails.

15. No other contention is urged.

16. In the result, these petitions fail and they are dismissed.

17. No costs.

Petition dismissed.

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D. M. CHANDRASHEKHAR AND
E. S. VENKATARAMIAH, JJ.

The Secretary, Agricultural Produce Market Committee, Mangalore and another, Appellants v. M/s. K. Appayya Shanbhogue & Co. and others, Respondents.

Writ Appeals Nos. 153 to 156 of 1975,
D/- 15-4-1975.*

*(From orders of Jagannatha Shetty, J, reported in (1975) 2 Kant LJ 110.)

GS/HS/C407/75/JHS

(A) Karnataka Agricultural Produce Marketing (Regulation) Act (27 of 1966), Section 6 (2) (a) and (b) — Addition of new items of agricultural produce by S. 5 notification — Fresh notification declaring market and market yard is not necessary. (1975) 2 Kant LJ 110, Reversed.

There is nothing in Section 6 (2) (a) which expressly provides that when any items of agricultural produce hitherto not regulated, is by a notification under Section 5, added to the existing items of notified agricultural produce, the earlier notification issued by the Chief Marketing Officer declaring any specified area in the market area to be a market, will not apply to such new items of agricultural produce and that the Chief Marketing Officer should issue a fresh notification under Section 6 (2) (a) declaring the market in respect of such new items. Likewise, there is nothing in Section 6 (2) (b) which expressly provides that when such new items of agricultural produce are so added to the existing ones, the earlier notification issued by the Chief Marketing Officer declaring any specified place in the market to be the market yard, will not apply to such new items and that the Chief Marketing Officer should issue a fresh notification under Section 6 (2) (b) declaring the market yard in respect of such new items. As the expression 'notified agricultural produce' occurring in Section 6 (2) (b), has been defined in Section 2 (28) as to mean not only agricultural produce which the State Government has declared as such by a notification under Section 4 but also agricultural produce so declared by a notification under Section 5, there is no reason why a market once declared under Section 6 (2) (a) and the market yard once declared under Section 6 (2) (b) should not be applicable to new items of agricultural produce added from time to time to the existing items of notified agricultural produce, by means of notifications issued under Section 5. Hence, it is permissible for the Market Committee to regulate the marketing of such new items also in the existing market yard and to demand market fee from buyers of such new items in the existing market yard and to require payment of licence fee by traders who want to operate in the existing market in relation to such new items. (1975) 2 Kant LJ 110, Reversed; (1972) 1 Mys LJ 35, Distinguished and Doubted. (Para 20)

The further contention that the words 'specified in the notification' occurring after the words 'notified agricultural produce' in clause (b) of Section 6 (2), should be understood as having reference to the notification issued under Section 4 and hence whenever there is an addition to the items of agricultural produce notified under Section 4, there should be a fresh notification by the Chief Marketing Officer declaring the market yard in respect of such new items of agricultural produce, is not sound. Though the language of clause (b) of Section 6 (2) is not happy, the words "specified in the notification" in the

clause clearly refer to the notification under Section 6 (2) (a) and not to the notification under Section 4. (Paras 25, 26)

Cases Referred: Chronological Paras
(1972) 1 Mys LJ 35 21, 23

B. B. Mandappa, H. C. G. P., for Appellants In all writ Appeals; K. Srinivisan, for Respondents In all Writ Appeals.

CHANDRASHEKHAR, J.:— These four appeals are from the common order of Jagannatha Shetty, J., in Writ Petitions Nos. 748, 1078, 1168 and 1998 of 1974. The respondents therein, namely, the Secretary, Agricultural Produce Marketing Committee, Mangalore, and the Chief Marketing Officer, Karnataka State, are the appellants and the writ petitioners (hereinfter referred to as the petitioners) are the respondents in these appeals.

2. The petitioners are dealers in agricultural produce. In the writ petitions they had prayed for issue of writs in the nature of Mandamus directing the Agricultural Produce Marketing Committee, Mangalore (hereinafter referred to as the Market Committee) to refrain from demanding licence fee and market fee from them in respect of the agricultural produce specified in the Notification of the Government dated 8-6-1973. The learned single Judge allowed writ petitions and issued writs directing the Market Committee to forbear from demanding licence fee and market fee from petitioners in respect of the agricultural produce specified in the aforesaid Notification (dated 8-6-1973) until a fresh notification was issued under Section 6 (2) (b) of the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966, (hereinafter referred to as the Act).

3. In the district of South Kanara which was in Madras State before re-organisation of States, regulation of marketing of agricultural produce was governed by the Madras Commercial Crops Marketing Act, 1943 (hereinafter referred to as the Madras Act). Even after reorganisation of States, that Act continued to be in force in that District by virtue of Section 119 of the States Reorganisation Act, 1956. A uniform legislation regulating marketing of agricultural produce in the new State of Mysore (Karnataka) was brought about by the Act which came into force on 1-5-1968. Section 154 of the Act repealed the Madras Act and other corresponding enactments in force in different areas of the State, regulating marketing of agricultural produce. But, the proviso to that section has saved the rules and notifications issued under the repealed enactments until superseded by rules and notifications made or issued under the Act.

4. Section 4 of the Madras Act provided that the Government might, by notification, declare areas specified therein to be the 'notified area' for the purposes of that Act in respect of commercial crops specified in such notification.

5. By its notification dated 1-11-1949, the Government of Madras declared that the entire district of South Kanara shall be the notified area for the purposes of that Act in respect of cocoanut and its by-products and arecanuts. Under Section 154 of the Act, the aforesaid notification issued by the Government of Madras, is deemed to have been issued under the corresponding provisions, namely Section 4 of the Act.

6. Sub-section (19) of Section 2 of the Act defines 'market area' as any area declared to be a market area under Section 4.

7. Sub-section (18) of S. 2 of the Act defines 'market' as any notified area declared or deemed to be declared to be a market under sub-section (2) of S. 6.

8. Sub-section (23) of S. 2 of the Act defines 'market yard' as a specified place declared or deemed to be declared to be a market yard under sub-section (2) of S. 6.

9. Section 3 of the Act provides that the State Government may issue a notification declaring its intention of regulating marketing of specified agricultural produce in a specified area and that the Government shall consider any objections or suggestions in respect of that proposal, which may be received within the period specified in such notification.

10. Section 4 of the Act provides that after the expiry of the period specified in the notification issued under Section 3 and after considering such objections and suggestions as may be received in time, the State Government may, by another notification, declare the area specified in the notification issued under Section 3 or any portion thereof to be a market area and that the marketing of all or any of the agricultural produce specified in the notification issued under Section 3, shall be regulated under the Act in such market area.

11. Section 5 of the Act provides that the State Government may, after following procedure specified in Sections 3 and 4, at any time by notification, exclude from any market area or include therein an additional area, or may declare that the regulation of the marketing of any agricultural produce in any market area shall cease, or that the marketing of any agricultural produce (hitherto not regulated) shall be regulated in such market area.

12. Sub-section (1) (a) of S. 6 of the Act provides, inter alia, that for every market area there shall be a market and that for every market there shall be market yard.

13. Clause (a) of sub-section (2) of Section 6 of the Act provides that as soon as possible after the issue of a notification under Section 4, the Chief Marketing Officer shall, by a notification, declare any specified area in the market area to be a market.

14. Clause (b) of sub-section (2) of S. 6 reads:

"The Chief Marketing Officer shall by a notification under clause (a) also declare a

specified place in the market to be a market yard for the regulated marketing of the notified agricultural produce specified in the notification. He may also by the same notification or notifications declare (any other specified place or places) as the case may be, in the market to be a market sub-yard or sub-yards for the regulated marketing of the notified agricultural produce specified in the notification."

15. The Chief Marketing Officer, by his notification dated 17-12-1968, issued in exercise of powers conferred by sub-section (2) of S. 2 of the Act, declared—

- (i) the area within the Municipal limits of Mangalore City in the market area of the Agricultural Produce Market Committee, Mangalore, shall be the market for the said market area; and
- (ii) the locality within the boundaries specified in that notification shall be the market yard for the regulated marketing of the notified agricultural produce in respect of the said area.

16. In exercise of powers conferred by Section 5 of the Act, the State Government, by its notification dated 8-6-1973, declared that with effect from 1-7-1973 the marketing of paddy, rice, cashewnut, ginger, pepper, jaggery, chillis, bananas, sweet potatoes, mangoes and livestock, shall be regulated in addition to the agricultural produce already regulated in the market area of the district of South Kanara.

17. In the writ petitions, the petitioners contended that after the issue of the aforesaid notification dated 8-6-1973 by the State Government, the Chief Marketing Officer had not issued any notification declaring any specified area as market and any specified place as market yard in respect of the new items of agricultural produce specified in the aforesaid notification and that in the absence of such fresh declaration of the market and the market yard by the Chief Marketing Officer, no licence fee or market fee could be demanded from the petitioners in respect of the new items of agricultural produce specified in the aforesaid notification dated 8-6-1973. In other words, the contention of the petitioners was that after Government issues the notification dated 8-6-1973 under Section 5 of the Act adding new items of agricultural commodities for regulation of marketing in the market area, the earlier notification issued by the Chief Marketing Officer declaring the market and the market yard shall not apply to those new items of agricultural produce specified by the Government in its notification dated 8-6-1973 and that in respect of those new items the Chief Marketing Officer should issue a fresh notification declaring the market and the market yard.

18. The above contention of the petitioners found favour with the learned single Judge who held that there is no presumption that all items of agricultural produce notified from time to time would be marketed in the

same market yard, that there may be different market yards for different items of agricultural produce and that therefore, even if any additional notified item of agricultural produce is intended to be marketed in the already existing market yard, a fresh notification as required under Section 6 (2) (b) of the Act, is absolutely necessary.

19. The correctness of the above view of the learned single Judge, was contested by the learned Government Pleader who appeared for the appellants, while Mr. K. Srinivasan, learned Counsel for the respondents, argued in support of the view taken by the learned single Judge.

20. There is nothing in clause (a) of Section 6 (2) which expressly provides that when any items of agricultural produce hitherto not regulated, is by a notification under Section 5, added to the existing items of notified agricultural produce, the earlier notification issued by the Chief Marketing Officer declaring any specified area in the market area to be a market, will not apply to such new items of agricultural produce and that the Chief Marketing Officer should issue a fresh notification under Section 6 (2) (a) declaring the market in respect of such new items of agricultural produce. Likewise, there is nothing in Section 6 (2) (b) of the Act which expressly provides that when such new items of agricultural produce are so added to the existing ones, the earlier notification issued by the Chief Marketing Officer declaring any specified place in the market to be the market yard, will not apply to such new items of agricultural produce and that the Chief Marketing Officer should issue a fresh notification under Section 6 (2) (b) declaring the market yard in respect of such new items of agricultural produce. As the expression 'notified agricultural produce' occurring in clause (b) of Section 6 (2), has been defined in Section 2 (28) of the Act as to mean not only agricultural produce which the State Government has declared as such by a notification under Section 4 but also agricultural produce so declared by a notification under Section 5, there is no reason why a market once declared under Section 6 (2) (a) and the market yard once declared under Section 6 (2) (b) should not be applicable to new items of agricultural produce added from time to time to the existing items of notified agricultural produce, by means of notifications issued under Section 5 of the Act. Hence, it is permissible for the Market Committee to regulate the marketing of such new items of agricultural produce also in the existing market yard and to demand market fee from buyers of such new items of agricultural produce in the existing market yard and to require payment of licence fee by traders, commission agents and brokers who want to operate in the existing market in relation to such new items of agricultural produce.

21. However, Mr. Srinivasan strongly relied on certain observations of a Division

Bench of this Court in Venkateswara Traders v. The Administrator, Agricultural Produce Market Committee, Chickballapur, (1972 (1) Mys LJ 35). There, the question that arose for decision was whether it is necessary for the Chief Marketing Officer to issue a fresh notification specifying any area in the market area to be a market and any place in the market to be a market yard, whenever there is an alteration of a market area made under Section 5 of the Act. Dealing with that question, their Lordships observed that (at page 37):

"When the alteration of a market area made under Section 5 is deemed to be a declaration made under Section 4 of the Act, it follows that it is obligatory on the Chief Marketing Officer to specify any area in the market area to be a market and further to specify any place in the market to be a market yard. The market and market yard notified for the original market area and before the alteration declared under Section 5, cannot be regarded as the market or the market yard for the new market area declared under Section 5."

22. On the basis of the above observations, Mr. Srinivasan argued that since alteration of the market area and addition or deletion of items of agricultural produce have both to be made by a notification under Section 5 of the Act, the reasoning of the Division Bench in Venkateshwara Traders' case, while dealing with alteration of the market area, is equally applicable to addition of new items of agricultural produce for regulation of marketing, made under Section 5 of the Act.

23. With great respect to their Lordships who decided Venkateshwara Traders' case, we doubt the correctness of the view expressed by them that an alteration of the market area brought about by issuing a notification under Section 5 of the Act, would necessitate the issue of a fresh notification by the Chief Marketing Officer under Section 6 (2) of the Act specifying the market and the market yard. In the present cases as we are dealing with the effect of addition of new items of agricultural produce, we do not consider it necessary to refer to a Full Bench the question whether the decision in Venkateshwara Traders' case, lays down the law correctly.

24. Moreover, the definition of the expression 'notified agricultural produce' is wide enough to include not only items of agricultural produce which were originally notified under Section 4 of the Act (or the corresponding provision in any of the repealed enactments), but also items of agricultural produce which may be subsequently added by a notification or notifications under Section 5 of the Act. Hence, there appears to be some difference between the effect of an alteration of the market area by issue of a notification under Section 5 of the Act and the effect of addition of new items of agricultural produce (the marketing of which is to be regulated in the market area) by issue of a notification or notifications under Sec-

tion 5 of the Act. On this ground the decision in Venkateshwara Traders' case is also distinguishable.

25. Mr. Srinivasan next contended that the words 'specified in the notification' occurring after the words 'notified agricultural produce' in clause (b) of Section 6 (2) of the Act, should be understood as having reference to the notification issued under Section 4 of the Act and that hence whenever there is an addition to the items of agricultural produce notified under Section 4 of the Act, there should be a fresh notification by the Chief Marketing Officer declaring the market yard in respect of such new items of agricultural produce.

26. We are unable to accept the contention of Mr. Srinivasan that the words "specified in the notification" occurring in clause (b) of Section 6 (2) of the Act, have reference to a notification under Section 4 of the Act. Though the language of Cl. (b) of Section 6 (2) is not happy, the words "specified in the notification" in the clause, have, in our opinion, reference to the notification under Section 6 (2) (a) and not to the notification under Section 4 of the Act.

27. Lastly, it was contended by Mr. Srinivasan that in the market and the market yard specified by the Chief Marketing Officer by his notification dated 16-12-1968 regulation of marketing can be done in regard to only those items of agricultural produce which had been notified under Section 4 of the Act prior to 16-12-1968 and not those items of agricultural produce which were subsequently added by the Government by its notification dated 8-6-1973 issued under Section 5 of the Act.

28. As stated earlier, the expression 'notified agricultural produce' has been defined in Section 2 (28) of the Act as any agricultural produce which the State Government has, by notification issued under Sections 4 and 5, declared as an agricultural produce, the marketing of which shall be regulated in the market area. The area declared as market and the place declared as market-yard under Section 6 (2) of the Act; can be market and the market yard for regulated marketing of any new items of agricultural produce declared as such, whether the notification under Section 5 of the Act so declaring those items, has been issued prior to, or subsequent to, the declaration of the market and the market yard under Section 6 (2) of the Act. There is nothing in Section 6 (2) (b) which restricts the scope of regulated marketing in the market yard, to only those items of agricultural produce which had been declared as such under Section 5 prior to the declaration of a specified place as the market yard.

29. We are unable to agree with the view of the learned single Judge that after the issue of the notification dated 8-6-1973 under Section 5 of the Act adding new items of agricultural produce as notified agricultural produce, there should be a fresh noti-

fication under Section 6 (2) of the Act declaring the market and the market yard in respect of those new items of agricultural produce for the purpose of regulation of marketing of those new items.

30. In the result, we allow these appeals, reverse the common order of the learned single Judge, dated 22-1-1975, in Writ Petitions Nos. 748, 1078, 1168 and 1998 of 1974 and dismiss those writ petitions.

31. Mr. Srinivasan requested that the respondents (writ petitioners) be granted 3 months' time to pay the arrears of market fee and license fee upto-date. We grant to the respondents (writ petitioners) three months' time from to-day to pay such arrears of market fee and license fee.

32. In the circumstances of the cases, parties shall bear their own costs both in these appeals and in the writ petitions.

33. Let copies of this Judgment be sent forthwith to appellant-1 (the Secretary, Agricultural Produce Market Committee, Managalore) and to the learned Government Advocate.

Appeals allowed.

AIR 1975 KARNATAKA 224

K. JAGANNATHA SHETTY, J.

Suneel Keerthi, Petitioner v. The Union of India and others, Respondents.

Writ Petn. No. 6129 of 1974, D/- 19-3-1975.

(A) Contempt of Courts Act (1971), Section 15 (1) (b) — Not ultra vires Art. 14 of the Constitution. (Constitution of India, Art. 14).

The imposition of the condition about the consent of the Advocate General cannot by itself invalidate the section, nor can it be said that the power conferred therein is arbitrary. The Advocate General is expected to exercise his discretion reasonably and in accordance with the policy indicated by the Act, while considering the request for consent to move High Court to initiate action for contempt. The bare possibility that the discretionary power may be abused is no ground for invalidating the section. (Para 4)

(B) Contempt of Courts Act (1971), Sections 18, 19 (1) — Rules to regulate contempt proceedings in the High Court of Karnataka, R. 7 — Criminal contempt — Procedure prescribed is not ultra vires Ss. 18 and 19 (1).

Rule 7 provides preliminary procedure for initiating contempt proceedings. It enables High Court to scrutinise the allegations in the motion or reference to find out whether or not there is any need to initiate contempt proceeding. If the Court decides that there is no need to take steps, it refuses to assume or exercise jurisdiction to punish for

contempt. Such a decision would not fall under Section 19 of the Act, and the petitioner has no right of appeal against that decision. Rule 7 cannot therefore be said to be invalid or contrary to Section 18 or 19 of the Act. (Para 6)

Cases Referred : Chronological Paras
AIR 1974 SC 2255 = 1975 Cri LJ 1 5, 6

Mohandas K. Hegde, for Petitioner; K. S. Puttaswamy, 1st Addl. Govt. Advocate, for Respondents Nos. 1 to 4 and 6.

ORDER :— In this petition, under Article 226 of the Constitution, the validity of Section 15 (1) (b) of the Contempt of Courts Act, 1971 (which is hereinafter called 'the Act'), and of Rule 7 of the 'Rules to regulate contempt proceedings in the High Court of Karnataka' is called into question.

2. The petitioner is a land holder at Moodabidabidri, South Kanara District. He has some pending litigation before the Court of Munsif, Karkala, as against Respondent 7, in respect of the tenancy claimed by the latter. According to him, respondents 4 to 7 have committed contempt of the said Court. Respondent 4 is the Hon'ble Minister for Revenue, respondent 5 is a Member of the legislative Assembly and respondent 6 is the Hon'ble Minister for State for Small Scale Industries. The petitioner wants to prosecute them for contempt. For that purpose, he approached the Advocate General with an application under S. 15 (1) (b) of the Act seeking his consent to move his court for taking action against the said respondents.

3. Section 15 (1) (b) provides—

"15. Cognizance of criminal contempt in other cases.—

(1) In the case of a criminal contempt, other than a contempt referred to in Section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by—

(a) The Advocate General; or

(b) any other person, with the consent in writing of the Advocate-General."

The petitioner states that the condition imposed by Section 15 (1) (b) is unreasonable without any guidances provided to the Advocate General as to how he should exercise his discretion, and therefore, it, offends Article 14 of the Constitution. He further states that the Advocate General holds office during the pleasure of the Governor and in turn has to obey the instructions of the Government, and in the very nature of his position, it would be impossible for him to give consent to initiate contempt proceedings against the Hon'ble Ministers of the Government.

4. I do not find much substance in the contention. The imposition of the said condition cannot by itself invalidate the section, nor can it be said that the power conferred therein is arbitrary. The Advocate General is expected to exercise his discretion reasonably and in accordance with the policy indicated by the Act, while considering a request for consent to move this Court to initiate

value of the building and that it is highly essential for the convenience of their trade. These contentions unmistakably show that the defendants intended that the room should be a permanent one which should last at least until they removed it at the time of vacating the premises. These pleas coupled with the nature of the construction leave no room for doubt that the structure is a permanent one and that it is contrary to the provisions of Section 108 (p).

4. Counsel for the appellants strongly contended that even if the structure which they had constructed is a permanent one there was no ground to issue a mandatory injunction. Indeed counsel went so far as to contend that the court has no jurisdiction to direct removal of the room during the currency of the lease. Section 108 (p), as also the other clauses of the section stand imported into the tenancy in the absence of a contract or local usage to the contrary, and the appellant's case that they had the plaintiff's permission to put up the structure having been rejected, it follows that they had committed a breach of the provisions of clause (p) by constructing this permanent structure. The appellants' contention poses the question whether the plaintiff-landlord has a present remedy to ask for its removal or whether he should be compelled to wait till he evicts the appellants. In *Chhedji Manjhi v. Mahipal Bahadur Singh*, AIR 1951 Pat 600, the tenant constructed certain pucca brick structures and the landlord sued among other things, for their removal. A Bench of the Patna High Court referred and after citing a decision of the Madras High Court in *Ismaj Kani Rowthan v. Nazarali Sahib*, (1904) ILR 27 Mad 211, that the rules laid down by the Transfer of Property Act substantially reproduce the law as it stood before, and the lessor has an option either to take the building or to pay compensation for it, or if he is unwilling to pay the compensation to allow the tenant to remove the building, held:

"And there is no reason why, during the continuance of the lease, if the landlord objects to the erection of permanent structures, those permanent structures should not be removed. If there is no waiver or acquiescence and if the equitable doctrine of estoppel by acquiescence cannot be invoked, then Cl. (p) of S. 108 must operate and the lessee cannot be allowed to construct permanent structures except for agricultural purposes."

In this view the learned Judges upheld the mandatory injunction granted by the Courts below directing removal of the structures. In *Doraikannu Ammal v. Ramaswami Mudaliar*, AIR 1940 Mad 32, the lessee of a land given for laying out a flower garden, erected cattle shed and

this assignee erected in its place dwelling houses and other masonry structures. Leach, C. J. and Kunhiraman, J. held that the lessor was entitled to an injunction requiring the demolition of the house as well as the other buildings. Counsel for the appellants however sought to distinguish this decision, contending that the structures with which it was concerned were calculated to injure the leasehold permanently. This is not correct for the learned Judges refer not only to clause (o) but also to clause (p) of Section 108. In *Kehari Singh v. Holasi*, AIR 1914 All 285, a tenant who was holding Abadi land under a Zamindar had built a compound wall and two rooms in the property. There was no custom in the village under which tenant could erect new buildings without the permission of the Zamindar. The Zamindar sued for eviction of the tenant on the ground of these unauthorised constructions and for an injunction for their removal. The Court held that the construction although unauthorised provided no ground for eviction but being unauthorised the Zamindar could ask for their demolition. There is no reference in this decision to Section 108 (p) but that is immaterial for the learned Judge found that the pacca constructions made by the tenant were not sanctioned by the village custom governing the lease. That being so, the same principle must apply to a construction which is in breach of the provisions of Section 108 (p). These three decisions establish that a landlord is entitled even during the subsistence of the lease, to ask for the removal of permanent structures erected by the tenant, contrary to Section 108 (p) or the custom governing the lease.

5. As against the above decisions counsel for the appellants relied upon *Punnam Satyanarayana v. Vegosina Narayana Raju*, (1964) 1 Andh WR 337. A tenant constructed, among other things, two brick walls in the leasehold and the landlord brought a suit asking for their removal. A learned Judge of the Andhra Pradesh High Court refused the injunction holding that "As the defendant has been found to be a lessee of the plaintiff, I do not think the mandatory injunction for demolition of the walls should be issued. It is not shown that the erection of these walls constituted an act of waste; nor is it shown that it will not be possible for the defendant when his lease terminates or when he is evicted, to restore the property to the plaintiff in the same condition in which it was taken by him on lease from the plaintiff. The decision does not consider whether the act of the tenant was in violation of any covenant of the lease or whether the structure was a permanent one and it also makes no reference to Section 108 (p) or to any of the

earlier decisions bearing on the question. If the decision can be constructed as covering the point in the present case I do not find it possible, with great respect, to agree that for breach of the term of a lease prohibiting the construction of a permanent structure either in itself or by virtue of clause (p) of Section 108, a mandatory injunction should not issue or that it could issue only where the tenant is unable to restore the property to the landlord in the same condition in which it was taken by him at the time of the lease. In my view, there is no reason why the landlord's right under S. 108 (p) should be abridged in this manner or the tenant should be licensed to commit breach of the covenant. The tenant's duty in this respect, is correlated to the landlord's right and the breach of that duty clearly gives the landlord an enforceable right. I find no principle to suspend that right till the time he evicts the tenant. With great respect I prefer the decisions cited earlier which have held that the landlord is entitled to an injunction.

6. Counsel for the appellants also referred to paragraphs 1240 and 1241, Volume 23, 3rd Edition of Halsbury's Laws of England. Those paragraphs deal with cases of waste and not case like the present. Indeed *Perivanan Chetty v. Govinda Rao*, AIR 1932 Mad 328 at p. 336, shows that under the English Law a tenant may lawfully erect buildings which improve the value of the land. Even so, it is worth reading the following passage from paragraph 1284 of the same Volume of Halsbury:

"A breach of an express covenant against making alterations or erecting new buildings will be enforced by injunction." This extract supports the view that the Court is not powerless to issue an order of injunction in the present case.

7. The provisions of Section 108 (p) imports a negative covenant and the law is well settled that "In the case of a negative covenant or stipulation the Court will in general enforce compliance by injunction without regard to the question of convenience or the amount of damage caused." (Halsbury's Laws of England, Volume 21, 3rd Edition, paragraph 744). The following passage from the speech of Lord Cairns L. C. in *Doherty v. Allman*, (1878) 3 AC 709, is worth reading:

"If parties, for valuable consideration with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of

the process of the Court to that which already is the contract between the parties."

Counsel for the appellants made a final submission that a decree for damages might be substituted for the injunction and that it will serve the justice of the case. There is no plea in the written statement nor even a ground in the memorandum of appeal in this regard, much less any evidence as to what would constitute adequate damages. Apart from the question whether damages would meet the requirements of the case, this belated plea must fail on this short ground.

8. I confirm the judgment and decree of the Court below and dismiss the appeal with costs.

Appeal dismissed.

AIR 1975 KERALA 178

V. P. GOPALAN NAMBIYAR, J.

M/s. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd., Petitioner v. The Union of India and another, Respondents.

O. P. No. 1947 of 1972, D/- 28-1-1975.

(A) Emergency Risks (Factories) Insurance Act (1962), Section 1 (3) — Expiry of Act — Proceeding for investigation in respect of premiums evaded or payable etc. can be initiated even after expiry of Act — (Emergency Risks (Goods) Insurance Act (1962), S. 1 (3)) — (General Clauses Act (1897), S. 6).

Section 1 (3) of both the Acts viz. Emergency Risks (Factories) Insurance Act, 1962 and Emergency Risks (Goods) Insurance Act, 1962 provides that expiry of the Acts shall not affect anything done or omitted to be done before such expiry and that Section 6 of the General Clauses Act will apply. The result is that action taken before the expiry can be continued and even fresh action can be initiated under the Act in respect of contraventions etc. made while it was in force. The contention that since payment of premium is the consideration which must precede the contract, ascertainment of premium subsequently, in respect of an antecedent period expired, is purposeless and futile as the contract of insurance could not come into being at all does not help the petitioner because assuming that in the light of investigation into the premiums evaded or payable a contract of insurance cannot come into being, the Court will not be justified in staying the hands of the authorities from investigating into what the Acts authorised them to investigate. Moreover even assuming that premium is consideration for the insurance, there is

no reason why the same cannot be subsequently ascertained where the premium was only promised and not paid. AIR 1973 Ker 2 and AIR 1971 Andh Pra 145. Followed. (Paras 6, 8, 9, 10)

Cases Referred: Chronological Paras

AIR 1973 Ker 2 = 1972 Ker LR 482	7, 9
AIR 1972 Pat 314 = 42 Com Cas 371	7
AIR 1971 Andh Pra 145 = 1971 Lab IC 651	7
AIR 1971 Mad 442 = 84 Mad LW 389	7
AIR 1970 SC 494 = 1970 Cri LJ 588	6, 8
(1970) Writ Petns. Nos. 2262, 2296, 2297, 2298 and 3075 of 1970 = 1971 All LJ 231	7
AIR 1962 SC 945 = 1962 Supp (2) SCR 380	6
AIR 1959 SC 609 = 1959 Cri LJ 782	6
AIR 1947 FC 38 = 48 Cri LJ 886	6, 8
(1947) 1 All ER 205 = 1947 AC 362	6
(1946) 2 All ER 529	6

K. P. Kesava Menon and K. P. G. Menon, for Petitioner; R. Ratna Singh and Central Govt. Pleader, for Respondents.

ORDER:— Messrs. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd. (Pulp Division), Mavoor, the petitioner in this writ petition, seeks to quash certain proceedings taken by the respondent under the provisions of the Central Emergency Risks (Factories/Goods) Insurance Acts, 1962 (Acts 62 and 63 of 1962); to declare Exts. P-1 and P-2 communications of the 2nd respondent addressed to the petitioner invalid; and to prohibit the respondents from proceeding with further investigations in pursuance of the Central Acts.

2. As is seen noticed in the judicial decisions which have considered the position, the two Acts referred to earlier, were intended to ensure the smooth flow and even course of commercial and industrial activities during Proclamation of Emergency, made by the President of India on 26-10-1962 consequent on the Chinese invasion of this country in October, 1962. The Acts were modelled on the lines of the War Risks Insurance Act which was in force in Great Britain during the time of the Second World War, and the provisions of which were extended to India during that period. It was realised after the Chinese aggression that due provision should be made for replenishment of raw material needed for the factories and other industrial concerns and for recoupment of loss and damage to goods by enemy action. This was necessary to keep up the even tempo of commercial and economic activities. The magnitude of the task and the large amount involved in providing the necessary indemnity against loss, required that the Union Government itself should come forward as the insurer for the loss and

damage sustained. The Acts brought into being certain compulsory insurance schemes under which compensation was payable in respect of the loss. The schemes were statutory schemes which had to be laid before Parliament. They provided for the mode of valuation of the goods and assets, the payments of premium, application for insurance policy, terms and conditions of such policy, settlement of claim on the policy, and the like. The Union Government was to undertake 80% of the liability for the sum insured, and the remaining 20% was to be borne by the owner, presumably to inspire a feeling in him that he still remained the owner of the goods. Except for certain differences in regard to the numbering, sequence and arrangement of some of the Sections, the provisions in the two Acts are practically identical. It would therefore be enough to notice the provisions of one of the Acts. Section 1 (3) of the Emergency Risks Goods Insurance Act reads as follows:

"1 (3) It shall remain in force during the period of operation of the Proclamation of Emergency issued on the 26th October, 1962 and for such further period as the Central Government may, by notification in the Official Gazette, declare to be the period of emergency for the purposes of this Act, but its expiry shall not affect anything done or omitted to be done before such expiry and Section 6 of the General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had been repealed by a Central Act."

Identical is the language of Section 1 (3) the Emergency Risks (Factories) Insurance Act also hereinafter referred to as the Factories Insurance Act, for short. Section 2 is the definition section. It is unnecessary to notice any of the definitions for the purpose of this writ petition. Section 3 occurs in Chapter II which provides for insurable goods and insurance scheme. The provision regarding insurance scheme is contained in Section 3 (1) of both the Acts. The Scheme itself is defined under Section 2 (k). Clause 7 of Section 3 of the Factories Insurance Act contained a provision for laying the scheme before the Houses of Parliament. Section 5 (4) of the said Act reads as follows:

"5 (4). Whoever, contravenes the provisions of sub-section (1) or the proviso thereto, or, having taken out a policy of insurance as required by that sub-section, fails to pay any instalment of premium thereon which is subsequently due, shall be punishable with fine which may extend to two thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first on which the contravention or failure continues, and such punishment shall be

without prejudice to any other penalty or liability incurred in consequence of such contravention or failure."

Section 8 of the Act empowers any person authorised by the Central Government to ascertain whether or not the owner or occupier of any property required to be insured under the Act has taken out a policy of insurance as required by the Act, in respect of such property, and also to investigate the insurable value of any such property or to estimate damages suffered by any property insured under the Act. For carrying out these duties, the person authorised is empowered to require the owner or the occupier of the property to submit account books or other documents or furnish such information as he may reasonably think necessary. He is also empowered at any reasonable time to enter any premises comprising the property, inspect the premises and call upon the person found on such premises to produce before him and allow him to examine, such account books or other documents thought to be necessary or to furnish other relevant information. By Section 11 of the Act, where a person has evaded payment by way of premium or any money payable by him under the Act the Central Government is given power without prejudice to the provisions of sub-section (4) of Section 5 to determine the amount which has been so evaded and the amount so determined shall be payable by such person and shall be recoverable as provided in sub-section (2). Sub-section (2) provides for the amount being recovered as an arrear of land revenue.

3. Turning now to the provisions of the Statutory Scheme, paragraph 13 of the same provides for determination of the amount of the evaded premium in accordance with the third schedule. Sub-clause (2) of the said paragraph provides for an appeal to the Central Government against the decision. It is unnecessary to notice in detail the other provisions of the Act or of the Scheme.

4. By Ext. P-1 notice dated 26-7-1971, the 2nd respondent viz, the Enforcement Officer gave notice to the petitioner that it was necessary to check up the premium paid, in respect of certain periods for the years 1963, 1965, 1966 etc, and demanding production of certain specified records. By another communication Ext. P-2 dated 28-2-1972 (in between there was correspondence between the petitioner and the Officer) the petitioner was again called upon to furnish copies of certain calculation statements for failure to pay in respect of certain quarters, and to furnish other information and details called for in the communication. The petitioner replied by

Ext. P-3 dated 11th March 1972 in which he stated that as the Central Acts 62 and 63 of 1962 had terminated by the lifting of the emergency and had ceased to have force on and from 10-1-1968 when the notification of emergency was revoked by the President, no step or action under these Acts could be initiated against the petitioner, and the 2nd respondent has no statutory authority or jurisdiction to do so. It was thereafter that the petitioner approached this Court and filed this writ petition for the reliefs already detailed.

5. It appears to me that this writ petition is premature; and that the petitioner has approached this Court when the matter is in an exploratory stage and the Officer was merely gathering the materials for the purpose of satisfying himself as to whether the petitioner had complied with the provisions of the Act or not. But the petitioner's Counsel contended that he apprehended drastic and penal action; and unless he approached this Court at the earliest stage, he might well find that he had 'missed the bus.' Rather than preclude the petitioner on the ground that the writ petition is premature, I would discuss and deal with the contention on the merits.

6. The contention strongly pressed was that the Acts in question were, by reason of Section 1 (3), to remain in force only during the operation of the Proclamation of Emergency issued on 26th October, 1962; that the Proclamation having been revoked and the emergency having been lifted on 10-1-1968, the Acts lapsed; and that being temporary enactments, with the death of these Acts, no action could be taken under their provisions. Section 1 (3) of both the Acts provides that the expiry of the Acts shall not affect anything done or omitted to be done before such expiry and that Section 6 of the General Clauses Act was to apply on the expiry of the Acts as if they had been repealed by a Central Act. The scope of the expression "anything done or omitted to be done" had come up for the judicial consideration by the Courts in England and India. The relevant decisions are noticed in detail in the Indian decisions to which reference will be made presently. I do not propose to cover the ground all over again. In *R. v. Wicks*, (1946-2 All ER 529) 'things previously done or omitted to be done' were held wide enough to make the provisions of the statute operate in respect of any act done before its expiration, and therefore expiration did not affect the liability to punishment under the Statute or prosecution of legal proceedings for inflicting that punishment. In *Wicks v. Director of Public Prosecutions*, (1947-1 All ER 205), the House of Lords, affirming the deci-

sion of the Court of criminal appeal (1946-2 All ER 529), and speaking through Viscount Simon, Lord Chancellor, observed (in relation to Section 11 (3) of the Emergency Powers Act. Similarly worded, as Section 1 (3) of the Act here involved), that "Parliament did not intend sub-section (3) to expire with the rest of the Act and that its presence in the Statute preserves the right to prosecute after the date of expiry." The Federal Court of our country considered the meaning of this expression "acts done or omitted to be done." in *J. K. Gas Plant Manufacturing Company Ltd. v. Emperor*, (AIR 1947 FC 38 at pp. 46 and 47) and accepted the principle of the above decision of the House of Lords. The Supreme Court had occasion to consider and to interpret these expressions in *Gopichand v. Delhi Administration*, (AIR 1959 SC 609 at p. 615); and again in the State of Orissa v. *Bhupendra Kumar*, (AIR 1962 SC 945 at p. 953). The matter was again considered in *M/s. Rayala Corporation v. Director of Enforcement, New Delhi*, (AIR 1970 SC 494). In the last of these cases it was observed by the Supreme Court that the thing done or omitted to be done can comprise only action already taken while the statutory provision was in force, but cannot justify the initiation of fresh proceeding which will not be covered by the said expression.

7. After noticing the above decisions (or some of them) a Division Bench of the Madras High Court in *M/s. Stone-ware Pipes (Madras) Ltd. v. Union of India*, (AIR 1971 Mad 442) took the view that the liability to pay premium evaded, arises only on its determination, and a demand being made on the defaulter. Where therefore, proceedings for determination of premium and its recovery were taken under Section 11 of the Act after its expiry, it was held that the said proceedings cannot be saved under S. 1 (3), as the proceedings are not in respect of a liability incurred or a right accrued prior to the repeal contemplated by Section 6 of the General Clauses Act. It was also held that the phraseology that "nothing shall affect anything done or omitted to be done" would not save the proceeding as the same would be apposite only to things completed either by an act or by an omission before the expiry of the Act. This ruling of the Madras High Court is in the petitioner's favour. But the same was dissented from by a Division Bench ruling of this Court in *M/s. Marikar Motors Ltd. v. Chief Enforcement Officer, Emergency Risks Insurance Scheme, Madras*, (AIR 1973 Ker 2). This Court expressed disagreement with the Madras view. This Court noticed the decision of a Division Bench of the Patna High Court in Eastern Bihar Divisional Chamber of

Commerce's case (AIR 1972 Pat 314), of the Andhra High Court in *Union of India v. Thammana Sitaramanjaneyulu*, (AIR 1971 Andh Pra 145), and of the Allahabad High Court in *Writ Petns. Nos. 2262, 2296, 2297, 2298 and 3075 of 1970* (said to be not yet reported)* all of which had taken a view contrary to the one expressed in the Madras case. This Court observed at page 7:

"We are in respectful disagreement with the learned Chief Justice. The reasons stated by him do not persuade us to accept his line of thinking. The opposite view reflected in the judgments of the High Courts of Patna, Allahabad and Andhra Pradesh, referred to above, according to us reflects the correct view and we hold that the liability under the temporary Act would continue to subsist upon its expiry and proceedings could be commenced to give effect to that liability. The action taken against the petitioner is valid also from the standpoint of Art. 358 of the Constitution, which provides that:—

"While a proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take, any executive action which the State would but for the provisions contained in that part be competent to make or to take, but any law so made, shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Therefore, the Enforcement Officer is justified in starting proceedings for realisation of the evaded premium and the compounding fee, which the petitioner is bound to pay. The complaint of the petitioner that the action initiated is violative of Article 19 (1) (f) of the Constitution has also no force in the above circumstances."

I am bound by the above Division Bench Ruling. In the light of the same, I hold that there is no merit in the petitioner's contention.

8. The view accepted by the Division Bench of the Kerala High Court, which is the same that was taken by the Andhra, Allahabad and Patna Courts is briefly this. If Section 6 of the General Clauses Act is made applicable to the temporary Act, action taken before the expiry of the Act, can not only be continued, but even fresh action can be initiated under the Act in respect of contraventions made while it was in force. This was based, in particular, on a passage in the Supreme Court decision in AIR 1970 SC 494, distinguishing AIR 1947 FC 38. The passage reads as follows:

*(Since reported in 1971 All LJ 231).

".....in that case the prosecution had been started before the Defence of India Act ceased to be in force, and, secondly the language introduced in the amended sub-section (4) of Section 1 of the Act had the effect of making applicable the principles laid down in Section 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force."

Section 1 (3) of the Acts 62 and 63 of 1932 expressly attracts Section 6 of the General Clauses Act. There is also Article 358 of the Constitution, which provides that on revocation of the proclamation of emergency, any law made during the time it was in operation, shall cease to have effect, except as regards things done or omitted to be done before the law ceases to have effect.

9. The petitioner's Counsel contended that one important aspect has been completely lost sight of by the Division Bench ruling of our Court in M/s. Marikar Motors Ltd's case, (AIR 1973 Ker 2). The ascertainment of the premium payable or the premium evaded, it was said, can only be for the purpose of enforcing payment of the same and effecting an insurance of the goods or factories as contemplated by the Acts. While in a contract of insurance, payment of premium is the consideration which must precede the contract, ascertainment of premium subsequently, in respect of an antecedent period expired, cannot, it was said, fructify in a contract of insurance; for, to do so, would be to reverse the order of things in a contract of insurance, as known to law. If a contract of insurance cannot be constituted, ascertainment of premium, besides being purposeless and futile, would also become impossible in law. So ran the argument. I find it difficult to appreciate this argument. Assuming, without deciding, that in the light of the investigation into the premium evaded or payable a contract of insurance cannot come into being, this Court would not be justified in staying the hands of the 2nd respondent from investigating into what the Acts permit him to investigate under the provisions of Section 8 (1), referred to earlier as a sample. Whether, after such investigation, he is entitled to bring into being a contract of insurance or not, is a point that does not strictly arise at this stage.

10. That apart, I may point out that a similar argument — practically the same argument — was dealt with and considered by the Andhra High Court in the ruling noticed earlier (See paragraphs 58 to 66). In substance the decision of the Andhra High Court held that

insurance may be either contractual or statutory, and nothing prevented a statutory insurance resulting in respect of an antecedent period on determination of premium payable or evaded, ascertained subsequently. It was also observed that such a contract of insurance would not fall outside the legislative Entry 47 of List I of the Seventh Schedule of the Constitution. The argument as to legislative competence was not advanced before me; and as to the argument that a contract of insurance cannot fructify and therefore ascertainment of premium is futile and illegal, the same does not appeal to me. Even assuming that premium is consideration for the insurance, I do not see why the same cannot be subsequently ascertained where the premium was only promised but not paid. The reasoning of the Andhra Pradesh High Court about statutory insurance also appears attractive.

11. Counsel for the petitioner and for the respondents have drawn my attention of the new Acts of 1971 (Acts 50 and 51 of 1971 which have replaced the 1962 Acts). I am not referring to these Acts as they have no application to the facts here.

12. I see no reason to interfere. I dismiss this writ petition, but in the circumstances, without costs.

Petition dismissed.

AIR 1975 KERALA 182

G. BALAGANGADHARAN NAIR, J.

Kavunmy Chakkia, Appellant v. Govinda Gurukkal and another, Respondents.

Second Appeal No. 988 of 1971. D/- 28-6-1974.*

(A) Limitation Act (1963), Arts. 64 and 65 — Defendant claiming to be in continuous possession as a lessee — Lease not proved — Adequate continuous possession by itself would be incapable of founding a prescriptive title or even a prescriptive tenancy right.

If a party in actual possession of the property admits that he holds a limited interest in it (e.g. as a lessee) he cannot plead prescriptive title in regard to general ownership, but he may successfully plead his adverse possession to the extent of the interest claimed by him. In this case where the defendant who claimed that he was in possession as a lessee from 1950 and the suit was brought in 1963, that there was adequate continuity.

*(Against order of Addl. Dist. J., Trichur. in A. S. No. 183 of 1968).

HR/JR/D406/74/RSK

But in view of the finding that the lease set up by the defendant was not proved, the continuous possession was not capable of founding a prescriptive tenancy right, for it is not enough if the person in possession claims a tenancy, there must be evidence to show the essential terms of the lease under which he purports to claim. (Paras 6, 7, 8)

(B) Limitation Act (1963), Section 14 — Words 'or other cause of a like nature' — Even liberal interpretation would not permit acceptance of contention that an incompetent plaintiff's suit can be invoked by another plaintiff to claim exclusion of time. (Para 9)

Cases Referred: Chronological Paras
AIR 1971 SC 2313 = (1970) 2 SCWR 743
9

C. S. Ananthakrishna Iyer, P. S. Krishna Iyer and M. Balakrishnan, for Appellant; T. M. Mahalinga Iyer and M. K. Narayana Menon, for Respondents.

JUDGMENT:— The appeal by the additional plaintiff, now represented by his legal representatives, arises out of a suit for recovery of 63 cents of land with a building thereon, on the strength of title. The suit was allowed by the trial Court but was dismissed on the appeal taken by the first respondent-first defendant.

2. The property in dispute admittedly belongs to the plaintiffs' tarwad. In 1113, there was a Karar (Ext. P-1) in the tarwad under which the then Karnavan Kunjunni Chakkir, relinquished his management in favour of Parameswara Chakkir, the original plaintiff (hereinafter called merely as the plaintiff). There were some disputes and litigations in the tarwad and these were referred to arbitration, which led to an award Ext. P-4, providing for a maintenance arrangement. The plaintiff's case in brief is as follows: In 1113 he leased the building to one Marath Achutha Menon. The first defendant (called for brief the defendant) began residing in the building under Achutha Menon and ran a 'Kalari'. Some time later he vacated the building but in 1118 again took it on a monthly rent of Rs. 3/-. While thus in occupation he attempted to trespass on the property and in order to cover the trespass created a letter in collusion with Kunjunni Chakkir. The plaintiff thereupon sent him a lawyer's notice (of which Ext. P-5 is a copy) on 19-2-1125 demanding surrender of the building with arrears of rent. On 20-2-1125 the defendant trespassed on the compound in which the building stands on the strength of the collusive letter (of which Ext. D-1 is a copy) and on 24-2-1125 he sent a reply (Ext. P-6) through his lawyer claiming that he was a lessee of the land and building under Kunjunni

Chakkir. The plaintiff and one Madhava Chakkir, the seniormost member of another branch filed O. S. 278 of 1954 for recovery of the land and building. The defendant contested the suit, setting up the alleged lease from Kunjunni Chakkir. The suit was decreed by the trial Court by the judgment Ext. P-7 dated 24-11-1956. This judgment was however reversed by the appellate Court which dismissed the suit (Ext. P-11 dated 15-2-1958 is the judgment). The two plaintiffs thereupon preferred S. A. 487 of 1958 in the High Court, which dismissed the appeal by the judgment Ext. P-12 dated 21-6-1962. The High Court held that a suit would lie only on behalf of the tarwad and not on behalf of any tavazhi and as there was no suit on behalf of the tarwad it had to be dismissed. Kunjunni Chakkir died on 15-9-1957 and the plaintiff thereupon became the karnavan, competent to represent the tarwad. He accordingly claimed recovery of the land and building with mesne profits from 20-2-1125, and some amounts by way of damages.

3. So far as relevant, the contentions of the defendant were that he had not committed any trespass and that he had not taken the building on rent in 1118. Kunjunni Chakkir leased the building and land to him on 11-12-1112 for an annual rent of Rs. 36/-, which was to be adjusted against the interest on the premium amount of Rs. 300 which he had received. Kunjunni Chakkir had also given him the document Ext. D-1 evidencing the terms of the lease. Since then he was in undisputed possession of the property as lessee and owing to his long adverse possession, the title of the plaintiff's tarwad was destroyed.

4. The trial Court decreed the suit in favour of the plaintiff, awarding him mesne profits for 3 years at the rate of Rs. 250/- a year and damages amounting to Rs. 50/-. On appeal by the defendant, the learned Additional District Judge, Trichur, set aside the decree for recovery of property and mesne profits, allowing the appeal to that extent.

5. Counsel for the appellant contended in the first place that as the plaintiff's title is admitted and found, the defendant can successfully resist the prayer for ejectment only by establishing the lease set up by him and as the lease has been concurrently found against, a decree for eviction must follow. In order to deal with this contention, it is necessary to recall briefly the rival contentions of the parties and the findings of the Courts below. While the plaintiff alleges that the defendant came to occupy the building under a lease of 1118 and that later in Kanni 1125 he trespassed on the land,

the defendant contends that he is holding both the building and land under a lease dated 11-12-1112 granted by Kunjunni Chakkir for an annual rent of Rs. 36/- which was to be adjusted against the interest on Rs. 300/- being the premium. In proof of this alleged lease the defendant has produced Ext. D-1, copy of a letter given by Kunjunni Chakkir, embodying the terms of the lease. The trial Court has held that Ext. D-1 was collusively created by Kunjunni Chakkir and the defendant, that the defendant did not get possession in 1112 as claimed by him and that the evidence and circumstances disprove his case that he is a lessee of the land and building. It further held that Marath Achutha Menon was the tenant of the building under Ext. P-14 dated 1-3-1113 and that the defendant came in as lessee of the building in 1118 and obtained possession of the land in Kanni 1125. The lower appellate Court has confirmed these findings except that it observes that there was no evidence of any fresh lease of the building to the defendant (in 1118) and so he must have continued in occupation under the original lease granted to Marath Achutha Menon. The result of the concurrent findings is that the lease set up by the defendant is without basis and that Exhibit D-1 is a collusive document created by him and Kunjunni Chakkir. In the face of these findings the appellant's contention, that whatever other defences the defendant might have, he cannot resist the suit on the unproved lease has to be accepted, as the plaintiff's title is clear.

6. In the trial Court the defendant had raised a plea that he has perfected absolute title by his adverse possession from 1112. Now the plaintiff admits that the defendant came upon the land in 1125. The Courts below while rejecting the defendant's plea have accepted the plaintiff's case on this point. The trial Court rejected the plea of adverse possession, holding that in view of his definite case that he was in possession as a lessee the defendant did not have the necessary animus to hold the property as his own or in his own right against the plaintiff's tarwad. The lower appellate Court did not expressly reject this contention, but did so in effect when it held that by asserting to be a lessee for over 12 years the defendant has merely prescribed for a lessee's right. No attempt was made before me to maintain that the defendant has acquired absolute title by prescription, obviously for the reason that despite a passing claim to that effect, the burden of the defendant's written statement is that he is holding as a lessee. Adverse possession postulates a hostile possession which carries a notorious disavowal of the true owner's title

and constitutes an invasion of that title. The defendant's plea of tenancy both in the written statement in this case and the written statement (Ext. P-8) in O. S. 278 of 1954 carries no denial or invasion of the title of the plaintiff's tarwad to the suit property; on the other hand they imply an admission of that title. That a party who admits that he holds only a limited interest cannot plead prescriptive title to general ownership is axiomatic. The plea of acquisition of absolute title was thus correctly rejected by the trial Court and it was not rightly sought to be revived in the lower Court or this Court.

7. Passing to the acquisition of lessee's right by prescription, there cannot be any doubt that such a right can be so acquired. As observed in the Law of Adverse Possession by Krishnaswamy (7th Edition), page 165, "The extent of the adverseness of the possession depends on the extent of the claim of right under which possession is obtained and kept" and "Where the claim of adverse possession is restricted to a limited interest in the property, the possession is adverse to that extent only." (page 166)

And further,

"If the party in actual possession of the property admits that he holds a limited interest in it, as for example, that he holds as a mortgagee, he cannot plead prescriptive title in regard to general ownership, but he may, in a suit for ejectment, successfully plead his adverse possession to the extent of the interest claimed by him." (page 166).

8. That being the position in law, the only question on this aspect is whether the defendant has prescribed for a lessee's interest as held by the appellate Court. He has been in possession from 1125 (1950) and the suit was instituted on 21-6-1963; so that there was adequate continuity. But in view of the concurrent findings — with which I agree — that the lease set up by the defendant has not been proved, this continuous possession is incapable of founding a prescriptive tenancy right, for it is not enough if the person in possession claims a tenancy; there must be evidence to show the essential terms of the lease under which he purports to claim. To uphold a prescriptive lease, in the absence of such evidence, will be to uphold a relationship that would be incapable of enforcement. This is of significance in the case of derivative or limited prescriptive rights, as the right of the owner is not completely extinguished as with acquisition of absolute prescriptive rights. The former case postulates a dichotomy of interests with a legal nexus—whether it is a mortgage or lease—with definite incidents regulating the re-

lationship and law will have to enforce them, if and when required. If the terms of that nexus are unproved, law will have to operate in a vacuum which is an impossible phenomenon. The result is the defendant's claim to prescriptive lease must fail, as the lease and its terms have been found against. It is meaningless to say that one is a lessee, without proof of that lease and its terms. What therefore survives in this case — positively — is only the defendant's plea that he is in permissive possession and — negatively — the absence of any hostile and adverse claim to the full ownership. This means that, notwithstanding the expiry of 12 years, the right of the plaintiff's tarwad is alive and the plaintiff is entitled to recover the property on the strength of title.

9. Counsel for the appellant raised an alternative contention that in any case the suit is within time as the plaintiff is entitled to exclude the period during which O. S. 278 of 1954 was pending, under Section 14 of the Limitation Act or on the principles underlying that Section, particularly Explanation III. Now O. S. 278 of 1954 was dismissed by the High Court (Ex. P-12 judgment) on the ground that it was brought by a tavazhi and not by the plaintiff's tarwad, which alone was competent to sue. In other words, the High Court held that the suit was by an incompetent plaintiff who had no cause of action. Section 14 has no application to such a situation and if counsel's contention is accepted an incompetent plaintiff's suit can be invoked by another plaintiff to claim exclusion of time under Sec. 14. Although as held by the Supreme Court in *India Electric Works Ltd. v. James Mantosh*, (1970) 2 SCWR 743 = (AIR 1971 SC 2313), the words "or other cause of a like nature" in the Section must be construed liberally, there is no warrant to extend the Section to one plaintiff who seeks to harness the benefit of a suit by another plaintiff. Nor does the failure of the earlier suit attract Explanation III which merely equates misjoinder of parties and of causes of action with defect of jurisdiction for O. S. 278 of 1954 did not fail for either of these grounds. I reject the appellant's contention. But for reasons already noticed, the title of the plaintiff's tarwad has not been extinguished and the suit has to be allowed.

10. I set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the trial Court. The appellants will get their costs in this Court and the lower appellate Court from the first respondent.

Order accordingly.

AIR 1975 KERALA 185

FULL BENCH

P. GOVINDAN NAIR, C. J., P. SUBRAMONIAN POTI AND V. KHALID, JJ.

Annamma, Appellant v. Ouseph Tressiamma, Respondent.

Second Appeal No. 566 of 1970, D/-19-3-1975.

(A) Contract Act (1872), Ss. 70 and 72 — Civil P. C. (1908), O 21, Rr. 91, 93 — Suit for refund of purchase money — Decree holder purchasing property in Court auction — Sale ineffective because judgment debtor had no saleable interest in property — Suit for refund of auction price — Maintainability — Doctrine of unjust enrichment — Applicability.

A filed a suit against B and C for recovery of a sum which was charged upon property bequeathed to B, C remained ex parte. A obtained a decree and purchased the property in Court sale which was also confirmed. But before delivery could be taken one M filed a suit claiming that the property belonged to her she having purchased it from B and that the decree and Court sale were not binding on her. This M was the wife of C in the first mentioned suit. Evidently the sale was taken by the wife but the husband was impleaded as the second defendant. A thereafter filed a suit against B for refund of auction price together with interest. The cause of action alleged was that there had been total failure of consideration in the matter of the Court sale and this was occasioned by the fraud practised by the defendant and her collusion in the earlier suit with C, the second defendant, to keep the plaintiff in ignorance of the fact of conveyance:

Held, that the suit was not maintainable. (Case law discussed). (Para 8-A)

An action for money had and received founded on a plea of failure of consideration cannot succeed by merely showing that one person has lost and another has made a gain. Money had and received was a development of a remedial form of action. All monies lost to one and gained by another cannot be said to be recoverable by reason of this rule irrespective of all other considerations. There may not be a legal right in the person who has paid to recover it and a corresponding obligation in the one who has benefited to return it. The rights must be founded on the theory of unlawful enrichment. It is not every gain or enrichment that is unlawful. Situations calling for redress for civil wrongs are conceived by the law of contracts as well as the law of torts. It is not easy to assume a moral code which covers all

categories of cases, which fall outside the purview of these. (Para 7)

In the case of a judgment-debtor who has in no way contributed to the situation resulting in a Court sale of property to which the judgment-debtor is found to have no title on the date of sale, he having parted with his right to the property even before the date of suit, it is difficult to find any justification for a plea that he has been unjustly enriched. Even assuming that he has been enriched, which itself, in the circumstances of the case, is controversial, it cannot be said to be unjust. (Para 8-A)

Cases Referred: Chronological Paras

AIR 1965 Andh Pra 239 = (1965) 1 Andh WR 395 (FB)	4
AIR 1964 Ker 109 = 1964 Ker LT 102	4
AIR 1964 Raj 140 = 1964 Raj LW 178	4
AIR 1963 Ker 148 = 1962 Ker LT 12	3, 4
AIR 1961 Cal 172	4
AIR 1950 Bom 313 = 52 Bom LR 112	4
1948 Trav LR 370 (FB)	4, 8-A
1947 Trav LR 132 (FB)	3, 4, 8-A
1943 AC 32 = 111 LJ KB 433	8-A
AIR 1940 Rang 1 = 1940 Rang LR 649 (FB)	4
AIR 1938 All 593 = 1938 All LJ 955 (FB)	4
AIR 1936 Mad 50 = 69 Mad LJ 750 (FB)	4
AIR 1936 Pat 97 = 16 Pat LT 908 (FB)	4
AIR 1932 Lah 401 = 33 Pun LR 649 (FB)	4
AIR 1930 Oudh 148 = 7 Oudh WN 232 (FB)	4
AIR 1925 Pat 106 = 6 Pat LT 769	4
AIR 1922 Bom 205 = 24 Bom LR 308	4
1914 AC 398 = 111 LT 1	8-A
(1778) 1 Doug (KB) 23 = 99 ER 19	8-A
(1760) 2 Burr 1005 = 97 ER 676	8

C. K. S. Panicker, P. G. P. Panicker and T. A. Narayanan Nair, for Appellant; K. S. Paripoornan, for Respondent.

SUBRAMONIAN POTI, J.:— An interesting question has been raised in this Second Appeal and the case has been referred to a Full Bench in view of the importance of the question. Can a decree-holder-auction-purchaser institute a suit against the judgment-debtor for refund of the purchase money paid by him when, subsequent to the sale, he discovers that the judgment-debtor had, at the time of the Court sale, no saleable interest in the property? That is the question for our consideration. The answer to this by the Courts below was in the affirmative and the plaintiff has therefore obtained a decree. That is challenged by the appellant here who is the sole defendant in the suit.

2. The appellant before us is the first defendant in O. S. 83 of 1955 of the Sub-Court, Vaikom. That was a suit filed by one Ouseph Tressiamma against this

appellant who was her sister, as the first defendant and one Isaac as the second defendant. That was for recovery of a sum of Rs. 1,500/- with interest said to be due to Tressiamma under a will executed by her father which amount the appellant was directed to pay her. That is said to have been charged upon the property bequeathed to the appellant. The suit was contested by the first defendant, but Isaac, the second defendant, remained ex parte. A decree was obtained and the property was brought to sale. The decree-holder herself purchased 1 acre 10 cents of the decree schedule property in auction and the sale was confirmed. But before she could take delivery one Mariakutty filed a suit, O. S. 384 of 1964, claiming that the property belonged to her, having been purchased by her from the appellant in 1125 M. E. and that the decree and Court sale were not binding on her right to the property sold in Court auction. This Mariakutty was the wife of Isaac, the second defendant, in O. S. 83 of 1955. Evidently the sale was taken by the wife, but it was the husband who was impleaded in the suit. Mariakutty succeeded in her suit and obtained a decree as a result of which the Court sale in favour of the decree-holder became ineffective. The decree-holder sought to execute the decree once again, as if the decree was not satisfied. But the Court did not allow such execution. Thereafter she filed the present suit against the appellant who was the first defendant in the earlier suit O. S. 83 of 1955 claiming that she was entitled to recover from the appellant the auction price together with interest at 6 per cent from the date of sale. The cause of action alleged is that there has been total failure of consideration in the matter of the Court sale and this was occasioned by the fraud practised by the defendant and her collusion in the earlier suit with Isaac, the second defendant, to keep the plaintiff in ignorance of the fact of conveyance.

3. The suit was resisted by the defendant on the plea that the plaintiff had no cause of action. The plea of fraud was denied. The claim against the defendant, it was said, was satisfied by the decree in O. S. 83 of 1955 and thereafter it was not open to the plaintiff to claim to recover any amount. It was also pleaded that the default to implead the real owner of the property was that of the plaintiff and therefore plaintiff alone should suffer the consequences. The maintainability of the suit was questioned. The Courts below found that the plaintiff was entitled to claim recovery of the purchase money since the sale had become ineffective. In taking this view the Courts below have evidently purported to follow a decision of this Court in

Mathai v. O. Oommen, 1962 Ker LT 12 = (AIR 1963 Ker 148) which had referred to the Full Bench decision of the Travancore High Court in Kasim v. Aliarkunju, 1947 Trav LR 132 with approval. But these decisions related to the question of the right of a stranger auction-purchaser to recover the sale amount where the judgment-debtor whose property was sold in Court auction was found to have no saleable interest in the property sold. Here the suit was by the decree-holder auction-purchaser who had brought the property to sale and purchased it in auction. The appeal is by the defendant challenging the decree passed against her.

4. There is keen divergence of views among the High Courts in India on the question whether a stranger auction-purchaser who discovers later that the judgment-debtor had no saleable interest could file a suit to recover the purchase money from the decree-holder. The controversy is not easy to resolve. Opinion appears to be equally divided and eminent Judges have forcefully supported their respective view points with persuasive reasons. Different views have been taken by two Full Benches of the High Court of Travancore on this question. The decision of a Full Bench in 1947 Trav LR 132 (Kasim v. Aliarkunju) has been overruled by a majority of the Full Bench of three Judges in the decision in Venkitachalam Iyer v. Vishnu Namboori, 1948 Trav LR 370. The decision in Kasim v. Aliarkunju, 1947 Trav LR 132 (FB) has been followed by the Kerala High Court in Mathai v. O. Oommen, 1962 Ker LT 12 = (AIR 1963 Ker 148) and later in Abdul Kassim v. State of Kerala, 1964 Ker LT 102 = (AIR 1964 Ker 109). That a stranger auction-purchaser can file a suit against the decree-holder when total failure of consideration is shown in that the judgment-debtor is found to have no interest in the property sold is supported by the authority of the cases in Macha Koundan v. V. Kottora Koundan, AIR 1936 Mad 50 (FB); Bahadur Singh v. Ram Phal, AIR 1930 Oudh 148 (FB); Mehar Chand v. Milkhi Ram, AIR 1932 Lah 401 (FB); Thakar Lal v. Nathulal, AIR 1964 Raj 140; Kasim v. Aliarkunju, 1947 Trav LR 132 (FB) and Maung Aye Maung v. A. Scott & Co., AIR 1940 Rang 1 (FB). The contrary view is held in Balavant Ranganath v. Bala Malu, AIR 1922 Bom 205; Santimmappa v. Balbhim Co-op. Credit Society, AIR 1950 Bom 313; Amar Nath v. Firm Chotelal, AIR 1938 All 593 (FB); Nagendra Nath v. Sambhu Nath, AIR 1925 Pat 106; Surendra Kumar v. Srichand, AIR 1936 Pat 97 (FB); Abinash Chandra v. Matilal, AIR 1961 Cal 172 and Suryakanthamma v. Doravya, AIR 1965 Andh Pra 239 (FB).

5. The auction-purchaser in this case is the decree-holder himself. The suit is therefore not by the auction-purchaser against the decree-holder but by the decree-holder against the judgment-debtor. If we could possibly decide the question before us without expressing any view one way or the other on the question of the right of the stranger auction-purchaser to seek recovery of the sale price, we should attempt to do so. One of the pleas urged in answer to the plaintiff claim is that an action for money had and received would not lie in a case where a suit for refund of purchase money is brought by the decree-holder-auction-purchaser against the judgment-debtor. It is necessary to examine this question here. If the plaintiff does not succeed in establishing his right to bring such an action, then, we can refrain from expressing our views on the question whether the Court-sale is void on account of the absence of title of the judgment-debtor.

6. The suit, in execution of the decree in which the plaintiff brought the property to sale, was for recovery of money due from the first defendant in that suit who is the defendant here. The first defendant had parted with her rights prior to the institution of that suit and that was by a registered document executed in favour of the wife of the second defendant in the earlier suit. But nevertheless the transferee was not impleaded, though her husband was made the second defendant. The Court-sale became ineffective for the reason the plaintiff omitted to make the vendee a party and was satisfied with her husband on the party array possibly on the assumption that the husband was the real owner though the document stood in the name of the wife. In that stand the decree-holder auction-purchaser failed in the present suit. Though a plea of fraud by the first defendant in the earlier suit is set up here, that remains a mere averment, for, no evidence oral or documentary has been adduced. Parties have not examined any witnesses in the suit and the case was heard by the learned Munsiff on the pleadings. Therefore as the matter now stands, it is not possible to find that the judgment-debtor was in any way responsible for the sale of a property over which he had no title. He had title to the property sometime prior to the suit. The plaintiff-decree-holder evidently assumed that the second defendant was the necessary party. This was either due to his ignorance of the fact of the title being in the second defendant's wife or he was knowingly taking the stand that the second defendant had title and not his wife. It was the decree-holder who brought the property to sale, caused the settlement of the proclamation of the

property, as if it belonged to the judgment-debtor and purchased it in auction. There can be no scope, in such circumstances, for a plea of misrepresentation, much less any scope for a plea of fraud. There is also no scope for any plea of estoppel which may possibly be urged by a stranger auction-purchaser against the decree-holder. The judgment-debtor has not contributed, in any measure to the situation resulting in the sale of a property in which the judgment-debtor had no title. He had no obligation under law to enlighten the decree-holder, assuming that he could have done so in this case. If the property had been sold with the wife of the second defendant in the earlier suit on the party array, that would have conveyed title to the auction-purchaser and that would have extinguished the liability of the judgment-debtor for the decree debt to the extent of the sale price. We are stating these facts as they may be necessary in assessing a plea of unjust enrichment on the part of the defendant in the case.

7. An action for money had and received founded on a plea of failure of consideration cannot succeed by merely showing that one person has lost and another has made a gain. Money had and received was a development of a remedial form of action. All monies lost to one and gained by another cannot be said to be recoverable by reason of this rule irrespective of all other considerations. There may not be a legal right in the person who has paid to recover it and a corresponding obligation in the one who has benefited to return it. The rights must be founded on the theory of unlawful enrichment. It is not every gain or enrichment that is unlawful. Situations calling for redress for civil wrongs are conceived by the law of contracts as well as the law of torts. It is not easy to assume a moral code which covers all categories of cases, which fall outside the purview of these.

8. Lord Mansfield attempted to provide a juristic basis for the doctrine of unjust enrichment. As early as in 1760 in *Moses v. Macferlan*, (1760) 2 Burr 1005 the learned Judge said—

"The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

8-A. The learned Judge did not lay down and evidently did not intend to lay down that in every case where a benefit was obtained or even unjustly obtained an action would lie. In *Weston v. Downes*, (1778) 1 Doug (KB) 23 the learned Judge said—

"I am a great friend to the action for money had and received, and therefore I

am not for stretching, lest I should endanger it."

At the beginning of this century the authority of this doctrine in quasi contracts was doubted and the expression of this is seen in what Lord Sumner said in *Sinclair v. Brougham*, 1914 AC 398. Whatever might have been the effect of Lord Sumner's judgment, later cases again recognised the validity of Lord Mansfield's views. We may refer to the decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Harbour Ltd.*, (1943 AC 32), Lord Wright said in that case—

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

Cheshire and Fifoot in the Law of Contract (7th Edn.) at page 584, referring to this doctrine, observe—

"Academic, as well as judicial, opinion has been divided upon the merits of Lord Mansfield's doctrine. But in the latest and most searching study of English quasi-Contract Mr. Goff and Mr. Gareth Jones have accepted as its rationale the principle of unjust benefit or unjust enrichment. This principle "presupposes three things; first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit." The learned authors have also faced, and turned to profit, a contributory difficulty in the analysis and development of quasi-contract; the fact that it transcends the traditional demarcation between law and equity. It is significant that both in *Sinclair v. Brougham* and in *Re Diplock* the Judges were driven to examine both common law and equity; and Lord Wright said of the former case that it "demonstrated a category of claims distinct from contract or tort or trust".

That "the good sense of the law will impose an obligation to return where there was a total failure of consideration" (*Kasim v. Aliarkunju*, 1947 Trav LR 132) (FB) is a statement of the law in too wide terms. Abraham, J. said in *Venkitachalam Iyer v. Vishnu Namboori*, 1948 Trav LR 370 (FB) thus:

"The urge to give a remedy where loss has been sustained, but no legal right infringed is an urge which is outside the province of law."

In the case of a judgment-debtor who has in no way contributed to the situation resulting in a Court sale of property to which the judgment-debtor is found to have no title on the date of sale, he having parted with his right to the property even before the date of suit, it is difficult to find any justification for a plea that he has been unjustly enriched. As we said earlier even assuming that he has been enriched, which itself, in the circumstances of the case, is controversial, it cannot be said to be unjust. The situation has been brought about by the decree-holder and solely by him. If someone is to lose in the transaction it must necessarily be the party who has been responsible for the situation and that would be the plaintiff himself. Therefore it may not be possible to find that the defendant had received the money or the benefit for the use of the plaintiff. Consequently no action for money had and received would lie. The suit will have, therefore, to be dismissed on this ground. We do so. The concurrent decrees of the Courts below are reversed. But in the circumstances of the case we direct the parties to suffer costs in all the Courts.

Appeal allowed.

AIR 1975 KERALA 189

V. P. GOPALAN NAMBIYAR AND
GEORGE VADAKKEL, JJ.

State of Kerala and others, Appellants v. M. C. Joseph, Respondent.

Writ Appeal No. 210 of 1973. D/- 3-6-1975.

(A) Constitution of India, Article 226 — No writ lies against an order passed in exercise of consensual jurisdiction — AIR 1973 Ker 216, Reversed.

Principle of natural justice that no man shall be a judge in his own cause will not apply to a contract. A clause in a contract whereby one of the parties agreed to make good the loss sustained by the other party immediately on receipt of written notice as to the amount of loss is not invalid on the ground that it violates principle of natural justice. No writ lies for quashing the order calling upon the party to pay the amount of loss, because the order is one passed in exercise of consensual jurisdiction. Case law Ref. AIR 1973 Ker 216, Reversed.

(Paras 3 and 4)

Cases Referred: Chronological Paras
1957 Ker LT 739 = 1957 Ker LJ 712 4
AIR 1956 Cal 361 = 97 Cal LJ 199 3
AIR 1955 SC 468 = (1955) 2 SCR 48 4
(1953) 1 All ER 327 = (1953) 2 WLR 342 4

AIR 1933 Sind 93 (2) = 26 Sind LR 469 3
AIR 1930 Sind 17 = 25 Sind LR 96 3
AIR 1927 Sind 253 = 22 Sind LR 54 3
(1894) 2 QB 667 = 71 LT 308 3
(1894) 2 Ch 478 = 63 LJ Ch 521 3
(1893) 1 Ch 238 = 68 LT 472 3
(1882) ILR 5 Mad 173 3
(1858) 3 H & N 766 = 157 ER 677 3
(1854) 5 HL 72 = 10 ER 824 3
(1852) 3 HL 794 = 10 ER 315 3

Govt. Pleader, for Appellants; K. Chandrasekharan and K. Vijayan, for Respondent.

GOPALAN NAMBIYAR, J.:— This appeal is against the judgment of a learned Judge of this Court in O. P. No. 748 of 1970, reported in 1973 Ker LT 366 = (AIR 1973 Ker 216). The writ petition sought to quash Ext. P-19 order of the State Government and certain other proceedings taken by it. These proceedings were taken against the writ petitioner (Respondent in the appeal) holding him liable for shortage of a stock of rice which he, as a godown keeper in the foodgrains depot, at Ponnani, under the Civil Supplies Department, had brought about on account of his neglect, carelessness or misconduct. The contract between the writ petitioner and the Government evidenced by Ext. P-1 contained Cl. (4) as follows:

"4. That the said bounden doth hereby covenant and agree with the party hereto of the second part that, in the event of any loss or damage being caused to the Government by any act, omission, neglect, carelessness, misconduct or dishonesty on the part of the said bounden, he the said bounden shall make good to the Government such loss or damage in full, immediately on receipt of notice in writing from the Government as to the amount of such loss or damage and that on his failure to so pay up the amount, it shall be lawful and competent to the Government to recover same from him as arrears of Public Revenue under the provisions of the Revenue Recovery Act for the time being in force or in any other manner that may commend itself to the Government."

On its being found that there was shortage of stock, which the Government was inclined to attribute to the negligence or misconduct of the 1st Respondent, proceedings were started invoking the above clause and notices and representations were exchanged between the 1st Respondent and the Government. By Ext. P-7 G. O. dated 12-7-1951 intimation was given among others to the 1st Respondent, of the Government, having written off the admissible shortage and having decided for recovery of the costs of the excess shortage from certain persons. Ext. P-7

appended a statement showing the details of shortage noticed at the time of physical verification. Against the name of the petitioner, the excess shortage or its value to be recovered was indicated with particularity and clearness. It would appear that although the petitioner kept quiet for a long time, thereafter, he made repeated and prolonged representations which were considered and dealt with in detail by Government orders; and eventually, Ext. P-12 order dated 5-2-1934 and Ext. P-16 order dated 26-9-1966 were passed by the Board of Revenue. These had been preceded, as stated, by representations of the petitioner. Ext. P-16 was challenged in a writ petition which went up in Writ Appeal No. 229 of 1966. By Ext. P-17 judgment, it was stated that the 1st Respondent proposed to move the Government for suitable relief and that his representation when made, may be disposed of, applying a fresh mind. Exhibit P-17 is a copy of the judgment. Accordingly the 1st Respondent submitted Ext. P-18 representation and this was dealt with and disposed of by Ext. P-19 order challenged in the writ petition. The learned Judge allowed the writ petition holding that clause (4) of Ex. P-1 offended the rules of natural justice and that the decision of the Government fixing liability on the petitioner was arbitrary.

2. We regret we are unable to sustain the reasoning and the conclusion of the learned Judge. The learned Judge was of the view that no man can be a Judge in his own cause, and that this elementary rule of natural justice was contravened by clause (4) in Ext. P-1, which clothed the Government, one of the contracting parties, to decide for itself the disputes between it and the 1st Respondent. The learned Judge was of the view that a provision dispensing with the rule of natural justice cannot be readily inferred in the case of even legislative enactments, and that stronger reasons for similar dispensation in case of contracts with similar provision as in Ext. P-1 was necessary. The learned Judge has noticed the passage from the 10th Edition of Broom's Legal Maxims at page 72. That passage itself has sufficiently emphasised that "the legislature can, and no doubt in a proper case would, depart from the general rule, and an intention to do so being clearly expressed, the Courts give effect to the enactment." Therefore, if the principle of applicability of rules of natural justice were to be extended to the region of contract, we have little doubt that the clearly expressed intention in clause (4) in Ext. P-1 must have its full sway and operation, and cannot be allowed to be overridden by the rules of natural justice.

3. The learned Government Pleader was asked to investigate and submit his argument on the question; and after a good amount of research, brought to our notice the decision in Secretary of State for India in Council v. Augustus John Arathoon, (1882) ILR 5 Mad 173 (178), which we consider quite apposite on the point. At page 180, Muthuswami Iyer, J. who agreed with the Officiating Chief Justice (Innes, J.), stated thus:

"Here I may refer to the principle laid down by Lord Campbell in the leading case of Dimes v. The Grand Junction Canal Co. (1852) 3 HL 794 and which may, at first sight, seem to favour the plaintiff's contention, viz., that no man is to be a judge in his own cause. This rule certainly applied in the case of persons constituted Judges without the option of the parties. In *Ranger v. The Great Western Railway Co.*, (1854) 5 HL 72 the principle was held not to apply to avoid the award of a referee, to whom though necessarily interested in the result, the parties had contracted to submit their differences though ordinarily it is contrary to reason that an arbitrator or umpire should be the sole and uncontrolled Judge in his own cause. Again in *Ellis v. Hopper*, (1858) 3 H & N 766 (767) in which one of the conditions of a race was that all disputes should be settled by the stewards, whose decision should be final, and one of the stewards had betted against the defendant's mare Baron Bramwell said, "the question put by my brother Watson in the course of the argument seems to be decisive, viz., is there any implied condition that the appointed arbitrators or Judges shall be without power if one of them becomes interested in the event of the race? If none exists, then, is there any general proposition of law that whenever a dispute is referred to one or several persons, his or their power shall cease if any of them becomes interested in the event? I know of no such rule. When parties agree to refer a matter, they may, if they please, insert a condition to that effect; but if they do not, why should we make such a condition for them?" My judgment proceeds on the ground that there was no implied condition that being interested should take away the power to act. The result is that where there is contract, it is the intention of the parties that governs, and that there is no general proposition of law that one of the contracting parties should not refer a matter to the judgment of the other by reason of the other being interested."

The principle of the above decision was followed in this country in *Burma Oil Co. v. Naraindas Dayal Singh*, AIR 1927 Sind 253; AIR 1930 Sind 17; AIR 1933 Sind 93 (2) and AIR 1956 Cal 361 at p. 364. In

Eckersley v. The Mersey Docks and Harbour Board, ((1894) 2 QB 667), observed Lord Esher, M. R. at page 671.

"It must, therefore, be shown in the present case that it is, at least probable that the engineer would be biased. Now, what is relied on by the plaintiffs in order to show that? It seems to be admitted that, if the engineer had to consider whether he had himself given a negligent or unskilful or incompetent order, it could not be said that the Court would be justified in directing that the matter should not be referred to him; but the Court is asked to say that he should not be the arbitrator because the negligent, unskilful, or incompetent order was given by his son. That involves our saying that a man who, it is certain, would not be biased in judging of his own acts, would probably be biased to give a decision in favour of his son which he knew to be wrong. I cannot take that view of human nature. Where you have a man of high character, one whose character for impartiality cannot be impeached when he has to decide as to his own conduct, to say that such a man would not have enough honesty and strength of mind to act impartially where his son's conduct came in question is a statement which I cannot accept. I do not believe it in this particular case."

Lopes, L. J. in the same case said:

"Now it is to be observed that the rule to be applied to a case of this kind is entirely different to that which is applied to Judges, Magistrates or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. There is no principle better recognised than that a man is not to be a Judge in his own cause; and in the case of Magistrates it is well established that, if there is any reason which, it can be suggested, would influence the minds of ordinary persons, and induce them to think that the Magistrates might be biased, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different. In the present case it is of the essence of the submission that questions shall be submitted to the engineer as arbitrator which must involve the decision of matters connected with his own competency, care, and caution and with the way in which he discharged his duties under the contract. The parties agree that the arbitrator is to adjudicate on matters in which he has an interest."

Davey, L. J. agreed and said:

"No doubt in a certain sense the engineer will be the Judge of his own conduct, and no doubt that is a position which, *prima facie*, raises some surprise in a judicial mind; but that is the contract of the parties. They have contracted that the servant of one of the parties to the contract shall be the arbitrator, and it appears to me that they have contracted that he shall be the arbitrator in cases which necessarily involve the correctness of his own opinion, the competency of his own advice and opinion as engineer, and the regularity of his own proceedings."

In *Ives and Barker v. Willans*, (1894) 2 Ch 478, Lindley, L. J. stated:

"Now, that is a very stringent provision, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well, that a dispute between the contractor and the company is in substance in this business a dispute between the contractor and the engineer whose business it is to see that the works are done for the company according to the agreement and the plans and specifications; so that the real agreement between the contractor and the company is this, that if there is any dispute between them, although the engineer is to tell the contractor what to do and order him to do what he likes consistently with the agreement, his decision must be final. Now, what is the real explanation of that? How does it happen that a man will agree to be bound by such a very stringent provision? The explanation of it is to be found in two circumstances. First, of all, competition for this kind of work is very keen, and contractors compete with each other and in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and when a contractor enters into such a very stringent provision as this, he knows the man he has to deal with. I take it that a contractor such as Mr. Williams would not submit to be bound by a clause of that kind unless he had confidence in the engineers, and unless the engineers were persons of the highest character. If he had not confidence he would not submit to it; but knowing the engineers he does submit to it, because he has confidence in them and knows that they can be trusted, even although it is their duty to look after the work of the contractor, to deal fairly with him in case of a dispute which is in substance, although not in form, a dispute between the contractor and themselves." Lopes, L. J. agreed and recalled the words of Bowen L. J. in *Jackson v. Barry Railway Company*, (1893) 1 Ch 238 at p. 246 to which we will make reference a little

later. The other learned Judge Kay, L. J. said:

"That these parties with their eyes open entered into this contract; they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties; and they agreed that in any question that arose which was submitted to arbitration, those engineers should be the arbitrators. Now after that agreement, when they turn round and say, we cannot accuse you of having acted honestly, we can only say that you approved of the materials, and we allege that those materials were not good notwithstanding your approval, and therefore you cannot properly sit as arbitrators, they are not fulfilling that obligation which is incumbent upon them, namely, to make out that those arbitrators, to use the language of the Master of the Rolls in the case of *Eckersley v. Mersey Docks and Harbour Board*, (1894) 2 QB 667 would be so biased when they come to exercise their duty as arbitrators that they are unfit to sit in that position."

In *Jackson v. Barry Railway Company*, (1893) 1 Ch 238 at p. 246. Bowen L. J. stated:

"It was an essential feature in the contract between the Plaintiff and the railway company that a dispute such as that which has arisen between the Plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiassed person but by the company's engineer himself. Technically, the controversy is one between the Plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the Judge, as to speak, in his own quarrel. Employees find it necessary in their own interests, it seems, to impose such (terms) on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They

know well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard." The above decisions sufficiently bring out the reason why the principle of that no man shall be a Judge in his own cause, cannot have application against a contractual term of the type of clause (4) in Ext. P-1. In addition to the principles laid down in the above decisions, the law has been stated in the same form by Text Books Writers. We do not propose to multiply citations, but content ourselves by referring to the 3rd Edition of *De Smith's Judicial Review of Administrative Action* page 218.

4. Our Supreme Court in *Thawaradas Pharural v. Union of India*, AIR 1955 SC 468 at p. 472 stated as follows:

"If, with that in view, Government expressly stipulated and the contractor expressly agreed that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affairs."

It is for this same reason that it has been recognised that no writ lies against an order passed in exercise of consensual jurisdiction. In *R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians*, ((1953) 1 All ER 327), Lord Goddard observed:

"That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English law, but in all the centuries that have passed since the decisions of English Courts first began there is no trace of an arbitrator being controlled by this Court by writ of either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the Courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by

"The covenant implied by Section 108 (c) protects against lawful, and not tortious interruptions; and this is so both in English as well as in Indian law. This is explained in the following classic passage in the judgment of Vaughan, C. J., in *Hayes v. Bickerstaff*, (1675) Vaugh 118 at pp. 119, 123:

'By covenant in law, the lessee is to enjoy his lease against the lawful entry, eviction, or interruption of any man, but not against tortious entries, evictions or interruptions, and the reason of law is solid and clear, because against tortious acts the lessee hath proper remedy against the wrong-doers'."

[That being the frame of the suit, the plaintiff's claim, as laid, must fail.

50. The decision of the Privy Council in *Lewis Pugh Evans Pugh v. Ashutosh Sen*, AIR 1929 PC 69 furnishes a complete answer to the plaintiff's claim. The question before their Lordships was as to whether the lessor was jointly and severally liable, as a joint tort-feasor, as to wrongful working by his lessee i.e., conversion by one of specific moveable property viz., wrongful extraction of coal from the area leased to the others. In dealing with the question, their Lordships observed:

"In their Lordships' opinion the learned Judges in both Courts have misapprehended the question they had to try viz., whether the appellant was a joint tort-feasor, with Bagchi and Pilcher and Co., Ltd., respectively. Neither the fact that he was their lessor assuming contrary to their Lordships' view, that he was a lessor in the proper sense of the term nor that he 'encouraged' the wrong-doers, whatever this may mean, would be sufficient by itself to support a finding that he was a joint tort-feasor."

It follows that in an action for conversion, neither the fact that a person was the lessor nor that he encouraged the wrong-doers would be sufficient, by itself, to support a finding that he was a joint tort-feasor.

51. The principles are well settled, but the difficulty, however, lies in their application to the facts of the present case. In *Narayan v. Gokuldas*, (supra), J. Sen, J., observed:

"The words 'without interruption' are not qualified in any way and have been understood to mean what in England is known as a covenant for quiet enjoyment in an un-qualified form which would include the eviction of the lessee by a title paramount. This clause has been a subject of interpretation in numerous judicial decisions: *Vithilinga Padayachi v. Vithilinga Mudali*, (1892) ILR 15 Mad 111, 121; *Tayawa v. Gurshidappa*, (1901) ILR 25 Bom 269 at pp. 273, 274; *Uday Kumar Das v. Katyani Debi*, ILR 49 Cal 948, 956,

957 = (AIR 1922 Cal 87 at p. 90); *Naorang Singh v. A. J. Meik*, ILR 50 Cal 68, 72, 74 = (AIR 1923 Cal 41 at p. 43); *Ayyana v. Gangayya*, AIR 1933 Mad 465; *Keshav Chander v. Sher Singh*, AIR 1937 Lah 930; *Surendra Nath v. Bhudar Chandra*, AIR 1938 Cal 690 and *Sundera Bai v. Pandharinath*, AIR 1938 Nag 441:

The propositions deducible from these cases are that the covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as against other persons, it protects the lessee only against lawful disturbance and that the covenant does not cover tortious entries, evictions or interruptions by trespassers."

52. In *Naorang Singh v. A. J. Meik* (supra), Sir Ashutosh Mookerjee, J., observed that the expression "claiming under him", in Section 108 (c) of the Transfer of Property Act must be restricted in its meaning to claiming a right under him i.e., the lessor, to do the particular act complained of. Placing that construction, the eminent Judge stated.

"There must be some limit and we are of opinion that the limit indicated by Lord Esher in *Harrison v. Muncaster*, (1891) 2 QBD 680, is reasonable. It comes to this, that the lessor becomes bound for any act of interruption by himself or by any person whom he has expressly or impliedly authorised to do the act."

That decision, instead of supporting the appellant, is against him.

53. It must accordingly be held that the defendant No. 3, the State of Madhya Pradesh, was not liable for damages for any breach of covenant of quiet enjoyment implied by Section 108 (c) of the Transfer of Property Act.

54. The result, therefore, is that the appeal falls and is dismissed with costs. Hearing fee, as per schedule.

Appeal falls.

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G. L. OZA AND G. G. SOHANI JJ.

Chaturbhujdas and another, Applicants v. The State of Madhya Pradesh and others, Opposite Parties,

Misc. Civil Case No. 43 of 1972, D/- 22-3-1975

(A) Stamp Act (1899), Ss. 56, 57 — Power under S. 56 — Ambit of — Revision before Board of Revenue — Important question about interpretation of law and document involved — Matter must be referred to High Court.

The power conferred on the Board of Revenue under Section 56 is power of control only. Therefore while exercising power of control, the scope of the jurisdiction of

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the Chief Revenue Controlling Authority will be limited and will not go to the extent of appellate powers where it can substitute its own decision. (Para 4)

Where in a revision before the Board of Revenue important question of law relating to interpretation of certain provisions of Stamp Act and also about interpretation of document was involved, the Board of Revenue while exercising the powers of the Chief Controlling Revenue Authority under Section 57 has no option to decide the matter itself but to state the case and refer it to the High Court. AIR 1950 SC 218 and 1965 Jab LJ (SN) 40 and AIR 1968 Delhi 210 Followed.

(Para 4)

Cases Referred:	Chronological	Paras
AIR 1968 Delhi 219		5
(1964) Misc Petn. No. 318 of 1964 D/- 16-9-		
1964 = 1965 LJ (SN) 40 = 1965 MPLJ		
(N) 28		5
AIR 1950 SC 218 = 1950 SCR 536		5

S. L. Garg, for Applicants; P. L. Mehta Addl. Govt. Advocate, for Opposite Parties.

OZA, J.:— This petition has been filed by the petitioners against an order dated 29-10-1971 passed by a Member, Board of Revenue, exercising powers under Section 56 of the Indian Stamp Act.

2. The facts giving rise to the present petition are that on 19-4-1957 Krishna Ginning Factory including the land situated at Zinga Khoh, Agar, Tehsil Agar, District Shajapur, was mortgaged by the Joint Hindu family of Munshiram Gopalji Vitthaladasji through its 'Kartas' Shri Shankar Bhan Das S/o Munshiram Gopal and Purushottamdas S/o Munshiram Vitthaladasji with Shri Ramkishan Gopalil Goyal. Then Shri Ramkishan Goyal gave this factory on lease to Messrs Jain Brothers, a registered partnership firm of Agar of which respondents Nos. 4, 5, 6 and 7 are partners. The lease was given with the consent of the mortgagor and possession of the factory was also delivered to M/s Jain Brothers. On 6-5-66, 'Kartas' of the Hindu Undivided family Munshiram Gopal Vitthaladas created a subsequent mortgage of the said factory with M/s. Jain Brothers for Rs. 2000/-. This mortgage was a usufructuary mortgage and according to the terms of the said deed, the mortgagees were entitled to remain in possession till 30th of September 1977 and on that date the mortgagees were to hand over possession of the Factory back to the mortgagors.

It was also agreed in this mortgage that M/s. Jain Brothers, the mortgagees, could spend any amount for making improvements in the factory with the consent of the mortgagors and, if such amount is spent, the mortgagors would pay interest at the rate of 7 per cent per annum on the amount so spent before the redemption. According to the terms of the said mortgage-deed, M/s. Jain Brothers the mortgagees with the consent of the mortgagors, spent about Rs. 70,000/-

(seventy thousand) for improvement of the said factory; they made certain construction and also installed machine. The mortgagors, thinking that they have to pay the aforesaid sum of Rs. 70,000/- and interest thereon before the date of redemption i. e. 30th of September, 1977 and also realising that they were not in a position to pay the same, decided to sell out their rights in the factory i. e. equity of redemption, to the mortgagees for Rs. 18000/- and consequently on 16-6-1970, executed a deed of sale in respect of the equity of redemption of the said factory in favour of M/s. Jain Brothers for an amount of Rs. 18000/-.

The said deed of sale was executed on Stamps of Rs. 810/- and the deed was presented for registration before the Sub-Registrar, Agar, who impounded the document and referred the matter to the Sub-Divisional Officer of Agar for considering the question of stamp duty and penalty. The Sub-Divisional Officer, after hearing the petitioners, by his order dated 12-11-1970 held that the document in question does not contain the correct value of the property and, the value set forth in the instrument being improper, it should have been valued at Rs. 88000/-, and the stamp duty was found deficit by Rs. 3406/- which he directed to be recovered and equal amount to be recovered as penalty. Against this order, the petitioners went up in revision before the Board of Revenue. The learned Member of the Board of Revenue, exercising jurisdiction under Section 56 of the Indian Stamp Act, passed an order further enhancing the duty and penalty chargeable against the petitioners. After the order of the Board of Revenue, the Sub-Divisional Officer issued a notice to the petitioners for recovery of duty of Rs. 4536.50np. and an equal amount as penalty and therefore the petitioners have filed this petition under Article 226 of the Constitution of India.

3. When the revision petition was filed before the Board of Revenue, the learned Member proceeded to exercise powers under S. 56 of the Indian Stamp Act (hereinafter referred to as 'the Act'. In exercising these powers, the learned Member re-assessed the duty chargeable from the petitioners. It was contended before us that the powers, the Board could exercise under Section 56 of the Act, were the powers of control only and not of an appellate tribunal. It was also contended that in case, like the present, where questions about interpretation of the documents and interpretation of the provisions of the Indian Stamp Act are involved, the Board of Revenue ought to have exercised jurisdiction under Section 57 of the Act, by making a reference to this Court rather than deciding the matter itself. It is not in dispute that the questions involved in the matter are important question of law relating to the interpretation of certain provisions of the Indian Stamp Act and also about the interpretation of the document which was sought to be registered. Learned counsel for the respon-

dent State also contended that the appropriate procedure, which the Board should have followed, was to make a reference to this Court under Section 57 of the Act, rather than deciding the question itself.

4. Section 56 of the Indian Stamp Act provides—

"56. (1) The powers exercisable by a Collector under chapter IV and Chapter V, and under Clause (a) of the First proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority.

(2) If any Collector, acting under Section 31, S. 40 or Sec. 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case and refer it with his own opinion thereof, for the decision of the Chief Controlling Revenue Authority.

(3) Such authority shall consider the case and send a copy of its decision to the Collector who shall proceed to assess and charge the duty (if any) in conformity with such decision."

Sub-section (1) of this section confers powers on the Chief Controlling Revenue Authority to keep control over the subordinate Revenue authorities. Therefore, the power conferred on the Board of Revenue under Section 56 of the Act is power of control only. It is therefore clear, while exercising power of control, the scope of the jurisdiction of the Chief Revenue Controlling Authority will be limited and will not go to the extent of appellate powers where it can substitute its own decision. Apparently, therefore, what the learned Member of the Board of Revenue has done in the impugned order, he could not do while exercising power under Section 56 of the Act. It appears that the learned Member lost sight of the provisions contained in Section 57 of the Act, and it appears that the parties also did not bring to the notice of the learned Member of the Board of Revenue the provisions contained in Section 57 of the Act. Section 57 of the Indian Stamp Act, reads:—

57. (1) The Chief Controlling Revenue authority may state any case referred to it under Section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon,—

(a) if it arises in a State, to the High Court for that State;

(b) if it arises in the Union territory of Delhi or Himachal Pradesh, to the High Court of Punjab;

(c) if it arises in the Union territory of Manipur or Tripura, to the High Court of Assam;

(d) if it arises in the Union territory of the Andaman and Nicobar Islands, to the High Court at Calcutta; and

(e) if it arises in the union territory of the Laccadive, Minicoy and Amindivi Islands, to the High Court of Kerala.

(2) Every such case shall be decided by not less than three Judges of the High Court

to which it is referred, and in case of difference the opinion of the Majority shall prevail.

Sub-section (1) of this section provides that when a case is referred to it under Section 56 sub-cl. (2) of the Act, or otherwise brought to its notice, it has to refer such a case with its own opinion to the High Court. It is clear from this section that the Chief Controlling Revenue Authority, under this section, has no option to decide a matter itself but to state the case and refer it to the High Court. It appears, the learned Member of the Board of Revenue, who heard the revision in this case, did not consider the provisions contained in Section 57 of the Act. Consequently, the Board of Revenue is led to exercise jurisdiction vested in it under Section 56 of the Act. The petitioners are, therefore, entitled to a direction from this Court.

5. In the Chief Controlling Revenue Authority v. The Maharashtra Sugar Mills Ltd. (AIR 1950 SC 218) a question under Section 57 of the Stamp Act, came up for consideration and it was observed by their Lordships:—

"In our opinion, in the present case the power to make a reference under Section 57 is not only for the benefit of the appellant. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference to the Court."

It is therefore clear that this Court, exercising jurisdiction under Article 226 of the Constitution of India, can direct the Board of Revenue to make a reference under Sec. 57 of the Act. This Court in *Balkrishna Nathani v. Board of Revenue*, Misc. Petition No. 318 of 1964, decided on 16-9-1964 = (1965 Jab LJ SN 40) following the decision of their Lordships of the Supreme Court quoted above, directed the Board of Revenue to make a reference under Section 57 (1) of the Act. A Division Bench of the Delhi High Court in *Union of India v. Sarup Singh*, (AIR 1968 Delhi 219) also followed the same course.

6. Consequently in the light of the discussion above, this petition is allowed, the order passed by the learned Member of the Board of Revenue exercising revisional jurisdiction under Section 56 of the Act is quashed and the matter is sent back to the Board of Revenue with a direction that it shall exercise jurisdiction under Section 57 of the Indian Stamp Act and make a reference to this Court. The petitioners shall be entitled to costs of this petition. Counsel's fee Rs. 100/- if certified.

Petition allowed.

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P. K. TARE, C. J. AND M. L. MALIK J.

Gulab Chand Gupta Petitioner v. Regional Transport Authority and others Respondents.

Misc. Petn. Nos. 199 and 869 of 1973 and 222 of 1972, D/- 7-3-1975.*

(A) Motor Vehicles Act (1939), Section 68-F (1-D), Proviso — Stage carriage Permit — Only temporary permits to be granted after scheme is proposed — Permit could be curtailed, renewed or cancelled after publication of approved scheme.

After the scheme is proposed, the Regional Transport Authority can give temporary permits alone, either to the State Transport Undertaking under sub-section (1-A) to meet the increased pressure on the route or where the State undertaking does not ask for temporary permits, to a private operator under sub-section (1-C). The duration of such temporary permit granted, does not go beyond the date of publication of the approved scheme but ceases as soon as the approved scheme is published. Thereafter, the approved scheme has to be implemented as the law and the Regional Transport Authority has to take steps under Section 68-F (2). It may then refuse renewal, cancel the existing permits or curtail the route. AIR 1965 Madh Pra 196 Rel. on. (Paras 5, 6, 8)

(B) Motor Vehicles Act (1939), Sections 57, 68-E and 68-F (2) — Implementation of approved scheme — Existing operators receiving permits after publication of approved scheme would be covered by provisions of Section 68-F (2) and not by provisions of Section 68-E for purposes of cancellation or curtailment of their permits.

The provisions of S. 68-E apply only when the approved scheme requires cancellation or modification and not where its implementation is desired. For implementation the R. T. A. has to proceed under Sec. 68-F (2). After the approval of the scheme, the R. T. A. just performs a ministerial function in granting permits to the State undertaking as soon as the undertaking applies for them. He has no quasi-judicial function to perform because he has no option to refuse the grant. The provisions of Section 57 (3) are, therefore, not attracted. (Para 13)

In proceeding under Section 68-F (2), the R. T. A. has to exercise its mind whether it must refuse to entertain the application for a grant, or refuse a renewal, or whether it has to cancel the permit or curtail it. In deciding this limited question, it acts quasi judicially. But once that decision is taken and the permits of the existing operators are lawfully cancelled or curtailed, and such cancellation or curtailment falls within the implementation of the approved scheme, it

* (To quash order of Secy., Regional Transport Authority, Rewa, D/- 14-10-1970).

would not be open to them to challenge the grant in favour of the State undertaking on the ground that the grant was made with certain procedural irregularities, say strict non-compliance with Section 42 or 57 (2).

(Para 14)

Cases Referred:	Chronological	Paras
AIR 1974 SC 1940 = (1974) 2 SCC 750	11	
AIR 1971 SC 1986 = 1971 SCD 901	9	
(1971) Misc. Petn. No. 172 of 1970, D/- 5-11-1971 (Madh Pra)	4	
AIR 1967 Madh Pra 130 = 1967 MPLJ 539	7	
(1967) Misc. Petn. No. 317 of 1967, D/- 24-8-1967 (Madh Pra)	4	
AIR 1965 Madh Pra 196 = 1965 MPLJ 434	4, 8	
AIR 1959 SC 1376 = (1960) 1 SCR 530	16	

S. Q. Hasan, for Petitioner; V. S. Dabir, for Respondents.

MALIK, J.:— These three petitions were heard together. The petitioners in these petitions have been affected by the implementation of the nationalization scheme No. 24. Their permits have either been curtailed or cancelled and, therefore, they have come to this Court seeking a writ of certiorari for the purpose of quashing the orders of the Regional Transport Authority affecting them.

To begin with Gulabchand Gupta, he seeks a writ of certiorari to quash the order of the Secretary, Regional Transport Authority, Rewa (his Annexure 'D') dated the 14th July, 1970, whereby his permit has been curtailed, and that of the Regional Transport Authority dated the 19th October, 1972 (His Annexure 'G'), whereby the renewal of permit for the whole route has been refused. The Regional Transport Authority has instead renewed the permit for the curtailed route.

2. The petitioner, Gulab Chand Gupta, held a stage carriage permit on Mouganj Sonouri route via Deotabab-Garh-Sohagi-Teonthar-Sohagi-Chak as indicated in his Annexure 'C'. The permit was granted in 1969 and was valid upto 31-7-1972. The grant was, however, made after the publication of the proposed scheme No. 24. The proposed scheme is petitioner's Annexure 'A' and it was published in 1964. The scheme was finalized six years after and was published on 6-3-1970. Under the final approved scheme (Petitioner's Annexure 'B'), as read and construed by the Regional Transport Authority, the routes — Rewa-Mouganj-Hanumana and Rewa-Mangaon-Chak were reserved for exclusive operation by the Madhya Pradesh State Road Transport Corporation. The Regional Transport Authority, for the purpose of giving effect to the approved scheme, acting under sub-section (2) of Section 68-F of the Motor Vehicles Act, ordered curtailment of the petitioner's permit insofar as it overlapped the nationalized routes. The petitioner has a grievance to make about these orders.

3. The first contention of the petitioner is that his permit could not be curtailed without notice to him and without affording him an opportunity to make representation. Since in the final scheme, his permit has not been shown for the purposes of curtailment or cancellation, he would be a left-out operator to whom the State Transport undertaking did not desire to exclude. He was after all an existing operator and if his exclusion was desired, he should have been shown in the approved scheme.

4. In advancing this contention, the petitioner has overlooked the dictum of this Court in *Premchand v. State of M. P.*, 1965 MPLJ 434 = (AIR 1965 Madh Pra 196) to the following effect:

"It was particularly brought to our notice that, while the permits held by Khillumal and M. P. Speedways for the Lashkar-Bhind route were to be cancelled, the one held by Jagannath Prasad for the same was left untouched. The short answer to the second Part of this contention is that Jagannath Prasad obtained his permit after the publication of the scheme and his permit would, therefore, be equally affected by the scheme."

The same view was reiterated in *M/s. Pannalal and Sons v. Regional Transport Authority, Rewa Misc. Petn. No. 317 of 1967 D/- 24-8-1967 (Madh Pra)* and *Prahlaj Rai Narayan Das v. State of M. P. Misc. Petn. No. 172 of 1970, D/- 5-11-1971 (Madh Pra)*, which related to the very scheme No. 24. The position is now well settled that a person obtaining permit after the publication of the proposed scheme, would be affected by the scheme as finally accepted. This was the view prevailing since prior to the introduction of sub-sections (1-A) to (1-D) into the body of the Section 68-F of the Motor Vehicles Act.

5. The effect of the amendment, as introduced by the Amending Act 56 of 1969 (with effect from 3-2-1970), on the existing permits is provided for in the proviso to Section 68-F (1-D) which says that the renewal of such a permit in relation to a notified route shall be for a limited period and the renewal shall cease to be effective on the publication of the scheme under sub-sec. (3) of Section 68-D. In our construction of the provisions (1-A) to (1-D) the intention appears to be clear that after the scheme is proposed, the Regional Transport Authority can give temporary permits alone, either to the State Transport undertaking under sub-sec. (1-A) to meet the increased pressure on the route, or where the State undertaking does not ask for temporary permits, to a private operator under sub-sec. (1-C). The duration of such temporary permit granted, does not go beyond the date of publication of the approved scheme but ceases as soon as the approved scheme is published. Thereafter, the approved scheme has to be implemented as the law,

and the Regional Transport Authority has to take steps under sub-section (2) of Section 68-F. He may then refuse renewal, cancel the existing permits, or curtail the route,

6. The petitioner's permit which was granted after the proposed scheme was published, and which was to be affected by the finalized scheme, was an "existing permit" within the meaning of sub-section (2) of Section 68-F, and had to be treated in the same manner as those proposed for curtailment or cancellation in the scheme itself. The proviso to sub-section (1-D) deals with all types of permits, temporary or regular, which are to be affected by the scheme; and the permit granted after the publication of the proposed scheme, is one, definitely falling within the purview of the proviso.

7. The learned counsel for the petitioner tried to invoke the dictum of *Balaram Daluram's case, Balaram Daluram v. State of Madhya Pradesh 1967 MPLJ 539 = (AIR 1967 Madh Pra 130)* and argued that since the approved scheme had omitted to mention the petitioner's permit for cancellation or curtailment, it might well be presumed that the State undertaking did not desire to exclude him from the nationalized route.

8. In advancing this argument, the learned counsel did not draw a distinction between an operator who held a permit before the scheme was proposed and one who obtained a permit after the publication of the proposed scheme. The former, if left out from the proposal, raised a presumption that the scheme did not propose to affect him. But such a presumption would not be available to the latter who had to his knowledge the proposal of nationalization of a particular route, subject to the final approval of which he had been granted a permit. The latter permit would automatically be affected by the approved scheme. That is what this Court held in *Premchand v. State of Madhya Pradesh 1965 MPLJ 434*.

9. The petitioner's second contention before us is that under the scheme, the two routes are not routes of exclusive operation for the State undertaking. To quote an instance, he says, that *M/s Mubarak Ali Varisali's permit on Hanumana-Chak via Katra* has been curtailed to some extent, but his permit remains operative on *Hanumana-Katra*. But a portion of *Hanumana-Katra* route overlaps the nationalized route from *Hanumana* to *Mauganj*. And once it is shown that there are permit holders who overlap even a portion of the nationalized route, the nationalized route ceases to be one of exclusive operation. If under the scheme itself, the route is shown to be of conjoint operation, the Regional Transport Authority, in implementing the scheme, would be within his authority to permit the private operators on the route. Reliance is placed on *Samrathmal v. Regional Transport Authority, Indore AIR 1971 SC 1986*.

10. The respondents have disputed the fact of Mubarak Ali Warisali overlapping a portion of the nationalized route. According to them, there is a direct route from Hanumana to Katra and no portion of that route overlaps the nationalized route. Be that as it may, under the scheme, the intention is unequivocally expressed that the routes Rewa-Chak and Rewa-Hanumana would be routes of exclusive operation for the State undertaking. As many as thirty three permits have been shown either for cancellation or for curtailment, and it is clear that the curtailment or ineffectiveness to which those thirty three permits are proposed to be subjected to, extends to the portion that overlaps the nationalized route. Without accepting that Mubarak Ali's permit overlaps the portion of the nationalized route even if it does, he is made a single exception, be that inadvertent or deliberate. But that would not make the nationalized route one of conjoint operation for all private operators. Nor will that authorise the R. T. A. to disturb the integrity of the nationalization scheme by permitting others to overlap portions of the nationalized route only because there is a solitary exception. Samrathmal's case under the circumstances would not apply.

11. The most relevant consideration is whether the scheme contemplated an exclusive right to run on certain route by the stage carriages of the State undertaking to the complete exclusion of the private operators (subject, however, to an exception or two provided in the scheme itself). If that is the position, the integrity of the notified scheme cannot be affected by grant of permits to private operators even if the grant overlapped only a small portion of the nationalized route. It would be relevant here to quote the observations of their Lordships of the Supreme Court in *Mysore State Road Transport Corporation v. Mysore State Transport Appellate Tribunal* AIR 1974 SC 1940.

"Any route or area either wholly or partly can be taken over by a State Undertaking under any scheme published, approved and notified under the provisions of Ch. IV-A of the Act inserted by Section 62 of Act 100 of 1956. If, therefore, the scheme prohibits private transport owners to operate on the notified area or route or any portion thereof, the Regional Transport Authority cannot either renew the permit of such private owners or give any fresh permit in respect of a route which overlaps the notified route. In considering the question whether when one Party has a monopoly over a route, a licence can be granted to any other party over any Part of that route, the distinction between "route" and "highway" is not at all relevant. Where a private transport owner makes an application to operate on a route which overlaps even a portion of the notified route, then that application has to be considered only in the light of the scheme

as notified. If any conditions are placed then those conditions have to be fulfilled and if there is a total prohibition then the application must be rejected. There is no justification for holding that the integrity of the notified scheme is not affected if the overlapping is under five miles or because a condition has been stipulated in the permit that the operators will not pick up or set down any passengers on the overlapped route."

12. The next contention of the petitioner's counsel is that no procedure has been prescribed under sub-section (2) of Section 68-F for implementation of the approved scheme, as to in what manner the existing permits ought to be cancelled or curtailed, and whether the procedure contained in Section 57 of the Motor Vehicles Act ought to be followed on the application of the State undertaking for permit; or whether the procedure of Section 68-E ought to be followed, inasmuch as the existing permit holders were being affected by the scheme and that necessitated modification of the scheme so as to include the existing permit holders who were left out at the time the final scheme was published. The counsel says that the procedure of Section 68-E was the only right course to adopt. In inducting private operators on the route after the proposed scheme was published, the Regional Transport Authority must be presumed to have acted, keeping in mind the proposed scheme. It logically follows that even upon approval of the scheme, such permit holders ought to remain on the route. And if they have to be ousted, that could be done only by cancellation or modification of the scheme under Section 68-E.

13. The contention of the learned counsel in our view, is misleading. The grant of permits to the private operators after the publication of the proposed scheme was a grant made subject to the ultimate shape the final scheme was to be moulded into. If implementation of the approved scheme affected the grant, it must accordingly cease or be curtailed. It would be wrong to say that the grant would survive despite the scheme intending otherwise, because the grant was made though the proposed scheme was published. The provision of Section 68-E applies only when the approved scheme requires cancellation or modification and not where its implementation is desired. For implementation the Regional Transport Authority has to proceed under sub-section (2) of Section 68-F. In what manner should he proceed is the next question. After the approval of the scheme, the Regional Transport Authority just performs a ministerial function in granting permits to the State undertaking as soon as the undertaking applies for them. He has no quasi-judicial function, to perform because he has no option to refuse the grant. The provisions of Section 57 (3) are, therefore, not attracted. The Regional Transport Authority has only to verify that the application of the State undertaking is

in order and that the grant is covered by the approved scheme. He need not thereafter publish the application for permit and invite objections from those who are to be affected. The existing permit holders are automatically affected by the approved scheme, except those and to the extent, saved by the scheme itself.

14. In proceeding under sub-sec. (2) of Section 68-F, the Regional Transport Authority has no doubt to exercise his mind whether he must refuse to entertain the application for a grant, or refuse a renewal, or whether he has to cancel the permit or curtail it. In deciding this limited question, he acts quasi-judicially. He has in his mind the scheme and its implementation and how that ought to affect the existing permit holders. But once that decision is taken and the permits of the existing operators are lawfully cancelled or curtailed, and such cancellation or curtailment falls within the implementation of the approved scheme, it would not be open to them to come before this Court challenging the grant in favour of the State undertaking on the ground that the grant was made with certain procedural irregularities, say strict non-compliance with Section 42 or 57 (2). The existing operators must come to this Court only for protection of their rights; and if their rights have been lawfully extinguished, they should be unconcerned with some slight irregularity in the grant made in favour of the State undertaking.

15. Another contention of the petitioner is that the order curtailing the permit (Annexure 'D') was passed by Secretary, Regional Transport Authority, who had no jurisdiction to pass it. A representation was made against this order to the Regional Transport Authority who refused to consider it, and the successor-in-office declined to review it when an application for renewal was presented to him. The renewal was granted in respect of the curtailed route on the basis of Annexure 'D', which was an order without jurisdiction.

16. Petitioner's contention has little force. Firstly, the order curtailing the permit appears to have been passed by the Regional Transport Authority as is mentioned in Para 2 of the Order (Annexure 'D'). The Secretary was implementing the Regional Transport Authority's order passed on 7-7-1970. He was performing a ministerial job. The decision was taken by the Regional Transport Authority himself. Secondly, the Regional Transport Authority had jurisdiction to curtail the route under sub-section (2) of Section 68-F for the purpose of giving effect to the approved scheme. It is no doubt true that the Regional Transport Authority should have exercised his powers after due notice to the existing operators before he passed the order (Annexure 'D'), but the defect in procedure should hardly matter when it was bound to be an idle formality. The Regional Trans-

port Authority was bound to implement the scheme and curtail the permits of private operators as soon as the Madhya Pradesh State Road Transport Corporation asked for permits under Section 68-F (1). We should also take notice of the supervening circumstances that the petitioner allowed the order of curtailment to operate for long two years without taking any action and, presumably, withdrew his vehicles from the nationalized route. Since July, 1970, the route is exclusively occupied by the Madhya Pradesh State Road Transport Corporation. Under the circumstances, we may refuse to exercise discretion in favour of the petitioner relying on the following pronouncement of the Supreme Court in Gullappalli Nageshwar Rao v. State of Andhra Pradesh, AIR 1959 SC 1376 at p. 1383:

"But, in view of the supervening circumstances, the High Court, while noticing this defect in the procedure followed by the Regional Transport Authority, refused to exercise its jurisdiction under Article 226 of the Constitution. Pursuant to the order of the Regional Transport Authority, the appellants withdrew their vehicles from the concerned routes and vehicles of the Road Transport Corporation have been plying on those routes. The judgment of this Court conclusively decided all the questions raised in favour of the respondents, and if the order of the Regional Transport Authority was set aside and the appellants were given another opportunity to make their representations to that Authority, it would be, as the High Court says, only an empty formality. As their vehicles have already been withdrawn from the routes and replaced by the vehicles of the Corporation, the effect of any such order would not only not be of any help to the appellants but would introduce unnecessary complication and avoidable confusion. In the circumstances, it appears to us that, as the appellants have failed all along the line, to interfere on a technical point of no practical utility is "to strain at a gnat after swallowing a camel."

We cannot, therefore, say that the High Court did not rightly exercise its discretion in this matter."

17. In this view of the matter, we see no substance in Gulabchand's petition and dismiss it with costs. Counsel's fee Rs. 100/-. The balance of the security amount shall be refunded to him.

Pahlaj Rai Narayandas v. Regional Transport Authority, Rewa Misc. Petn. No. 222 of 1972:

18. Petitioner Pahlajrai held a permit No. P. St. Sec. 4/69 for Rewa-Hanumana via Lour-Naigarhi. This permit was granted after the proposed scheme No. 24 was published. The petitioner No. 2 Ugra Tara Motor Service likewise held permit No. P. St. S. 28/69 for the same route. After the finalization of the scheme No. 24, the R. T. A. has by his order dated the 15th December, 1971 (Annexure 'G'), curtailed the per-

mit so as to survive only one route Lour-Hanumana via Naigarhi. The petitioners are aggrieved by that order.

19. The petitioners have raised the very same contentions as have been repelled by us in Gulabchand's case. We have held that the permits granted after the publication of the proposed scheme would be affected by the scheme as finalized, and that such permit-holders could not be placed in the category of those left out permit-holders who were on the route at the time of the publication of the proposed scheme. We have also held that the scheme was of exclusive operation by the M. P. S. R. T. C., and the routes from which the petitioners have been excluded, could not be treated as for conjoint operation even if Mubarak Ali Varisali was a single exception. We also said that the existing operators, to whom permits were granted after the publication of the proposed scheme, would be covered by the provisions of the Section 68-F (2) for the purposes of cancellation or curtailment when action is taken towards implementation of the scheme as finalized. Their claim that their permits could be cancelled or curtailed by a modified scheme as contemplated by Section 68-E, has been negatived by us.

20. The only contention that remains to be considered is that according to the petitioners, the Regional Transport Authority having passed an order on 17-11-1971 towards the implementation of the finalized scheme, was functus officio and he could not pass a second order of 15th December, 1971.

21. We see no substance in this contention. Implementation of the scheme is a continuing process and as and when it is brought to the notice of the R. T. A. that private operation is continuing in breach of the scheme, he can legitimately exercise jurisdiction to remedy the breach. The R. T. A. had cancelled certain permits by his order dated the 17th November, 1971. The Madhya Pradesh State Road Transport Corporation then brought to his notice that the approved scheme affected the permits granted after publication of the proposed scheme and that such was the decision given in Miscellaneous Petition No. 172 of 1970 by the High Court. The R. T. A. then heard the permit holders to be affected by his order and passed the order dated the 15th December, 1971. The approved scheme was the law and it could not die out if the R. T. A. had omitted by inadvertence to cancel or curtail certain permits affected by the scheme. The R. T. A. could exercise jurisdiction towards implementation of the scheme which was the law.

22. In the result, the petition must fail and is hereby dismissed with costs. Counsel's fee Rs. 100/-. The balance of the security amount shall be refunded to the petitioners.

Misc. Petn. No. 869 of 1973 (Madh Pra):
M/s. Pahlajrai Narayandas v. State Transport
Appellate Authority Gwalior:—

23. Petitioner held a permit for Rewa-Hanumana route before the publication of the proposed Scheme No. 24. In the scheme, this permit was proposed for cancellation. But during the pendency of the finalization proceeding, the petitioner applied for extension of the permit from Hanumana to Hatta and the route that came to be described in the permit was Rewa-Hatta via Hanumana.

After the finalization of the scheme, the Regional Transport Authority and State Transport Authority have both refused renewal of the permit on the nationalized portion of the route i. e. Rewa to Hanumana. The petitioner's permit is kept alive for Hanumana to Hatta portion only. The petitioner contends that he should have been treated as a left-out permit holder since the extended route Rewa to Hatta was not shown in the scheme for cancellation or curtailment, and that till a modified scheme was published under Sec. 68-E nationalizing this route, he deserved to be granted a renewal. Besides, he says that the route Rewa to Hanumana was one of conjoint operation. As an instance he quotes Mubarak Ali Varisali's case.

24. We see absolutely no substance in this petition. The petitioner's permit on route Rewa to Hanumana was proposed for cancellation in the scheme itself. Any extension granted was subject to the approval of the scheme. And as soon as the scheme was approved, his permit covering the portion of the nationalized route would stand cancelled.

25. The petitioner contends that he could be placed in the category of those permit holders mentioned in Clause 7 (c) of the Scheme, whose permits have been made ineffective by directing that they shall not pick up or drop passengers from any station on the nationalized route. Such was not the contention of the petitioner before the Regional Transport Authority or the State Transport Authority and this aspect could not be considered by them. But even if the petitioner desired a treatment contemplated by Clause 7 (c), he could not possibly claim it, for the simple reason that in the scheme itself his permit was shown for cancellation as item 13 of Clause 7 (a). The scheme had to be implemented in spirit and letter, as contained in the document. Where the scheme said that a particular permit would stand cancelled, the Regional Transport Authority could not possibly say that the same object could be served by directing that the permit holder shall not pick up or set down passengers from the overlapping route. The integrity of the scheme would nonetheless be affected if the Regional Transport Authority took such a step. This is not permissible.

26. The petition must, therefore, be dismissed with costs. Counsel's fee Rs. 100/-.

The balance of the security amount shall be refunded to the petitioner.

Petitions dismissed.

AIR 1975 MADHYA PRADESH 217

C. P. SINGH AND C. P. SEN JJ.

Loonkaran Parakh, Petitioner v. State of Madhya Pradesh and another, Respondents.

Misc. Petn. No. 1074 of 1974, D/- 3-5-1975.*

(A) M. P. Municipal Corporation Act (23 of 1956), Section 366 (3) — Bye-laws framed under Section 427 Cls. 23 and 45-D and Section 442 (1) (c) by Municipal Corporation of Raipur — Payment of fees under By-law 7 for grant of permission to construct building — Authority to charge fees — Validity.

Although there is no separate provision in the Act authorising the Corporation to charge any fee for grant of building permission, Section 366 (3) read with Section 294 is sufficiently wide to cover such an authority of the Commissioner to grant written permission on payment of fees. (Para 5)

Section 366 (3) which in terms confers power on the Commissioner to fix the rate of fees does not require that Bye-laws have to be made for the fixation of rate. An order of the Commissioner is enough for fixation of rate of fees. Rate of fees is, therefore, not a subject which can be dealt with by the Bye-laws.

It is well settled that if while passing an order a wrong provision is quoted, that by itself will not invalidate the order and the exercise of the power will be referable to a jurisdiction which confers validity upon it. *Ut res magis valeat quam pereat*, which means that it is better for a thing to have effect than to be made void, is a salutary rule of construction. Applying this principle bye-law No. 7, read with the Schedule though ineffective as a bye-law can be given effect to as an order made by the Commissioner under Section 366 (3) and the unnecessary formality taken by the Administrator in obtaining the confirmation by the Government can be ignored. (Para 6)

(B) M. P. Municipal Corporation Act (23 of 1956), Section 366 (3) — Imposition of fees for grant of permission to construct building — Not a tax but a fee in the strict sense — Distinction between "tax" and "fee". (Constitution of India, Article 265).

Levy of tax is for the purposes of general revenue whereas a fee in the strict sense is payable as a sort of return or consideration for services rendered and the collections made from imposition of fee are correlated to the expenses incurred in rendering the services.

*(To quash Notification of M. P. Govt. D/- 24-12-1973.

GS/HS/C524/75/SVM

Having regard to the scheme of the Act, the authority conferred on the Commissioner under Section 366 (3) to charge fee for any written permission which he is authorised to give under the Act cannot be construed to be a power to impose any tax. This inference is strengthened from the fact that the fee can be charged under this section simply by an order passed by the Commissioner without even a resolution of the Corporation and the safeguards of the procedure contained in Section 133 for imposition of a tax are not applicable for imposition of a fee under this section. AIR 1975 SC 346 Fol; AIR 1965 SC 1107 and AIR 1968 SC 1119, Ref. to. (Para 7)

The fact that the fees collected are paid into the Municipal Fund by virtue of Sec. 87 and not credited to a separate fund is not by itself sufficient to hold that the impugned levy is a tax and not fee. AIR 1975 SC 846 Fol. (Para 9)

It is true that normally a fee is uniform and no account is taken of the paying capacity of the recipients of services, but absence of uniformity will not make it a tax if correlation is established between the total collections and the expenditure incurred for rendering the services. AIR 1973 SC 724 and AIR 1975 SC 706, Rel. on. (Para 10)

The Corporation can levy a fee under Section 366 (3) for the grant of building permission to cover the cost of inspection of site, approval of site, scrutiny of plan of proposed building, issue of building permission, inspection during construction and issue of completion certificate and permission to occupy the building. These regulatory duties flow from the provision of the Act and performance thereof amounts to services rendered to the person who constructs the building. AIR 1931 PC 217, Distinguished. (Para 12)

What is necessary to sustain a fee is an approximate correlation between the amount collected as fee and the expenses incurred on rendering the services and this requirement was satisfied in the present case. AIR 1971 SC 344 and AIR 1971 SC 1182, Applied. (Para 14)

Cases Referred: Chronological Paras
AIR 1975 SC 706 = (1975) 1 SCJ 497 9
AIR 1975 SC 846 = 1975 Tax LR 1455 7, 9, 14
AIR 1973 SC 724 = 1973 Tax LR 581 9, 10
AIR 1971 SC 344 = (1970) 2 SCR 348 14
AIR 1971 SC 1182 = 1971 (Supp) SCR 319 14
AIR 1968 SC 1119 = (1968) 3 SCR 374 7, 12
AIR 1965 SC 1107 = (1962) 2 SCR 477 7, 13
AIR 1963 SC 966 = (1963) Supp SCR 302 10
AIR 1962 SC 204 = (1962) 3 SCR 108 12
AIR 1931 PC 217 = 58 Ind App 313 12

Anoop Choudhari, for Petitioner; S. K. Dixit, (for No. 1) and G. P. Bajpai with A. P. Tare, (for No. 2), for Respondents.

SINGH, J.— This petition under Article 226 of the Constitution raises a question as to the validity of the fee imposed by Bye-law 7 of the Building Permission (Fees, Composition Fee) Bye-laws, 1973, of the Municipal Corporation, Raipur.

2. The petitioner has filed this petition as a guardian of his minor son. An application was made to the Corporation on behalf of the minor for permission to construct a building. As a prerequisite to the grant of permission, the petitioner was required to pay to the Corporation Rs. 225/- as fee payable under the bye-laws. The petitioner contends that the Madhya Pradesh Municipal Corporation Act, 1956, which is the relevant Statute, does not authorise the Corporation to charge any fee for grant of building permission, that the provisions under which the bye-laws purport to have been made do not refer to any fee and that the impost is a tax in the garb of fee. The petitioner prays that the bye-laws be quashed and that a direction be issued to the Corporation to refund the fee collected from the petitioner. The Corporation in its return has justified the imposition of the fee under Section 366 (3) of the Act. The Corporation denies that the fee is a tax and contends that the fee is correlated to the expenses incurred by the Corporation in discharging its duty of regulation and control of building activity within the Corporation limits. It is submitted that the expenses incurred by the Corporation in discharging the aforesaid duty are approximately equal to the collections made as fee under the impugned Bye-laws.

3. To appreciate the rival contentions, it is first necessary to notice the relevant provisions of the Act and the Bye-laws. Chapter XI of the Act deals with Taxation. Section 182 in this Chapter authorises the Corporation to impose taxes enumerated therein and Section 183 provides the procedure for imposition of tax. Chapter XXIV which occurs in Part VI of the Act deals with the subject of "Building Control". Sec. 293 which is the first section in this Chapter prohibits erection or re-erection of any building or making of any material external alteration to any building without the permission of the Commissioner, who is one of the municipal authorities charged with the duty of carrying out the provisions of the Act (Section 6). As required by Section 294, every person intending to erect or re-erect a building has to make two applications: (1) an application for approval of the site together with a site plan and (2) an application for permission to build together with a ground plan, elevation and Section of the building and a specification of the work to be done. The Commissioner may refuse to approve the site on the grounds mentioned in Section 296. The grounds on which permission to erect or re-erect building may be refused are contained in Sections 295 and 297. Speaking generally, a site may be disapproved if

erection or re-erection of the proposed building would be in contravention of a town planning scheme or any other provision of the Act or any other enactment; or if the site is in a portion within the limits of the city in which the position and direction of the streets have not been determined and the proposed building will obstruct or interfere with the construction in future of suitable streets or with the drainage, water-supply or ventilation, or if the site has been re-claimed or used as a place for depositing sewage, offensive matter or rubbish or carcases of dead animals or is otherwise insanitary or dangerous to health; or if the building is likely to interfere with a future town planning scheme. Permission for erection or re-erection cannot be granted by the Commissioner until the site is approved. Even after approval of the site permission to erect a building cannot be granted if the plans and specifications show that the proposed building is not in accordance with a town planning scheme or the provisions of the Act or any rule or bye-law made thereunder or any other enactment; or if the erection of the proposed building would be a nuisance or injurious to the inhabitants of the neighbourhood or to the public. Section 298 provides that the work of the erection of the building shall be executed in such manner under such supervision through such qualified agency and subject to such conditions or restrictions as may be prescribed by the Bye-laws. If the work of erection is not started within one year the sanction lapses but it can be renewed under Section 300. A new building cannot be occupied or used without first obtaining the permission of the Commissioner under Section 301. The section requires that after completion of the work a notice shall be given to the Commissioner who may refuse permission to occupy or use the building if the erection, construction or re-construction is in contravention of any provisions of the Act, or any rule or bye-law made thereunder or any other enactment for the time being in force. The section requires that all necessary facilities for inspection of the work shall be given to the Commissioner. The Commissioner has power under Section 307 to require removal of any work which has been executed without sanction or in contravention of the terms of sanction. These Sections in Chapter IV dealing with building control do not contain any provision for charging any fee. Section 366 which authorises imposition of a fee for every licence or written permission occurs in Chapter XXXIV (Part VIII) which contains General Provisions for the carrying on of the Municipal Administration. Section 366 which is the first section in this Chapter deals with licences and permissions. Section 366 (1) provides that whenever it is prescribed by or under the Act that the permission of the Commissioner is necessary for the doing of any act, such permission, unless otherwise expressly provided, be in writing. Section 366

(2) requires that every licence and permission shall be signed by the Commissioner and contain the particulars mentioned in the Section. Section 366 (3) which permits imposition of a fee reads:

"366 (3). Except when it is otherwise expressly provided in this Act or in any rule or bye-law made thereunder, a fee for every such licence or written permission may be charged at such rate as may be fixed by the Commissioner and such fee shall be payable by the person to whom the licence is granted."

4. The subject of Bye-laws is dealt with in Chapter XXXVII (Part X). Section 427 authorises the Corporation to make Bye-laws consistent with the provisions of the Act and the rules made thereunder for carrying out the provisions and intentions of the Act. The section also enumerates various topics under different heads on which Bye-laws can be made. The topics relating to construction of buildings occur in clause (28), but the topic of fee for obtaining permission to erect a building is not mentioned in this clause or anywhere else. Clause 45-D in the section refers to 'conditions, fees and limitations for compounding of offences'. So this clause is limited to the subject of compounding of offences.

(Contd. on Col. 2)

fences: fee chargeable for construction of building does not fall within it. The Bye-laws purport to have been made under clause (28) read with clause 45 (B) of Section 427. The relevant notification reads as follows:

"No. 961-XVIII-I.— In exercise of the powers conferred by sub-section (1) of Section 430 of the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956), the State Government hereby confirms the following bye-laws made by the Administrator, Municipal Corporation, Raipur under clause (28) read with clause (45-D) of Section 427 and clause (c) of sub-section (1) of Section 442 of the said Act, the same having been previously published as required by section 429 of the said Act, and they are now published as required by Section 431 thereof namely:"

Bye-law No. 7, which is the impugned bye-law, provides that the Commissioner on being satisfied that the application for grant of building permission is complete in all respects shall issue a notice to the applicant to deposit the fee in the Corporation treasury and produce in evidence the challan of depositing the fee as shown in the Schedule. The fee deposited is refunded under Bye-law 17 if building permission is refused. The Schedule which prescribes the amount of fee chargeable reads as follows:

SCHEDULE

(See Bye-law 7)

Item No	Type of construction	Built up area Sq. Meter to Sq. Meter	Fees Chargeable
1	2	3	4
1.	A building intended to be used for residence	0 75	Rs. P. 50.00
		76 125	100.00
		126 200	150.00
		201 300	225.00
		301 400	350.00
		401 600	500.00
		601 750	750.00
		751 1000	1250.00
		1001 1250	1500.00
		1251 1500	2000.00
		above 2500	4250.00
2.	A building intended to be used as shop, store house, ware house or for carrying trade or business or any other commercial purpose.	Fees prescribed as in Item No. 1 plus an additional charge of 5% of such amount of Fees:	
		Provided that for a built up area above 2500 Sq. Mtr. the fees charged shall be Rs. 15000.00	
6.	A building intended to be used as administrative block in a factory	Fees prescribed in Item No. 1	
4.	A building used for shop cum residence purposes	Fees as prescribed in Item No. 1 plus an additional charge of 25% of such amount of fees.	
5.	A building intended to be used as a Cinema or theatre Hall.	0 to 80 seats	
		Capacity	Rs. 4,000.00
		and above (80) seats capacity	Rs. 7,500.00
6.	A building intended to be used for any social, charitable, etc. purposes	5% of fees as prescribed in Item No. 1	

(e. g. Hospital, Schools, Clubs, Dharmashalas and similar types of buildings)

7. Addition, alteration with existing built up area or external addition or alteration which do not add to the built up area such as court-yard compound, alteration in elevation or roofing such as tiles to A. C. Sheet of Flat Surface addition, opening or closing
8. In case of addition or alteration in the proposed plan

9. Renewal of the building permission.

5. It is true, as argued by the learned counsel for the petitioner, that there is no separate provision in the Act authorising the Corporation to charge any fee for grant of building permission, but the general provision made in Section 366 (3) is sufficiently wide to cover such an authority. Permission of the Commissioner is needed for erection or re-erection of any building or for making any material alteration to any building under Section 294. As provided in Section 366 (1) such a permission has to be in writing. Section 366 (3) authorises charging of a fee for every written permission at such rate as may be fixed by the Commissioner. Thus the Act authorises the Commissioner to fix rates of fee for grant of building permission required under Section 294. The petitioner is, therefore, not right in his contention that no fee can at all be charged by the Corporation for grant of building permission.

6. We will now take up the next argument that the impugned Bye-laws have not been made under Section 366 (3) and, therefore, it cannot be said that the rate of fee has been validly fixed. We have already stated that the Bye-laws can be made under Section 427 on topics mentioned in that Section. We have also said that the topics enumerated do not cover the topic of fixation of rate of fees chargeable under Section 366 (3). Section 366 (3) in terms confers power on the Commissioner to fix the rate of fees chargeable under that section. That section does not require that Bye-laws have to be made for the fixation of rate. An order of the Commissioner is enough for fixation of rate of fees. Rate of fees is, therefore, not a subject which can be dealt with by the Bye-laws. The question then is whether the impugned Bye-law can be read as an order fixing the rate of fee under Section 366 (3). We were informed at the time of hearing of this petition that the Corporation stands superseded since long and the powers of the Corporation are exercised by the Administrator appointed by the Government under Section 423. We were further informed that the Administrator is also the Commissioner appointed under Section 54 of the

A flat rate of Rs. 25.00 in respect of building mentioned in Items 1, 3 and 6 and Rs. 100.00 in respect of building in Item Nos. 2, 4 and 5.

- (i) upto 5% Nil
- (ii) Between 6% Rs. 50.00 to 10%
- (iii) Above 10% Fresh application according to the Bye-laws.

5% of the amount of fees charged originally in respect of the building concerned."

Act. The Bye-law fixing the rate of fees was made by the Administrator who is also the Commissioner after previous publication and was confirmed by the Government. The Bye-law although ineffective as a Bye-law can be given effect to an order of the Commissioner fixing the rate of fee under Sec. 366 (3) for grant of building permission. To such a course, we do not find any valid objection. The requirement of previous publication and confirmation by the Government are not the formalities required for fixation of fees by an order of the Commissioner under Section 366 (3). These formalities were, therefore, unnecessarily taken; but that by itself will not lead to the invalidity of the fee rather it will show that not only the Commissioner, but the Government also thought that the rates fixed were reasonable. It is well settled that if while passing an order a wrong provision is quoted, that by itself will not invalidate the order and the exercise of the power will be referable to a jurisdiction which confers validity upon it. *Ut res magis valeat quam pereat*, which means that it is better for a thing to have effect than to be made void, is a salutary rule of construction. In our opinion, this principle should be applied in the present case and Bye-law No. 7 read with the Schedule should be given effect to as an order made by the Commissioner under Section 366 (3) and the unnecessary formality taken by the Administrator in obtaining the confirmation by the Government can be ignored.

7. We then come to the main question raised by the petitioner that the fee charged under the impugned Bye-law has no correlation to any service rendered by the Corporation and that the charge is really a tax in the garb of fee. The distinction between a tax and a fee has been settled by the Supreme Court in a series of cases. The last case now in the series to our knowledge is *State of Maharashtra v. Salvation Army*, AIR 1975 SC 846. The basic distinction between a tax and a fee is that the levy of tax is for the purposes of general revenue whereas a fee in the strict sense is payable as a sort of return or consideration for ser-

vices rendered and the collections made from imposition of fee are correlated to the expenses incurred in rendering the services. The use of the word 'fee' in an Act is not decisive of the question whether the legislature intended to confer a power to levy a fee in the strict sense and not a tax although prima facie the use of the word 'fee' will show that the power to levy tax was not intended to be conferred. We have already seen that the subject of taxation in the Act is dealt with in Chapter XI. Section 132 authorises the Corporation to levy the taxes mentioned therein and Section 133 prescribes the procedure for imposition of a tax. Having regard to the scheme of the Act, the authority conferred on the Commissioner under Section 366 (3) which occurs in Chapter XXXIV to charge fee for any written permission which he is authorised to give under the Act cannot be construed to be a power to impose any tax. This inference is strengthened from the fact that the fee can be charged under this section simply by an order passed by the Commissioner without even a resolution of the Corporation and the safeguards of the procedure contained in Section 133 for imposition of a tax are not applicable for imposition of a fee under this Section. The learned Deputy Advocate-General, who appeared for the Corporation, conceded that fee chargeable under Section 366 (3) is fee in the strict sense and that the section does not authorise imposition of a tax. It is, however, interesting to notice that an analogous provision in the Calcutta Municipal Act, 1951, was construed to authorise levy of a tax (*The Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107) but a similar provision in the Uttar Pradesh Municipalities Act 1916 was construed to authorise levy of a fee in the strict sense; *Nagar Mahapalika Varanasi v. Durga Das Bhattacharya*. AIR 1968 SC 1119. It is not necessary to pursue this matter any further in view of the stand taken by the learned Deputy Advocate-General.

8. The stand taken by the Corporation in the return (including additional return where more details are given) is that the regulatory provisions relating to building control contained in Chapter XXIV, necessitates the employment of a qualified staff. This staff consists of one Engineer who is also a qualified architect, 38 ward peons, 13 Sanitary Inspectors, one Building clerk and one Health Officer. The duties imposed on the Corporation by Secs. 295, 297, 298, 299 and 301 require inspection of site before its approval, scrutiny of plan before grant of building permission, checking and inspection during construction, inspection after completion of building, issue of completion certificate and permission to use or occupy the building. It is averred in the additional return that the staff mentioned above also looks after the public health and sanitation work of the Corporation but it has to devote 50 per cent of its time for carrying out the aforesaid

duties relating to building control. It is also averred that the total expenditure on salary alone of this staff comes to Rs. 1,86,000/- per year out of which at least half i. e. Rs. 93,000/-, can be said to be used for the purposes of carrying out the duties relating to building control. It is further averred that the Corporation has also to spend for expenses on the movement of officers and stationery for carrying out the said duties and the total expenditure roughly comes to Rupees 1,25,000/-. The collections made in the year 1974-75 as fee charged under the impugned Bye-law amount to Rs. 1,34,752.00. On these averments the Corporation submits that correlation to a reasonable degree is established between the quantum of the fee charged and the expenses incurred by the Corporation in providing services to the person who applies for building permission. After the additional return was filed, the learned counsel for the petitioner on our inquiry intimated as that the petitioner did not intend to file any rejoinder. In the circumstances, the facts stated in the additional return must be accepted and the question of legality of the fee must be judged on the facts stated therein.

9. The learned counsel for the petitioner has argued that the amount of fee collected by the Corporation under the impugned Bye-law is taken to the Municipal Fund and is not separately appropriated for meeting the expenses of the Corporation for grant of building permission and matters connected thereto. The Municipal Fund is constituted under Section 86 of the Act and Section 87 (1) (e) and (f) require that all moneys raised by any tax levied for the purposes of the Act and all fees payable and levied under the Act or any rules or Bye-laws made thereunder be credited to the Municipal Fund. Thus by the command of Section 87, the fees collected are paid into the Municipal Fund and this fact by itself is not sufficient to hold that the impugned levy is a tax and not fee. It is true that generally speaking the amount collected as fee should be earmarked to meet the expenses of rendering the services and should not be taken to the general revenue of the State; *State of Maharashtra v. Salvation Army* (Supra). But the fact that collections are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the services is not by itself decisive. This legal position can be taken to be settled by the decision of the Constitution Bench of the Supreme Court in *Government of Madras v. Zenith Lamps*, AIR 1973 SC 724 where while holding that "fees taken in Court" cannot be equated to taxes and that there must be a broad relationship with the fees collected and the cost of administration of civil justice, the Court approved the observations of Dayal, J., in an Allahabad case that the Constitution did not contemplate it to be an essential element of a fee that it should be credited to separate fund and not to a con-

solidated fund. It was pointed out that under Article 366 of the Constitution all revenues received by the State, whether as tax or as fee, have to go to the consolidated fund. The case of *Govt. of Madras v. Zenith Lamps* (supra) was followed in *State of Rajasthan v. Sajanlal*, AIR 1975 SC 706 at p. 725 and the same point was stressed. We have already stated that under the Act collections made from taxes and fees have all to be credited to the Municipal Fund under Section 87. Therefore, the fact that the fee collected is not credited to a separate fund is not of importance for deciding the question whether the levy in its real nature is a tax or fee.

10. It is also argued that the impugned fee is not levied at a uniform rate and the rate varies according to the plinth area of the proposed building which goes to show that it is a tax and not fee. It is pointed out in the same context that the rate of fee is higher if the proposed building is a shop or meant for business purposes. It is true that normally a fee is uniform and no account is taken of the paying capacity of the recipients of services, but absence of uniformity will not make it a tax if correlation is established between the total collections and the expenditure incurred for rendering the services. *S. T. Swamiar v. Commr. H. R. and C. E.* AIR 1963 SC 966 at p. 975; *Govt. of Madras v. Zenith Lamps* (supra).

11. The next question is whether the Corporation renders any service to the person applying for building permission and whether correlation is established between the total collections and the expenditure incurred in rendering the services. In our opinion, the inspection of site, approval of site, scrutiny of plan of proposed building, issue of building permission, inspection during construction, inspection after construction and issue of completion certificate and permission to occupy the building by the Corporation are all such acts which benefit the person who constructs the building and pays the fee and these acts can be said to be services rendered by the Corporation to him. The aforesaid regulatory acts of the Corporation done under Chapter XXIV of the Act are for ensuring safety and protection of health of the person owning the building and other persons residing in the locality. The fee is charged to cover the expenses incurred in the performance of these regulatory acts and it is not correct to say that no services are rendered by the Corporation to the persons paying the fee.

12. While dealing with Rule 11 of the Custom House Agents Licensing Rules, 1960, which levied a fee of Rs. 50/- for issue of the licence, the Supreme Court in *Chandrakant v. Jasjit Singh*, AIR 1962 SC 204 sustained the fee so far as fresh applicants were concerned on the ground that the expenses incurred in scrutinising the applications, subjecting the applicants to an examination and providing them with licences could be reim-

bursed from the fee collected and that the fee was not unreasonable having regard to the "services involved". The same amount of fee for renewal of licence was held to be excessive for in case of renewal all that was necessary for the licencing authority was to make an endorsement on the licence that it was renewed for a further period. In *Nagar Mahapalika, Varanasi v. Durga Das* (supra) the Supreme Court held that a licence fee charged under the U. P. Municipalities Act from rickshaw owners and rickshaw drivers was excessive as nearly 66% of the collections were used for paving bylanes and for lighting streets which were ordinary municipal services for the benefit of the general public. But the case further shows that the fee could be charged for payment of salary to the staff maintained for issuing licences and inspecting rickshaws as also for making provision for parking grounds. The Privy Council in *Pazundaung Bazar Co. Ltd. v. Municipal Corporation of the City of Rangoon*, AIR 1931 PC 217 considered a case relating to a licence fee levied under Sec. 178 (2) of the Rangoon City Municipal Act, 1922, for keeping open a private market. It was held that the licence fee might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation in respect of supervision and regulation of private markets. These cases support our conclusion that the Corporation can levy a fee under Section 366 (3) for the grant of building permission to cover the cost of inspection of site, approval of site, scrutiny of plan of proposed building, issue of building permission, inspection during construction and issue of completion certificate and permission to occupy the building. As already seen these regulatory duties flow from the provisions of the Act and performance thereof amounts to services rendered to the person who constructs the building.

13. In *Corporation of Calcutta v. Liberty Cinema* (supra) a fee was levied for keeping open a cinema house under the Calcutta Municipal Act, 1951. The said Act did not provide for rendering any service to the cinema owners. The Bye-laws provided for inspection of cinema houses to ensure that the licensee carried out the conditions of the licence. It was held that inspection of such a nature was not service rendered to the licensee. It was further held that the fee was in its true nature a tax. This case is clearly distinguishable on facts. We have already stated that the Corporation in the instant case renders service to the person who applies for building permission by performing various duties laid on it in Chapter XXIV of the Act.

14. The next thing to be seen is whether there is a reasonable correlation between the amount collected as fee and the expenses incurred in rendering the services. It has already been stated that according to the Corporation's additional return, which

is not controverted, the collections from fee in 1974-75 amounted to Rs. 1,34,752.00 and the expenditure on the services was roughly Rs. 1,25,000.00. The correlation necessary to sustain a fee need only be of a general nature and arithmetical exactitude has not to be established: *The Indian Mica and Micanite Industries Ltd. v. State of Bihar* AIR 1971 SC 1182 at p. 1187. In *Delhi Cloth and General Mills Ltd. v. Chief Commr. Delhi*, AIR 1971 SC 344, only 60% of the amount of licence fee was spent for rendering services and it was held that correlation was established. Similarly in *State of Maharashtra v. Salvation Army* (supra) 62% of the amount of fee was spent for rendering services and the Court held that requirement of correlation was satisfied. Having regard to these cases it has to be held that what is necessary is only an approximate correlation which is present in the instant case. Moreover, the learned Deputy Advocate-General has stated before us that the Corporation will not in future recover the fee at a higher rate for buildings to be used as business premises and that the fee for these buildings also will be recovered at the normal rate. This stand is consistent with justice because the purpose for which a building is constructed makes no difference to the Corporation on the question of expenses in rendering the services for which the fee is charged. This equation of rate of fee will further reduce the difference between the amount of fee and the expenditure for rendering services. The necessary correlation, therefore, is fully established.

15. For the reasons stated above, the petition fails and is dismissed, but without any order as to costs. The security amount shall be refunded to the petitioner.

Petition dismissed.

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G. P. SINGH AND C. P. SEN, JJ.

Laxmidas Patel, Petitioner v. The Indore Municipal Corporation, Indore and others, Respondents.

Misc. Petn. No. 727 of 1973, D/- 3-4-1975.

(A) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970) — Cess imposed by the Act — Not violative of Article 19 (1) (f) of Constitution. (Constitution of India, Article 19 (1) (f).)

The cess is imposed for a public purpose. It is true that it imposes a burden on owners of lands and buildings who are to derive no direct benefit from the tax and who may not be responsible for the existence of destitutes. But from this it cannot be held that the cess is an unreasonable restriction of the property rights of the owners under Article 19 (1) (f).

GS/GS/C522/75/CWM

After all destitutes cannot be taxed for providing relief to destitutes. AIR 1972 SC 845, Relied on. (Para 5)

It is true that lands and buildings within a Municipal Corporation are taxed by the Corporation under the Municipal Corporation Act, 1956, and by the State under the Nagariya Sthawar Sampatti Kar Adhiniyam, 1964 (14 of 1964). But from this alone it cannot be inferred that the cumulative burden imposed by all these Acts is extortionate or confiscatory. The maximum rate of cess which can be imposed by a local authority under the Act is one per cent of the annual letting value which in no sense can be called excessive. AIR 1970 SC 169 and AIR 1974 SC 2272 and AIR 1966 Madh Pra 298, Relied on. (Para 6)

(B) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970) — Cess imposed by the Act — Not violative of Article 14 of Constitution. (Constitution of India, Article 14).

The cess imposed is a tax on lands and buildings under Entry 49, List II. Under this entry owners of other properties cannot be taxed at all. The Act, therefore, cannot be said to discriminate between owners of lands and buildings and owners of other properties. AIR 1972 SC 845 Relied on. (Para 7)

If the State has decided to permit imposition of a tax under Entry 49, List II for raising funds to provide relief to destitutes, it cannot be argued that the State should have also legislated for imposition of taxes permitted under other entries for the same purpose. (Para 7)

(C) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970), Section 7 — Imposition of cess after following procedure under rules framed under earlier Ordinance — Not invalid in view of Section 25 of M. P. General Clauses Act (1957). (M. P. General Clauses Act (3 of 1958), Section 25).

The rules prescribing the manner of levy of the cess under the Act were made in August 1972. The cess was levied in February, 1972 under the Act after following the procedure prescribed by Rule 11 of the Rules made under the Ordinance which was repealed by the Act.

Held that the levy of cess was not invalid in view of the provisions of Section 25 of the M. P. General Clauses Act (1957).

(Para 10)

The word "enactment" in Section 25 will include an Ordinance. By force of Section 25, the rules under the Ordinance continued under the Act of 1970 as rules deemed to have been made under it until superseded by new rules. The Administrator and the Government were, therefore, right in following the procedure of levy under Rule 11 of the Rules made under the Ordinance.

(Para 10)

(D) M. P. Municipal Corporation Act (23 of 1956), Section 423 (1) — Interpretation — Supersession of Corporation — Administrator can be appointed.

The clauses (b) and (c) should be read as independent clauses (b) and (c) of sub-section (1) and not as part of clause (a). Section 423 (1), therefore, on a correct reading authorises the appointment of Administrator not only when a Corporation is dissolved but also when it is superseded. (Para 13)

(E) M. P. Municipal Corporation Act (23 of 1956), Section 423 (1) (b) — Administrator — Can function beyond a period of more than two years.

It is not correct to say that the Administrator cannot function beyond a period of more than two years because the total period of supersession cannot exceed two years. The Administrator can continue as provided by Section 423 (1) (b) "until the Corporation is reconstituted". (Para 14)

(F) M. P. Municipal Corporation Act (23 of 1956), Sections 423 (1) (c) and 66 (1) — Administrator — Has power to levy cess on lands and buildings for relief of destitutes under M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970).

Under Section 66 (1) it is the duty of the Corporation not only to fulfil any obligation imposed by the Corporation Act but also to fulfil any obligation imposed by "any other law for the time being in force". The Corporation is also authorised under this provision to use any means or measures which it may lawfully use or take for fulfilling its obligations. By virtue of this provision the duty to give relief to destitutes and the power to impose the cess for carrying out this duty, though imposed and conferred on the Corporation by another Act, also became a duty and power imposed and conferred under the Corporation Act. The Administrator, therefore, has authority to levy the cess. (Para 15)

(G) M. P. Municipal Corporation Act (23 of 1956), Section 423 — Administrator — Exercise of powers of Corporation.

As the Administrator exercises all the powers of the superseded Corporation, he is competent to exercise even those powers which if exercised by the Corporation require that a meeting be specially called for the purpose or that a resolution be passed by a special majority. AIR 1970 SC 1848 Relied on. (Para 16)

(H) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970), Section 7 (3) (a) — Rules under — Regulation of Assessment and Collection of Cess Rules (1971), Rr. 3 to 6 — Procedure of preparation and authentication of assessment list — Non-compliance — Bill for payment of cess is illegal.

The cess must be assessed by preparing an assessment list and the list must be authenticated after disposing of all objections before the stage of the collection of the cess is reached. The cess cannot be collected without assessment and assessment is complete only after the authentication of the assessment list. (Para 18)

Where the procedure of preparation and authentication of assessment list was not followed before issuing the bill for payment of the cess, the bill and the demand contained in it are illegal. (Para 18)

(I) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970), Section 7 (1) (ii) — Assessment of cess with reference to annual letting value determined under Act 14 of 1966 — Illegal.

The annual letting value with reference to which the cess is levied has to be determined in accordance with the law relating to the local authority concerned which in the instant case will mean the Corporation Act. So the cess is to be assessed with reference to the annual letting value determined in accordance with Sec. 138 of the Corporation Act. The assessment of the cess with reference to the annual letting value determined in accordance with Act 14 of 1966 is thus clearly illegal. (Para 19)

Cases Referred: Chronological Paras
AIR 1974 SC 2272 = 1974 Tax LR 2220 6
AIR 1972 SC 845 = (1972) 2 SCR 257 5, 7
AIR 1972 Madh Pra 95 = 1972 MPLJ 568 1
AIR 1970 SC 169 = (1970) 2 SCR 268 1
AIR 1970 SC 1848 = (1970) 2 SCJ 401 16
AIR 1966 Madh Pra 238 = 1966 MPLJ 683 6

S. R. Fadnis and P. V. Pandit, for Petitioner; A. P. Tare, Dy. Govt. Advocate, for Respondents.

SINGH, J.:— The petitioner by this petition under Articles 226 and 227 of the Constitution challenges the validity of Section 7 of the Madhya Pradesh Nirashriton Ki Sahayata Adhiniyam (Act 12 of 1970), hereinafter referred to as the Act, which authorises a local authority to levy a cess on lands and buildings within its local area. The petitioner also challenges the imposition and assessment of the cess and the bills issued to him for payment of tax on various grounds. An earlier challenge to the Act was negatived by this Court in Bhagwandas v. State of M. P., 1972 MPLJ 568 = (AIR 1972 Madh Pra 95). Grounds of challenge covered by that decision have not been repeated before us.

2. The petitioner is the owner of house No. 97, situated within the limits of the Municipal Corporation, Indore. The Indore Corporation was superseded by the State Government on 10th July 1970 and since then the Administrator appointed by the State Government carries on the duties of the Corporation. The Administrator is respondent No. 2 to this petition. The petitioner was served with a bill dated 5th September 1975 for payment of Rs. 48.64 as the cess assessed under the Act for the years 1971-72, 1972-73 and 1973-74.

3. The object of the Act as disclosed by its long title is "to make provision for assistance to destitutes by making it obliga-

v. Rambati Bai, AIR 1942 Nag 92, where it was held as follows:

"If the whole account is time-barred, then the ban imposed by Section 25 (3), Contract Act, would apply." This decision was followed in *Tulsiram Srikisan v. Zaboo Bhima*, AIR 1949 Nag 229, where their Lordships held:—

"In an account stated, it does not matter if some of the items are time-barred. It would be a different thing if all the items are time-barred and we see no reason to depart from the view expressed on this point in *Ganesh Prasad v. Rombati Bai*, AIR 1942 Nag 92."

The question arose also before a Full Bench of the Kerala High Court in *Chako Varkey v. Thommen Thomas*, AIR 1958 Ker 31. Their Lordships were called upon to construe Section 26 of the Travancore Contract Act which corresponds, word for word, to Section 25 of the Indian Contract Act, 1872, and their Lordships observed as follows—

"An account stated is no more than an agreement, and when the entire claim is barred as in this case prior to the date of the settlement, the account stated cannot give rise to any cause of action unless it amounts to an express promise within the meaning of Section 26 (3) of the Travancore Contract Act. . . . When the entire claim is not barred, but only a portion thereof of the maximum that can be said is that the consideration for the settlement is inadequate. The position however is different when the entire claim is barred; in such a case, there is no consideration at all and the agreement will be void unless it is saved by Section 26 (3) of the Travancore Contract Act."

We respectfully follow the rulings cited above and hold that the account stated in Ex. A. 1 on 30-5-1964 relates to a claim which was clearly time-barred on that date, and there being no express promise within the meaning of Section 25 (3) of the Indian Contract Act, to pay the time-barred debt, the plaintiff cannot rely upon it to save his claim from the bar of limitation. Both these points are answered against the plaintiff.

10. In the result, the judgment and decree of the trial court are set aside and the appeal allowed with costs throughout.

Appeal allowed.

AIR 1975 MADRAS 337
RAMAPRASADA RAO AND
MAHARAJAN, JJ.

Union of India Appellant v. T. L. Dakshinamurthy Respondent.

Appeal No. 506 at 1969, D/- 2-7-1974.*

*(Against decree of City Civil Court, Madras in O. S. No. 5079 of 1967.

CS/ES/B88/75/JHS

1975 Mad./22 XI G—25

(A) Limitation Act (1963), Article 7 — Decree for arrears of pay, reinstatement etc. — On demand of arrears, employee informed that amount would be settled after decision of appeal filed and requested to wait till then — Held, fresh contract came into existence and suit for arrears filed within 3 years of appellate court decision was in time. (Contract Act (1872), Section 2 (h).)

(Paras 9, 10)

Cases Referred: Chronological Paras
1974 Lab IC 949 = (1974) 1 Mad LJ 208 5

(1970) 2 SCJ 288 = (1970) 3 SCR 222 5

K. Venkateswara Rao, for Appellant; M. Anantharama Mudaliar and P. Mohan, for Respondent.

RAMAPRASADA RAO, J.— The Union of India owning the Southern Railway and represented by its General Manager, who was the unsuccessful defendant in O. S. No. 5079 of 1967 on the file of the City Civil Court Madras, is the appellant. The plaintiff, a permanent employee in the Southern Railway, was placed under suspension on and from 8-5-1950 on certain charges levelled against him. Ultimately, under Ex. B 1, dated 15-6-1950 the plaintiff's services were terminated with effect from the afternoon of 22-6-1950. He was given a month's salary in lieu of notice in accordance with the terms and conditions of the service. The plaintiff took up the matter in appeal before the Railway Board, but was not successful. Thereafter on 7-7-1953, he filed a suit O. S. No. 335 of 1956 seeking for a declaration that the order dated 15-6-1950 and contained in Ex. B1 was illegal and for setting aside the order and for arrears of salary as also for future salary. Under Ex B 27, the trial Judge dismissed the action. The plaintiff took up the matter in appeal C. C. A. No. 93 of 1957. Basheer Ahmed Sayeed, J. allowed the appeal and decreed the suit. It is relevant to extract the decree in the City Civil Court appeal. It has been exhibited in the trial court as Ex. A. 1. The relevant portion of the decree runs as follows:

"1. That the order of the lower Court be and hereby is set aside.

2. That the order dated 15-6-1950 of the General Manager terminating the services of the appellant (petitioner) herein is illegal, improper, void and inoperative and that the appellant petitioner be reinstated in his original post in the Railway Administration.

3. That the respondent do pay to the appellant-petitioner herein a sum of Rs. 118 and 94 naya paise being half of salary and dearness allowance payable to the petitioner from 8-5-1950 to 22-6-1950 and Rs. 5069 and 56 np. being full salary due from 22-6-1950 to 7-7-1953 the date of plaint and also future salary at the same rate, and

4. that the respondent-defendant do pay to the appellant-plaintiff his costs of the suit O. S. 335 of 1956 on the file of the City

Civil Court, Madras, which shall be taxed and ascertained by the said Court.

5. that the respondent-defendant do pay to the appellant-petitioner — a sum of Rs. 989 and 3 np. as and for his costs of this appeal."

It is seen from clause 3 of the decree, that the plaintiff was not only given a decree for half pay and allowance during the period when he was under suspension, but he was also given full salary from 22-6-1950 to 7-7-1953, the date of suit, and also 'future salary at the same rate'. Pursuant to the judgment of this Court, the plaintiff was reinstated in service as is seen from Ex B-2 dated 22-8-1959. It was made clear even in Ex. B 2, that, as regards the payment of the amounts claimed under the decree, since the administration had by then filed a Letters Patent appeal against the judgment of Basheer Ahmed Sayeed, J. the result of the same may be awaited. It is common ground that the plaintiff joined duty on 22-8-1959. The plaintiff, however, was reiterating his demands regarding the settlement of his arrears of salary as per the decree, as apparently, he was not satisfied with the bare reference to it in Ex B. 2. In answer to such representations made by the plaintiff, the defendant wrote under Ex. A. 2, dated 27-6-1960 as follows—

"The Letters Patent appeal preferred by the administration is pending in the High Court, Madras, and you may await the result of appeal for the final decision regarding fixation of pay, seniority, claim for arrears, etc. The position and pay offered now are purely provisional and subject to review on the disposal of the Letters Patent appeal."

The result was that the plaintiff did not pursue his claim for arrears of salary either by making further representations to the defendants-appellants nor did he take any steps to file a suit for its recovery in a manner known to law. He waited till the judgment in the Letters Patent appeal was pronounced. On 29-9-1961 under Ex. A-3 a Bench of this court disposed of the Letters Patent appeal. They dismissed the same and observed in the judgment as follows:—

"One small correction with regard to the decree passed by the learned Judge is, however, necessary. Paragraph 3 of the decree declared that the appellant should pay certain sums to the respondent and 'also future salary at the same rate'. Future salary will be governed by the service conditions. We are of opinion that there is no necessity for that clause in the decree, and we accordingly direct that the phrase 'and also future salary at the same rate' in paragraph 3 of the decree in C. C. C. A. 93 of 1957 be deleted."

In other respects, the decision of the learned Appellate Judge in C. C. C. A. 98 of 1957 was confirmed. Subsequent to the disposal of the Letters Patent appeal,

the defendant settled all claims of the plaintiff including the salary after refixation upto 7-7-1953, but did not pay the salary from 8-7-1953. The plaintiff, therefore, had to come to court for relief. The present action springs from the above narration of events.

2. In the present suit, the plaintiff claimed a sum of Rs. 15300.65 for arrears of salary upto 27-8-1959. Obviously, this is so made because the plaintiff joined duty on 27-8-1959. The plaintiff also claimed interest and sought for a decree, basing his cause of action on 22-6-1950, when his services were unlawfully terminated, on 25-2-1959, when Basheer Ahmed Sayeed, J., allowed the appeal, holding the order of termination of service as void, on 27-6-1960 when under Ex. A-2, the defendant wanted the plaintiff to await the result of the Letters Patent appeal by then filed by the Union of India, and on 29-9-1961, when the Letters Patent appeal was disposed of. The defence to the action was mainly based on the bar of the claim under the statute of limitations. According to the defendant, there was no acknowledgment of any liability to pay the arrears of salary from 8-7-1953 at any time and that Ex. A-2 does not project any such acknowledgment as averred by the plaintiff and that, therefore, the claim is barred by limitation. The defendant denied liability to pay the interest and denied the express allegation made that the defendant practised fraud on the plaintiff. As we said the main plea is one of limitation. The learned Judge framed the following issues:—

"1. Is the plaintiff entitled to any arrears of salary and if so, for what period and what is the correct amount?"

2. Is the Union of India liable to pay Rs. 7500/- for the loss of emoluments from the date of reinstatement, viz., 28-8-1959?

3. Is the plaintiff entitled to interest on the arrears of salary withheld by the defendant?

4. Is the plaintiff entitled to fixation of salary according to the position and seniority which he would have occupied had he been in service?

5. Is the claim barred by limitation?

6. To what relief is the plaintiff entitled?"

On Issue No. 5, he held that the claim was not barred by limitation, as the action was filed within three years from the date of the judgment in L. P. A. No. 128 of 1959. On the other issues, he found that the plaintiff was entitled to the salary as also interest at 6 per cent. at any rate from the date of judgment of the Letters Patent Appeal till the amount is realised and decreed the suit with proportionate costs.

3. The learned Judge, however, disallowed the sum of Rs. 7,500/- claimed by the plaintiff towards the loss of emoluments from the date of reinstatement. It is as against this judgment of the trial court that the Union of India has come up to this court in appeal.

4. The sole question urged before me is that the suit originally filed in this court as a pauper in 1964 is barred by limitation, in that the claim made therein for salary for the period 8-7-1953 to 28-8-1959 is beyond three years from the date when such salary accrued due. On the other hand, it is stated that a fresh cause of action was created under Ext. A-2 and that the respondent was restrained from instituting an action on the representations made by the defendant under Ext. A-2 and that, therefore, the date of judgment in the Letters Patent Appeal, namely, 29-9-1961, gave a fresh cause of action to the suit and thus calculated the suit filed on 4-9-1964 was in time.

5. Mr. Venkateswara Rao, learned counsel for the appellant, relied on certain observations of the Supreme Court in *Jaichand Sawhney v. Union of India*, 1970-2 SCJ 288 in support of his contention that the suit is barred by time. In that case there was no demand for reinstatement by the aggrieved person after the Civil Court directed such reinstatement after setting aside the order of dismissal. It appears, however, from the recitals in the judgment that he filed straightway a suit for setting aside the order of dismissal on the ground that the principles of natural justice were not borne in mind, as he was not given an opportunity to show cause against the action proposed. The plaintiff also claimed arrears of salary for a considerable period of time, which was well over three years beyond the date of filing of the suit. In fact he was removed from service in October 1959, and he filed the suit long thereafter. The contention raised by the Union of India in that suit was that the period of limitation under Article 102 of the Limitation Act, 1908, commenced to run when the wages accrued due and the wages accrued due when in law the servant became entitled to the wages and as the salary was payable month after month, the plaintiff therein was not entitled to the salary as claimed because it was beyond three years. There, the learned Judges did not have occasion to consider the impact of a request by an aggrieved party to the railways seeking for the payment of arrears of salary in response to which the railways replied that the person can wait till a certain event happens and in this case till the Letters Patent Appeal is disposed of. This particular feature which

is present in the instant case, makes the ratio in 1970-2 SCJ 288 distinguishable. As a matter of fact, Ismail, J., had occasion to consider the content of the ratio in the above case and he observed that, having regard to the facts which he was noticing the decision of the Supreme Court did not apply, as if it is of universal application, as he was of the view that a particular exhibit noticed by him in the suit decided upon constituted an acknowledgment of liability on the part of the railways to pay the arrears of salary ranging over a period commencing from 21-3-1957 to 7-2-1962. He also observed that the Supreme Court had no occasion to deal with the question of acknowledgment and in that context also distinguished. He expressed his dissent (*vide Union of India v. Kanniah*, 1974-1 Mad LJ 208 = (1974 Lab IC 949)).

6. It has, therefore, become necessary for us to consider whether there are certain peculiar or singular features in this case, which would take the case out of the bare rule laid by the Supreme Court in the above case. We have already referred to the fact that the respondent joined duty or was allowed to join duty on 28-8-1959 pursuant to the orders of Basheer Ahmed Sayeed, J., in *C. C. C. A. No. 93 of 1957*. Soon thereafter, the respondent made frantic representations regarding the arrears of pay payable to him. This was obviously to further the decree, which he obtained from the learned Judge as reflected in Clause 3 of the decree already extracted. The learned Judge said that the plaintiff would also be entitled to future salary at the same rate. When the order of reinstatement was passed, the respondent was informed that regarding the payment of the amounts claimed under the decree, since the administration has filed the Letters Patent appeal, the result of the same may be awaited. The respondent was not satisfied apparently with this manner of reply and he pursued the matter again by making representations on 9-9-1959, 27-10-1959 and 15-12-1959. We are able to perceive the content of such representations though they have not been exhibited in the instant case. Apparently, the respondent wanted relief and particularly a settlement of accounts in relation to the arrears of salary by then due and payable by the railways in accordance with the judgment and decree of this court. In answer to the specific request, the respondent was asked to await the result of the Letters Patent Appeal for the final decision regarding the claim for arrears of salary, allowance etc. The railways also made it clear that they would review the position on the disposal of the Letters Patent Appeal. On the strength of this, it is said that a fresh cause of action has arisen, which would

entitle the plaintiff to lay his cause of action on the recitals in Ext. A-2, and claim the arrears payable to him during the period 8-7-1953 to 28-8-1959. The learned trial Judge accepted the contention, but without much of discussion that Ext. A-2 would save the bar of limitation. He would not agree with the contention of the respondent that as a sum of Rupees 5188.50 was paid on 9-7-1963, by the administration towards the decree in O. S. No. 335 of 1956, there was a payment towards the debt due within the meaning of Section 19 of the Limitation Act, 1963, which would save the bar of limitation. It is not urged before us that such a part payment made on 9-7-1963 would constitute an acknowledgment or would avoid the bar of limitation. In fact, we are of the view that such a contention is not open to the respondent for the reason that Section 19 of the Limitation Act deals with the effect of payment on account of debt or of interest on a legacy made before the expiration of the prescribed period by the person liable to pay the debt. It is not pretended that the Union of India made such a payment on 9-7-1963 towards the debt and that such a payment was made before the expiration of the period of limitation prescribed for claiming such debts. It is only in such circumstances a fresh period of limitation shall be computed from the time when the payment was made. No such case has arisen before us in the instant case for consideration. The only surviving circumstance, which requires a serious discussion is whether Ex. A-2 does create a new situation in the eye of law, which would save the bar of limitation which undoubtedly looms large in this case.

7. Mr. Venkateswara Rao, however, would refer to an apparent discrepancy in the decree of the learned Judges who decided the Letters Patent Appeal. In that judgment, the learned Judges were of the view that the plaintiff would be entitled to future salary as a matter of course. They expressed in canny terms that only a small correction was needed in the decree as drafted and which had reference to the judgment of Basheer Ahmed Sayeed, J. While making the small correction, they made their minds very clear and held that the appellant would be entitled to future salary and that such payment would be governed by the service conditions. It would be too much to read between the lines of this portion of the judgment of the learned Judges to say that there has been a revision of the decree of the first appellate Judge resulting in a total denial of the plaintiff of his right to claim future salary. On the other hand, we are of the view, that the learned Judges said that the plaintiff would be entitled to

future salary, but it would be governed by the service conditions and not to be paid at the same rate as Basheer Ahmed Sayeed, J., thought. That this was their view is also clear from the language deployed by the learned Judges. They characterised the treatment of the decree in the manner they did as a small correction. They intended to revise the decree of the learned Appellate Judge. They, however, for the reasons better known to themselves felt that there was no necessity for the clause in the decree. Probably in that context the decree drafted by this court in the Letters Patent Appeal did not provide for the same. Nevertheless, we are of the view that notwithstanding the absence of such a provision in the decree as the judgment provides positively for the payment of future salary to the plaintiff, the argument of Mr. Venkateswara Rao, that the decree does not *ex facie* provide for the same cannot be taken undue advantage of by the Union Government.

8. We may add that the contention now raised by the Union of India on the basis of a so-called omission in the decree so as to press a bar of limitation against a poor employee of theirs is rather unfortunate.

9. The question, is how far Ex. A-2 would provide a fresh cause of action to the plaintiff to lay his claim for the arrears of salary for the period 8-7-1953 to 28-8-1959. We have already referred to the events that led to the reinstatement of the plaintiff on 28-8-1959. This was as a direct result of the judgment of this court in Letters Patent Appeal which was delivered on 25-2-1959 as seen from Ex. A-1. The applications of the plaintiff for payment of the arrears of salary pursuant to the judgment of this court were of no avail. But he was confronted with the reply wherein he was asked to await the result of the appeal for final decision regarding the claims of pay, seniority, claim for arrears etc. It is in this context that the elementary principles laid down in the Contract Act would loom large. Section 2 of the Indian Contract Act, which deals with definitions which are always considered by eminent jurists as explanatory of the expressions used by the legislature can be referred to for purposes of finding out whether a new contract has been made out in the course of correspondence between the plaintiff and the railways, which ultimately resulted in the issuance of Ex. A-2, by the defendant to the plaintiff. Section 2 (a) provides that when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. Here, the railways made a pro-

posal to the plaintiff asking him to abstain from taking further proceedings pursuant to the judgment of Basheer Ahmed Sayeed, J., till the disposal of the Letters Patent Appeal. Section 2 (b) says that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and that a proposal, when accepted, becomes a promise. In the instant case by conduct it is clear that the plaintiff signified his assent to await the decision of the Letters Patent Appeal and he did not pursue the matter in relation to his claim for arrears of salary till the judgment of this court was pronounced in Letters Patent Appeal. Therefore, it follows that the proposal of the railway has been accepted by the plaintiff. The consideration for the promise is forbearance to sue. In fact, Section 2 (d) provides that, when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise. The consideration in the instant case is the promisee has abstained from pursuing his claim for arrears on the specific representation made by the railways that he may wait till the disposal of the Letters Patent Appeal. Section 2 (e) says that every promise and every set of promises, forming the consideration for each other, is an agreement and an agreement enforceable by law is a contract under Section 2 (h). We are, therefore, of the view that the circumstances in which the railway was prompted to issue this letter and the supervening express conduct of the plaintiff in having abstained from instituting an action to further his claim till this court pronounced its judgment in the Letters Patent appeal, obviously can be terminologically called a new contract entered into between the parties on which rights and obligations obviously would flow from one to the other. The question, therefore, is what are the rights that could reasonably be held to flow from such contract deemed to have been forged between the railways and the plaintiff. We have already referred to the fact that forbearance to sue even though no definite time is allowed is a valuable consideration for a promise, provided the promisee has a reasonable ground to believe that he has good cause of action. In the case before us the plaintiff succeeded. It was the defendant, who took up the matter further in appeal. The plaintiff, therefore, can be said to be a person, who had a reasonable ground to believe that he has a good cause of action. He acceded to the request of the railways in that he agreed to forbear from suing or pursuing his claim till the Letters Patent Ap-

peal was disposed of. As pointed out by the author, Pollock and Mulla on the Indian Contract Act, 9th Edn. page 256—

"Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined is free to bring it before the proper court and have the judgment of the court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not; for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here."

We are of the view that the context and the language employed by the railways under Ex. A-2 did prompt the plaintiff to forbear from suing on his cause of action which was then quite alive and which was processable in the eye of law and which he did not further (pursue?) because of the proposal made by the railways and which he accepted in his turn; the cumulative effect of all such events is the springing of a promise ultimately resulting in an enforceable contract in the eye of law. It is in this view we are of opinion that Ex. A-2 has to be interpreted as a fresh contract between the parties.

10. Thus interpreted, if the suit has been filed well within three years from the date of judgment of the Letters Patent Appeal by the learned judges of the Division Bench, it follows that under Art. 7 of the Limitation Act the suit filed on 4-9-1964 is well within time. We reiterate that Ex. A-2 which has been interpreted as a contract, as it is popularly and legally understood, is one under which the defendant wanted to request the plaintiff not only to postpone the action but also would impliedly mean that they admitted their responsibility and liability to pay such arrears as was decreed by the appellate court, but only wanted to postpone such settlement until a decision by the Division Bench was arrived at. In this view, therefore, the suit laid on 4-9-1964 is well within time, though the arrears of salary claimed relates to a period commencing from 8-7-1953 to 28-8-1959. As the only question, which was raised in the appeal is one of limitation and as we are not in agreement with the contentions of the learned counsel for the appellant the appeal fails and it is dismissed. The judgment of the court below is confirmed in all other res-

pects also. The respondent will be entitled to costs.

Appeal dismissed.

AIR 1975 MADRAS 342

VEERASWAMI, C. J. AND
NATARAJAN, J.

Hepzibah Annathai Rengachari, Appellant v. R. Ananthalakshmi Rangachari, Respondent.

O. S. Appeal No. 60 of 1973, D/- 18-6-1974.*

(A) Succession Act (1925), Section 255 — Entirety of assets to be disclosed in affidavit — Joint account in Bank — Amount payable to either or survivor is exception to general rule under Section 255 — Wife entitled to draw amount in her own right — Letters of Administration unnecessary — Court not barred from granting letters to meet banker's demand: Judgment of Paul, J., in Appln. No. 466 of 1973, D/- 19-4-1973, Reversed,

Normally, when letters of Administration are applied for, the entirety of the assets of the deceased should be disclosed in the affidavit of assets for purposes of court-fees. AIR 1955 Mad 411, Rel. on.

Where it is a case of joint account in a bank and the amount is payable to either or survivor, the nature of the case requires that it is treated as an exception to general rule under Section 255. The surviving wife is entitled to draw the money in her own right and is not obliged even to apply for letters of Administration. In such a case the court is not barred from granting letters as a formality to meet bankers' demand. Similar consideration will apply to other claim of the death benefits of the husband and the right to draw the amount can be exercised by the surviving wife independently of the will. Judgment of Paul, J., in Appln. No. 466 of 1973, D/- 19-4-1973, Reversed. (Paras 2, 3)

(B) Succession Act (1925), Section 255 — Civil P. C. (1908), Section 100 — Finality of order depends upon circumstances of each case — Letters of Administration granted in absence of other party at whose instance the same was set aside — Order being final, objection to the maintainability of appeal, not acceptable.

What a final order would be in a case will depend not merely on the abstract proposition of law but also the circumstances of each case. In the instant case

*Against judgment and order of Paul, J., in Appln. No. 466 of 1973, D/- 19-4-1973).

ES/ES/B506/75/SGK

the impugned order was final, there being nothing more to be considered as far as the main petition for granting letters of Administration was concerned. As a matter of fact letters of administration were granted in absence of other party at whose instance the same had been set aside. The objection to the maintainability of the appeal on the ground of finality of orders, could not, therefore, be accepted. (Para 5)

Cases Referred: Chronological Paras
AIR 1955 Mad 411 = 68 Mad LW 489 2

P. H. Pandian, for Appellant: V. C. Srikumar, for Respondent.

VEERASWAMI, C. J.:— The appeal arises from an order of Paul, J., made in an application of the appellant for grant of letters of administration. She claimed that she was the wife of one S. Rangachariar, who died at Madras leaving a will dated 14-1-1964. He had an account No. 3188 in the United Commercial Bank, Purasawalkam, jointly with the appellant and her daughter one Rebecca. Also, she claimed the death benefit payable by the Arabian Oil Co. In respect of these two items, she applied for Letters of Administration valuing them together at Rs. 59,793.76. The respondent claiming to be the senior wife of the deceased, appeared on the scene at a later stage and contended that the assets left by Rangachari amounted to much more than the value mentioned in the affidavit of assets, and that all the assets of the deceased should be valued and brought into the affidavit of assets of the deceased in order that Letters of Administration might be granted subject to other conditions, if any. This objection prevailed with Paul, J., except in respect of the property covered by a sale deed which stood in the name of the appellant.

2. Normally, when Letters of Administration are applied for, as envisaged by the provisions of Chapter II of the Indian Succession Act, the entirety of the assets of the deceased should be disclosed in the affidavit of assets which will count for valuation for purposes of court-fee. That this is so, was held in Parthasarathi Naidu In re, 68 Mad LW 489 = (1955-1 Mad LJ 542 = AIR 1955 Mad 411). As pointed out in that decision, the rule has exceptions as provided by Sections 254 to 257. Though the appellant sought to invoke Section 254 (1), in our opinion, the real exception applicable to this case is what is contained in Section 255. Where it is a case of joint account in a Bank and the amount is payable to either or survivor, the nature of the case requires that it is treated as an exception to the general rule we mentioned. This is because, though the will in this case devised the entire assets of the deceased testator in favour of the appellant, inasmuch as the account was joint and the

amount standing to its credit was payable to either or survivor, the appellant, as between the Bank and herself, would be entitled to draw the same in her own right. On that view, it may not even be necessary to obtain Letters of Administration, for, there is in that case little to administer, and, as we mentioned, her right to draw the amount can be independently of the will. In the case of payment of the death benefit, that again, as we take it, was payable to the wife and though it may not stand on the same footing as the joint account aforesaid, still her right to draw the money as death benefit would likewise arise even independent of the will. That being so, we are inclined to think that this is a case where Letters of Administration are totally unnecessary for the appellant so far as the above two items are concerned.

3. It is, however, strenuously contended before us that, even on the footing of the amount payable to either or survivor, since there is no presumption in favour of the wife, all that could be said is that there would be a resulting trust in favour of the surviving wife, and that, as the respondent is the senior wife of the deceased, she would be entitled to share that amount. This argument, as we think, is mixed up with the real issue, namely, whether the appellant could invoke any of the exceptions to the general rule. That question does not involve consideration and disposal of the rights of the contesting claimants in respect of the two amounts. From the stand point of administration and the requirement of mentioning the items the deceased left in the affidavit of assets, which will eventually bear on court-fee, we are of opinion that at this stage substantive rights of the contending claimants do not fall to be decided. All that we are concerned is to see whether the nature of the case requires application of the exception contained in Section 255. We think that, in this case, the nature of the case being such, namely, a joint account payable to either or survivor, the surviving wife is entitled to draw the money in her own right. Apart from that, she is not obliged even to apply for Letters of Administration. But, since the Bankers, as we are told, had insisted upon such Letters she had applied. In such a case, the court is not barred from granting Letters as a formality to enable the appellant to meet the demands of the Bankers in order to draw the amount. As we opined earlier, the consideration will apply to the other claim on account of the death benefit of the husband.

4. Learned Counsel for the respondent strongly relied on In the matter of Varadaraja Mudaliar, to contend that

in the case of either or survivor account the money belonged to the estate of the husband, and that being so, no exception could be applied to the general rule that the entire assets should be disclosed in the affidavit of assets. But this contention is only begging the question. The authority cited does not go beyond what we have already mentioned that in case of such account, the survivor may hold the proceeds of the account in trust, if there are other valid claimants to the same. But that is entirely a matter different from, as we said, what we are concerned.

5. Also it is contended for the respondent, that the order of Paul J., is not a final one and as such the appeal did not lie. What a final order would be in a case, will depend not merely on the abstract proposition of law but also the circumstances of each case. Cases on this part are legion. Suffice to say that in the instant case Paul J.'s order was final, because there was nothing more to be considered so far as the main petition for granting of Letters of Administration is concerned. As a matter of fact, the appellant had once obtained such Letters, but it happened to be in the absence of the respondent at whose instance the earlier order had been set aside. The objection as to the maintainability of the appeal cannot, therefore, be accepted.

6. We accordingly allow the appeal. No costs.

Appeal allowed.

AIR 1975 MADRAS 343

N. S. RAMASWAMI, J.

V. P. Padmavathi Ammal and others, Appellants v. P. S. Swaminatha Iyer and others, Respondents.

Appeal No. 477 of 1969 and C. R. P. No. 2479 of 1967, D/- 11-2-1975.*

(A) T. P. Act (1882), Section 69 (3) — Purchase by mortgagee's nominee — Effect of — Suit by purchaser for possession — Plea by mortgagor-defendant that sale is to mortgagee's nominee, is not barred by Section 69 (3).

In a suit for possession by the purchaser of property sold in exercise of the power by the mortgagee under Section 69 (1), a plea by the mortgagor-defendant in defence that the plaintiff was only a nominee of the mortgagee is not barred by Section 69 (3). It cannot be contended that the plea amounts to saying that the exercise of power by the mortgagee had been done improperly or irregularly and so the defence is covered by Sec. 69 (3).

*(Against decree of City Civil J., Madras in O. S. No. 1953 of 1961 etc.).

ES/FS/B658/75/DRG

If really the plaintiff is the nominee of the mortgagee the sale would be ab initio void. It is not a mere improper or irregular exercise of the power of sale. AIR 1943 Mad 301, Rel. on. (Para 2)

Cases Referred: Chronological Paras
AIR 1943 Mad 301 = (1943) 1 Mad LJ 92

AIR 1940 Mad 903 = 1940 Mad WN 772

JUDGMENT:— The legal representatives of a mortgagor whose property had been sold under Section 69 of the Transfer of Property Act are the appellants in the appeal and the petitioners in the revision petition. The plaintiff who is the auction purchaser of the property filed the suit for possession. It was resisted by the legal representatives of the mortgagor who have been impleaded as defendants 1 to 8 in the suit, on the ground that the plaintiff is only a nominee of the mortgagee and that therefore the private sale under Section 69 of the Transfer of Property Act is wholly invalid. An issue was framed touching the above question. However, at the time of the trial, when the defendants wanted to cross-examine the plaintiff while he was in the witness-box, regarding the question whether he was only a nominee of the mortgagee, the court below held that by virtue of sub-section (3) of Section 69, it was not open to the defendants to attack the sale in the manner in which they tried to do, and disallowed the cross-examination which was sought to be made. The learned Judge passed an order holding that the defendants cannot be permitted to put any question to the plaintiff and his witnesses regarding the question whether the plaintiff was only a nominee of the mortgagee. Against the abovesaid order, the revision petition is filed. As the defendants had been prevented from cross-examining the plaintiff, they did not take further part in the trial of the suit and the suit was decreed. Against the decree, the appeal has been filed.

2. I am satisfied that the order of the court below disallowing questions in cross-examination regarding the plea taken by the defendants is wholly wrong. Sub-section (3) of Section 69 which has been relied on by the court below is in the following terms—

"When a sale has been made in professed exercise of such power, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damaged by an unauthorised or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power."

It is contended on behalf of the plaintiff-respondent that the plea taken by the defendants amounts to saying that there had been improper or irregular exercise of the power conferred on the mortgagee under Section 69 and that therefore the provisions contained in sub-section (3) quoted above would apply. The contention is that as the defendants attack the plaintiff's title only on the ground that the exercise of the power conferred on the mortgagee had been improper and irregular, their remedy is only by way of damages as contemplated under sub-section (3) and that the title itself cannot be questioned. This contention is not correct because the defendants are not attacking the sale in favour of the plaintiff on any of the three grounds mentioned in sub-section (3). On the contrary, they attack the sale as wholly invalid on the ground that the plaintiff is only an alias for the mortgagee. It cannot be disputed and as a matter of fact it is not disputed that if the mortgagee himself purchases the property under Section 69 of the Transfer of Property Act, such a sale would be wholly void as a person cannot sell the property to himself. It is to be noted that under Section 69, the mortgagee is given the power of sale and therefore he is the seller. He cannot possibly sell the property to himself. If any such sale is purported to be made it would be wholly void. It has been held so by this Court in *Egmore Benefit Society v. Aburupammal*, 1943-1 Mad LJ 92 = (AIR 1943 Mad 301). Therefore, if the sale under Section 69 is in favour of the mortgagee himself, it cannot be contended that the mortgagor cannot attack the title of the purchaser. Sub-section (3) of Section 69 would not be a bar against the mortgagor questioning the title in such a sale. But what is contended on behalf of the plaintiff is that in the present case, the mortgagee himself has not purchased the property and that the plea of the defendants is only that the plaintiff is a nominee of the mortgagee. In the present appeal and the revision petition, I am not concerned with the question whether the plaintiff is really a nominee of the mortgagee or not. That is a matter which has still to be investigated. It is quite possible that the defence taken by the defendants that the plaintiff is only a nominee of the mortgagee is not factually sustainable, but as I said, that is not a matter to be considered in the present appeal and the revision petition. The question is whether the court below is right in shutting out cross-examination by the defendants on the above question. I am quite clear that the defence taken by the defendants is not one covered by sub-section (3) of Section 69. It cannot be legitimately contended that that plea amounts to saying that the exercise of power by

the mortgagee had been done improperly or irregularly. If really the plaintiff is a nominee of the mortgagee, he does not stand on any different footing than the mortgagee himself. Regarding the present question it does not matter whether the sale is in the name of the mortgagee himself or in the name of his nominee. If the mortgagee cannot effect a valid sale in his favour, by merely putting up his nominee, the position would not be different. Therefore, if really the plaintiff is a nominee of the mortgagee, the sale would be ab initio void. It is not a mere improper or irregular exercise of the power of sale as sought to be made out by the plaintiff. The decision reported in *Govindasami Naiker v. Pukhraj Sowcar*, 1940 Mad WN 772 = (AIR 1940 Mad 903), relied on by the court below does not cover the present question.

3. The result is the appeal and the revision petition are allowed. The decree and judgment are set aside and the suit is remitted to the trial Court for fresh disposal, according to law and in the light of the observations above. The Court-fee paid on the appeal memorandum shall be refunded to the appellants. No costs in the appeal as well as the revision petition. The suit being very old, it should be disposed of by the trial Court within two months from this date. Appeal allowed.

AIR 1975 MADRAS 345

K. VEERASWAMI, C. J. AND
VARADARAJAN, J.

Ghousia Begum, Appellant v. The Union Territory of Pondicherry, Respondent.

Appeal No. 167 of 1970 (P) and W. P. 2795 of 1970 (P). D/- 6-3-1974.

(A) Land Acquisition Act (1894), Sections 24, 4 (1) — Objection to acquisition — Requirement for own business is not a valid ground of objection.

Under the provisions of the Land Acquisition Act, it is not open to the owner of the land sought to be acquired, to object to the acquisition on the ground that it affects his right to carry on his business in the particular land sought to be acquired. The question whether a particular land should or should not be acquired for a public purpose is left, under Section 4 (1) to the decision of the appropriate Government which, when it is so satisfied, may make the declaration to that effect in the Official Gazette.

(Para 20)

(B) Land Acquisition Act (1894), Sections 4 (1), 5-A, 6 (1) — Personal notice to party not necessary.

Sections 4 (1), 5-A, and 6 (1) do not require service of the notification under Section 4 (1) and any notice personally on the person interested in the land acquired for holding an enquiry under Section 5-A, and the making of the declaration that the land is needed for a public purpose. (Para 20)

(C) Land Acquisition Act (1894), Sections 4 (1) and 9 (3) — "Land" includes buildings thereon — Notification describing property as land not bad on the ground that there are buildings on the land.

"Land" would include buildings thereon, the fact that the notification under Section 4 (1) and the notice under Section 9 (3) describe the property as "land", while, as a matter of fact, there are buildings on the land, would not affect the acquisition proceedings.

(Para 20)

(D) Land Acquisition Act (1894), Sections 3 (ee) and 4 (1) — Constitution of India, Articles 239 and 246, Sch. VII List 1, Item 31 — Acquisition of land for putting up telephone-exchange for P. and T. Department — Appropriate Government to do so — President of India cannot authorise the Union Territory of Pondicherry to make the acquisition under the Act.

Posts and Telegraphs etc., constitute Item 31 of List 1 of the Seventh Schedule of the Constitution. (Para 22)

The Parliament has, under Article 246 (1), exclusive right to make laws with respect to the matters enunciated in List 1. In view of Sections 3 (ee) and 4 (1) of the Land Acquisition Act, the appropriate Government to make the acquisition should be the Central Government.

(Para 22)

The President of India, while administering the Union Territory of Pondicherry by virtue of Article 239 of the Constitution does not act as the head of the Central Government.

(Para 22)

He cannot therefore delegate the powers and functions of the Central Government under the Land Acquisition Act for the acquisition of land for the purpose of the auto-telephone exchange for the Posts and Telegraph Department at Pondicherry, to the District Governor of Pondicherry or to an Administrator appointed under the Article. AIR 1968 SC 637 and AIR 1970 SC 2097 and AIR 1968 Mad 298, Rel. on.

(Para 23)

(E) Constitution of India, Article 226 — Acquisition of land under L. A. Act (1894) — Writ petition challenging it — Petitioner's interest in the property ceasing on the date of hearing — Delay in filing petition — Right to challenge being barred by res judicata — Petition rejected.

A lessee of the land acquired under the L. A. Act (1894) challenged by a writ petition, the validity of the acquisition. By the time of hearing of the petition the interest of the petitioner as a lessee and therefore his locus standi to maintain the petition ceased. The petition was filed after a delay of over 4 years, after the taking of possession by the Government. The right to challenge was also found to be barred by the principle of constructive res judicata. Held that, on the above grounds, the petitioner was not entitled to relief in the writ petition. (Paras 23, 24, 25)

(F) Civil P. C. (1908), Section 11 — Constructive Res Judicata — "Right to sue".

"Right to sue" means right to seek relief. Until there is an accrual of a right asserted in the suit and its infringement there can be no right to sue. AIR 1964 Pat 127 and AIR 1930 PC 270 and AIR 1960 SC 335, Rel. on.

Where the petitioner in a writ petition challenging the acquisition of property under the L. A. Act was aware of the notification under Section 4 (1) of the Act and did not take steps to object to the same at the proper time held that it cannot be said that there was no effective threat to the right claimed by him by the acquisition proceedings and therefore it was not open to him, on the principles of constructive res judicata to challenge the same in the writ petition.

(Para 25)

(G) Pondicherry (Extension of Laws) Act (25 of 1968), Sections 3 (1), 4 (2) (d) — Proviso — Civil P. C. (1908), Section 80 — Suit against Union Territory of Pondicherry filed after 25-4-1968 — Notice under S. 80 of the Code necessary.

Section 4 (2) (d) and proviso of the Act will not entitle a party to file a suit against the Union Territory of Pondicherry, after 25-4-1968, without the required notice under Section 80 of the Civil Procedure Code in view of the fact that the Code, as in force on 1-8-1966, has been made applicable to the Union Territory of Pondicherry with effect from 25-4-1968 by Section 3 of the Pondicherry (Extension of Laws) Act 1968. (Para 26)

Cases Referred: Chronological Paras

AIR 1970 SC 1126 = (1970) 3 SCR 881	26
AIR 1970 SC 2097 = (1971) 1 SCA 143	22
AIR 1968 SC 637 = (1968) 2 SCR 103	22
AIR 1968 Mad 298 = (1967) 2 Mad LJ 85	22
AIR 1966 SC 644 = (1966) 1 SCR 430	22
AIR 1964 Pat 127	25
AIR 1960 SC 335 = (1960) 2 SCR 253	23
AIR 1957 SC 540 = 1957 SCR 488	26
AIR 1930 PC 270 = 57 Ind App 325	25

A. S. No. 167 of 1970:—

VARADARAJAN, J:— This appeal is against the judgment and decree dated

18-3-1970 of the Additional District Judge, Pondicherry in O. S. No. 160 of 1969. That was a suit filed by one Ghouseia Begum, wife of Grochil Jahan Khan alias Kurshid Jan Pasha, the owner of the property acquired in pursuance of a notification made under Section 4 (1) of the Land Acquisition Act, 1894, by the Administrator of the Union Territory of Pondicherry on 8-12-1964. The suit was for a permanent injunction restraining the Union Territory of Pondicherry from taking possession of the property in pursuance of the acquisition proceedings. Ghouseia Begum claimed that she had a charge, as in a mortgage or "hypothecue legale" on the property for the mahar debt due to her from her husband. She filed the suit on 2-1-1969, nearly four months after the Code of Civil Procedure, 1908, was extended or made applicable to the Union Territory of Pondicherry by the Pondicherry (Extension of Laws) Act, 1968, repealing the French Civil Procedure Code. She had not issued the suit notice as required by Section 80 of the Civil Procedure Code, 1908, before filing the suit. The respondent contended inter alia that the suit was not maintainable for want of the notice. The parties agreed that the issue relating to the notice might be considered as a preliminary issue. The Court below found that the appellant, who could have filed the suit even before the Code of Civil Procedure, 1908 was extended to the Union Territory of Pondicherry as the Notification under Section 4 (1) of the Land Acquisition Act was made on 10-11-1964 (sic, the correct date of the notification is 8-12-1964) itself and the cause of action alleged had arisen long prior to 2-1-1969, and who had filed the suit only under Order VII, Rule 1 of the Civil Procedure Code, 1908, was bound to issue the notice as required by Section 80 of the Code. It held that the suit was not maintainable in the absence of the notice and rejected the plaint under Order VII, Rule 11 of the Code. Hence the appeal.

W. P. No. 2795 of 1970:—

2. This writ petition has come before us as in the opinion of Ramaprasada Rao, J., it involves a question of considerable constitutional importance. The writ petition is for the issue of a Writ of Mandamus or any other appropriate writ, direction or order directing the respondents, the Union Territory of Pondicherry and the Union of India, to release from acquisition the land and building acquired in pursuance of the notification dated 8-12-1964 made under Section 4 (1) of the Land Acquisition Act, 1894.

3. An extent of 15084 sq ft., equivalent to 13 ares 19 centiares, of land in No. 5, Ranga Pillai Street, Pondicherry Town, was sought to be acquired for pub-

ting up an auto telephone exchange for the Posts and Telegraphs Department at Pondicherry. The notification under Section 4 (1) of the Land Acquisition Act was published in the Pondicherry State Gazette on 8-12-1964 in pursuance of the delegation of the powers of the Central Government to the Administrator of the Union Territory of Pondicherry, in the Ministry of Home Affairs' proceedings No. G.II/Pondy/119/18/36 (S. R. O. 3165) dated 5-11-1963. The notification reads:

"In pursuance of clause (1) of Article 239 of the Constitution, the President hereby directs that subject to his control and until further orders the Administrator of the Union Territory of Pondicherry shall exercise the powers and discharge the functions of the Central Government under (i) the Land Acquisition Act, 1894 (I of 1894) except those under the provisos to sub-section (1) of Section 55, and

(ii) the Land Acquisition (Companies) Rules, 1963 within that Union Territory."

4. The enquiry under Section 5-A of the Land Acquisition Act was held on 25-3-1965. The enquiry report shows that the owner Grochil Jahan Khan alias Kurshid Jan Pasha raised objection to the acquisition and that the Enquiry Officer was of the view that the objection was "neither considerable nor sustainable." The concerned officials inspected the land on 12-4-1965. The Government of the Union Territory of Pondicherry made the declaration under Section 6 of the Land Acquisition Act on 5-7-1965 to the effect that the land was required for a public purpose, being a purpose of the Union, to wit, for putting up an auto-exchange for the Posts and Telegraphs Department in Pondicherry Town. The President appears to have sanctioned the acquisition. The sanction has been communicated to the Post-Master General, Madras by the Director-General, Posts and Telegraphs Department, in his letter No. 45-4/63(XI)/Land dated 26-7-1966.

5. Grochil Jahan Khan alias Kurshid Jan Pasha, as one of the owners of the land sought to be acquired, filed W. I. 3199 of 1965 (P) under Article 226 of the Constitution against the Union Territory of Pondicherry, for the issue of a writ of certiorari quashing the declaration dated 5-7-1965 made under Section 6 of the Land Acquisition Act, on the main ground that after the publication of the notice under Section 4 (1) of that Act he filed his objections and that the declaration under Section 6 of the Act has been made without holding any enquiry under Section 5-A of the Act. Ramakrishnan, J., found that an enquiry under Section 5-A had been actually held after service of notice on the petitioner Grochil Jahan Khan therein and that he had in

fact filed a statement in that enquiry. He was of the opinion that the said petition had been filed without proper basis and accordingly he dismissed the petition on 15-10-1965 with costs.

6. The tenants of the land sought to be acquired presented a petition to the Lieutenant Governor of the Union Territory of Pondicherry, objecting to the acquisition of that property. The Chief of Contributions Department and Land Acquisition Officer observed that he would take note of those objections at the time of the award enquiry. He held the award enquiry subsequently on 28-1-1966. Grochil Jahan Khan did not participate in the award enquiry. Nor did he file any claim or petition in response to the notice under Sections 9 (3) and 10 of the Land Acquisition Act. The Divisional Engineer, Telegraphs, Salem and the Building Overseer represented the Posts and Telegraphs Department in the award enquiry. The tenants, Chandru or Chandrasekaran, the proprietor of Raja Ganapathi Hotel, and one Alan Sandanaswami, a carpenter, participated in the award enquiry. Chandru raised objection to the acquisition. The Land Acquisition Officer has fixed the compensation for the land, well, trees and construction at Rs. 84,118/- and the usual solatium at Rs. 12,617.70, aggregating to Rs. 96,735.70, as payable to the owner Grochil Jahan Khan, in award No. 984 dated 9-2-1966. In pursuance of the award, the First Class Magistrate No. I, Pondicherry put the Land Acquisition Officer in possession of the property on 23-2-1966 as per order in C. M. P. No. 37 of 1965 filed under Section 47 of the Land Acquisition Act.

7. Grochil Jahan Khan's wife Ghouseia Begum filed W. P. No. 361 of 1966 (P) in this Court, against the Union Territory of Pondicherry, under Article 226 of the Constitution, for the issue of a writ of certiorari quashing the said declaration dated 5-7-1965 made under Section 6 of the Land Acquisition Act, evidently after the dismissal of W. P. No. 3199 of 1965 (P) filed by her husband for a similar relief. She claimed in her petition to have a charge on the property acquired for her alimony and mahar and contended that she was consequently entitled to be served with notice in the acquisition proceedings individually and that no notice was served on her. She urged two other grounds in her petition. Ramakrishnan, J., dismissed that petition also with costs on 16-11-1968. Subsequently, the hotel building forming part of the acquired property was taken possession of on 11-4-1969 in pursuance of the order dated 24-12-1968 of the Sub-Divisional Magistrate Pondicherry. In four civil miscellaneous petitions of 1969; two of them filed by the Union Territory of Pondicherry and two by Ghou-

sia Begum and Chandrasekharan (one of the proprietors of the hotel), the petitioner herein, this Court ordered that the status quo should be maintained until final orders were passed by the Vacation Court at Pondicherry in certain review petitions and connected petitions which were then pending before that Court.

8. Now, this writ petition has been filed by the said Chandrasekharan, for the issue of a writ of mandamus or any other appropriate writ, direction or order as aforesaid, directing the respondents to release from acquisition the land and building acquired in pursuance of the notification dated 8-12-1964 made under Section 4 of the Land Acquisition Act. The petitioner Chandrasekharan and his younger brother Vembu Iyer claimed to have taken on lease a one-room tenement and a vacant site appurtenant thereto, forming part of the property acquired in this case, from the owner Kurshid Jan Pasha, husband of Ghousia Begum, and to have started in that portion a hotel business under the name and style of Raja Ganapathi Refreshment Stall. The allegations made in Chandrasekharan's affidavit filed in support of the writ petition are briefly these: Chandrasekharan put up some additional constructions after the one-room tenement and appurtenant land were taken on lease from Kurshid Jan Pasha. On 1-10-1962, he entered into a lease deed with the owner of the property in respect of five different contiguous items comprising of 2300 sq. ft. for a term of five years and put up a pucca masonry construction for running his business. As he was permitted to continue in possession even after the lease had expired on 1-10-1967, the lease stood renewed for a further period of five years under Article 1738 of the Code Civile of Pondicherry and he is entitled to be in possession of the property until 1972. Kurshid Jan Pasha filed W. P. 3199 of 1965 (P) in this Court for the issue of a writ of certiorari. That petition was dismissed on 15-10-1965. The mahar debt of Rs. 11,225/- due from Kurshid Jan Pasha to his wife Ghousia Begum was outstanding. Under Mohamedan Law, as applicable to Pondicherry, Ghousia Begum has a legal mortgage on her husband's immovable properties for the mahar amount due to her and she is entitled to object to the acquisition of the property, but had no notice of the acquisition proceedings. She filed W. P. No. 361 of 1966 (P) in this Court for the issue of a writ of certiorari, to quash the acquisition proceedings. On the dismissal of that petition, she filed W. A. No. 514 of 1968. The learned Judges, who dismissed that appeal on 19-12-1968, have observed that it was open to Ghousia Begum to pursue her remedy under the common law. She accordingly filed O. S.

160 of 1969 in the Court of the First Additional District Judge, Pondicherry for a permanent injunction restraining the first respondent, the Union Territory of Pondicherry, from taking possession of the property. In that suit, she filed I. A. No. 31 of 1969 for an interim injunction restraining the first respondent from taking possession of the hotel premises. That application was dismissed on 1-4-1969. Taking advantage of this situation the first respondent came to the hotel premises on 11-4-1969 and took forcible possession of the premises with all the moveables and cash and locked and sealed the premises. Ghousia Begum's suit O. S. No. 160 of 1969, for injunction was dismissed by the First Additional District Judge, Pondicherry on 12-3-1970 for want of notice under Section 80 of the Civil Procedure Code, and she has filed A. S. No. 167 of 1970 in this Court against that decree. This Court has granted an interim injunction in C. M. P. Nos. 4726 to 4728 of 1970, restraining the first respondent from demolishing the superstructures of the hotel premises. Though the petitioner is vitally interested in a portion of the property under acquisition, no notice of the enquiry, under Section 5-A of the Land Acquisition Act was given to him before the declaration under Section 6 of the said Act was made. This was done deliberately to prevent him from questioning the validity of the acquisition proceedings.

9. The petitioner's right to carry on hotel business in pursuance of the licence granted by the Government of Pondicherry and Health Authorities and the goodwill he has earned are all his property. Sections 23 and 24 of the Land Acquisition Act do not provide for the payment of any compensation against the destruction of this property which would result from the acquisition. The provisions of the Land Acquisition Act are violative of the petitioner's fundamental rights under Article 19 (1) (f) and (g) of the Constitution of India, in so far as these provisions cast an unreasonable restriction on the petitioner's right to hold property and to carry on his trade and enable the Government to acquire his property without paying any compensation. The decision whether the land should be acquired or not is left to the subjective satisfaction of the appropriate Government. No reason need be given for such a decision and no right of appeal is provided against that decision and the entire property of a citizen can be taken away in the most high-handed fashion. Section 4 (1) of the Land Acquisition Act does not provide for the service of any notice personally on the owner and occupier of the land. The publication of the notice in the Official Gazette in the conditions now

prevailing in Tamil Nadu and the country as a whole is no notice. There is no procedure for the circulation of the Official Gazette throughout the State and it is troublesome to obtain copies thereof from the Government Press. There is no provision for serving copy of the declaration under Section 6 of the Land Acquisition Act on the owner or occupier of the land. Even the enquiry under Section 5-A of the Act can be dispensed with. No test for deciding the question of urgency in the event of which the enquiry under that Section can be dispensed with has been laid down in the Act. The entire proceeding under Section 5-A is a secret one in so far as no copy of the decision under that section is given to the party before it is submitted to the Government. The entire Land Acquisition Act is thus violative of Article 19 (1) (f) and (g) of the Constitution of India.

10. The notification under Section 4 (1) of the Land Acquisition Act in the present case is void in so far as it describes the property to be acquired as a house site when in fact the building in which the petitioner carries on the hotel business is standing on the land. It is apparent that the Lieutenant Governor of Pondicherry who has formed the opinion that the land should be acquired, was not even aware that there was a building with a running business on the land.

11. The acquisition in this case is for the construction of an auto-exchange for the Posts and Telegraphs Department, which is a purpose of the Union of India. The appropriate Government for the purpose of this section is the Union Government by reason of the definition in Section 3 (33) of the Land Acquisition Act. Therefore, it is essential that the opinion under Section 4 (1), the satisfaction under Section 6 (1), the authorization under Section 7 and all other decisions to be taken under the Land Acquisition Act, have to be taken by the Union Government. But in the present case, these things have been done by the Lieutenant Governor of Pondicherry, apparently in pursuance of the delegation made in S. R. O. 3165 dated 5-11-1963, whereby the Government of India have delegated the powers and functions of that Government under the Land Acquisition Act on the Administrator of the Union Territory of Pondicherry, in respect of this acquisition under Article 239 (1) of the Constitution of India. The delegation is violative of the Constitution of India and the provisions of the Land Acquisition Act, in so far as Article 239 (1) does not authorize the Government of India to entrust its powers and functions in relation to matters other than the administration of the Union Territory of Pondicherry on the Adminis-

trator of that territory and the power to administer that territory does not include the power to acquire land for the purpose of the Union of India even if the land to be acquired is situate in that territory. The acquisition of the land in pursuance of such delegation is illegal. Hence the petition.

12. The respondents admit that the notification under Section 4 (1) of the Land Acquisition Act was made by the Lieutenant Governor of Pondicherry in pursuance of the delegation in S. R. O. 3165 dated 5-11-1963 of the powers and functions of the Central Government under the Land Acquisition Act except those under the provisos to sub-section (1) of Section 55 of that Act and that the petitioner was running a hotel business on the land belonging to Kurshid Jan Pasha. They contend that an oral representation made by the petitioner during the enquiry by the Land Acquisition Officer was communicated to the requisitioning department and his request could not be complied with since it was reported that the entire land was required by the Posts and Telegraphs Department. His joint petition dated 15-1-1966 was rejected by the Land Acquisition Officer and he was informed that his request could not be acceded to. Three months' time was given to the petitioner to vacate the building and the site on which it stood. The petitioner did not accept the alternative accommodation which was offered to him and since he refused to vacate the building, possession of the property was taken on 8-5-1969 in the presence of the Executive Magistrate, Pondicherry and the property was handed over to the Posts and Telegraphs Department. The petition is devoid of good faith and was filed after an enormous delay. The petitioner is guilty of suppression of material facts. The petition filed after a delay of four years after possession was taken is liable to be dismissed on that ground.

13. The petitioner was served with notice of the enquiries under Sections 5-A and 9 (3) of the Land Acquisition Act. He had knowledge of the affixture of the notification under Section 4 (1) of the Act on the land on 23-12-1964. The Land Acquisition Act or the rules do not provide for service of individual notices or of copies of the decision under Section 5-A or any other provision of the Act. Nothing prevented the petitioner from obtaining copies of these records which are public documents. He had requested the Government, by letter dated 3-3-1966, for time to deliver vacant possession of the land in his occupation and had asked for alternative accommodation.

14. The petitioner claims rights in the land as the lessee of the owner Kurshid Jan Pasha. W. P. 3199 of 1965 and

W. P. 361 of 1966, filed by Kurshid Jan Pasha and his wife Ghousia Begum respectively, have been dismissed by this Court. Ghousia Begum's suit, O. S. 160 of 1969, filed for a permanent injunction restraining the Government from taking possession of the acquired property and for other reliefs has been dismissed by the Additional District Judge, Pondicherry. The petitioner cannot have any better claim than his lessor himself. He cannot be allowed to re-agitate the identical issues in these proceedings. The present petition is therefore barred by *res judicata*.

15. The power of the State to acquire land for public purposes is irrespective of the proprietary right or interest of the owner of the land and persons holding under him and they have only the right to compensation for the property acquired. The notification for the acquisition in this case was made in the Official Gazette on 8-12-1964 and also affixed on the premises on 23-12-1964. The petitioner was served with the notice of the award enquiry on 15-12-1965 before the award was passed on 28-1-1966 in pursuance whereof possession of the vacant land was taken on 23-2-1966, in the presence of the First Class Magistrate, Pondicherry. The petitioner did not claim any compensation for the superstructure etc. However, a compensation of Rs. 16,788/- has been awarded for the superstructure. The respondents do not admit that Ghousia Begum had any legal mortgage in respect of her alleged mahar debt. There is no inscription of any such mortgage in the register maintained by the *bureau de hypothèque* (register of mortgages). The Supreme Court has repeatedly held that the provisions of the Land Acquisition Act are not violative of Article 19 (1) (f) and (g) of the Constitution of India. Section 23 of the Act provides that if the person interested is compelled in consequence of the acquisition of the land to change his residence or place of business, the Court may take into consideration the reasonable expenses, if any, incidental thereto. Nothing prevented the petitioner from carrying on his business in another suitable place and as a matter of fact he has not taken advantage of the alternative accommodation which was offered to be provided for him. Section 24 of the Land Acquisition Act provides that the Court shall not take into consideration any damages sustained by the person interested which, if caused by a private individual, could not render such person liable to suit. The petitioner is only a lessee for certain period and the owner is at liberty to renew or terminate the lease. If the owner could evict him on the ground of his requirement, he would have no right except to remove his superstructure. His

only right in case of acquisition of the property is a right to compensation which has already been awarded in this case. He is estopped from seeking remedy in this court by way of any writ alleging infringement of fundamental rights under Article 19 (1) (f) and (g) of the Constitution.

16. The contentions that the Government of India is the appropriate Government and that the proceedings initiated by the Administrator of the Union Territory of Pondicherry by virtue of the notification in S. R. O. 3165 dated 5-11-1963 are illegal and violative of Article 239 (1) of the Constitution are ill-conceived, though no doubt under the Land Acquisition Act the Central Government is the appropriate Government for the Union purposes.

17. The functions to be exercised by the Central Government under the Land Acquisition Act are executive in nature and could be delegated to any appropriate agency. The Administrator of the Union Territory of Pondicherry, within the scope of the authority given to him for administering that territory, could be entrusted with other executive functions, viz., acquisition of land by notification, and when that is done, he acts as the Central Government within the meaning of Section 3 (8) (iii) of the General Clauses Act, 1897.

By the issue of the notification by the President, the Land Acquisition Act must be deemed to have been amended *pro tanto*. The said notification is valid under Article 239 read with Article 53 (1) of the Constitution. Even otherwise, in view of the definition of 'Central Government' in the General Clauses Act, the Administrator of the Union Territory of Pondicherry is entitled to exercise the powers of the Central Government. The petitioner is trying to cover once again the ground covered by the writ petitions mentioned above and he is not entitled to any relief.

18. The petitioner states in his reply affidavit that he does not remember whether he submitted a joint petition dated 15-1-1966, but has not received any reply dated 22-2-1966. He has not suppressed any material fact and there is no wanton delay in filing the petition. He was served with notice of the enquiry under Section 9 (3), but not of the enquiry under Section 5-A of the Land Acquisition Act. There is no question of *res judicata*. The petitioner is a person aggrieved by the acquisition and can challenge the acquisition proceedings.

19. The petitioner, Chandrasekaran, and his brother Vembu Iyer are joint proprietors of Messrs. Raja Ganapathi Refreshment Stall, which was run in the building which stood on the land in No. 5,

Ranga Pillai Street, Pondicherry Town, which was sought to be acquired for putting up an Auto-Telephone Exchange for the Post and Telegraphs Department. The petitioner has mentioned five grounds in the affidavit filed in support of the petition for the issue of a writ of mandamus or any other appropriate writ, direction or order directing the respondents, the Union Territory of Pondicherry and the Union of India, to release from the acquisition the land and the building acquired in pursuance of the notification dated 10-11-1964 which was published on 8-12-1964 under Section 4 (1) of the Land Acquisition Act. The first ground is that the petitioner's right to carry on hotel business in pursuance of the licence granted by the Government of Pondicherry and the authorities of the Health Department of that Union Territory and the goodwill which he has earned are all 'property'. Sections 23 and 24 of the Land Acquisition Act do not provide for payment of any compensation for the destruction of this property which would result from the acquisition. The provisions of the Land Acquisition Act are violative of the petitioner's fundamental right under Article 19 (1) (f) and (g) of the Constitution in so far as those provisions cast an unreasonable restriction on the petitioner's right to hold property and to carry on his trade and enable the Government to acquire the property without paying any compensation. The second ground is that the decision whether a land should be acquired or not is left to the subjective satisfaction of the appropriate Government, and no reason need be given for such a decision and no right of appeal is provided against that decision and the entire property of a citizen can be taken away in a most high-handed fashion. The third ground is that Section 4 (1) of the Land Acquisition Act does not provide for service of any notice personally on the owner and the occupier of the land. The publication of the notification in the Official Gazette in the conditions now prevailing in Tamil Nadu or in the country is no notice at all. There is no procedure for circulating the gazette throughout the State and it is troublesome to obtain copies from the Government Press. There is no provision for serving any copy of the declaration under Section 6 of the Land Acquisition Act on the owner of or the occupier of the land. Even the enquiry under Section 5-A of the Act can be dispensed with. No test for deciding the question of urgency, in the event of which the enquiry under that section can be dispensed with, has been laid down in the Act. The entire procedure under Section 5-A is a secret one in so far as no copy of the decision under that Section is given to the party before it is submitted to the

Government. The entire Land Acquisition Act is thus violative of Article 19 (1) (f) and (g) of the Constitution. The fourth ground is that the notification under Section 4 (1) of the Act in the present case is void in so far as it describes the property to be acquired as a house site, when in fact the building in which the petitioner is carrying on his hotel business is standing on the land. It is apparent that the Lt. Governor of Pondicherry, who formed the opinion that the land should be acquired, was not even aware of the fact that there was a building with a running business on the land. The fifth and the last ground is that the acquisition in this case is for the construction of Auto-Telephone Exchange for the Posts and Telegraphs Department, which is a purpose of the Union of India. The appropriate Government for the purpose of this acquisition is the Union Government by reason of the definition in Section 3 (33) of the Land Acquisition Act. Therefore, it is essential that the opinion under Section 4 (1), the satisfaction under Section 6 (1), the authorisation under Section 7 and all other decisions to be taken under the Land Acquisition Act have to be taken by the Union Government. But in the present case, all these things have been done by the Lt. Governor of Pondicherry, apparently in pursuance of the delegation under S. R. O. No. 3165 dated 5-11-1963, whereby the Government of India have delegated the functions of that Government under the Land Acquisition Act on the Administrator of the Union Territory of Pondicherry in respect of this acquisition under Art. 239 (1) of the Constitution. The delegation is violative of the Constitution of India and the provisions of the Land Acquisition Act in so far as Article 239 (1) does not authorise the Government of India to entrust its functions in relation to matters other than the administration of the Union Territory of Pondicherry on the administrator of that territory and the power to administer that territory does not include the power to acquire land for the purpose of the Union of India even if the land is situate in that territory. The acquisition of the land in pursuance of such a delegation is illegal.

20. We are of the opinion that there is no substance in the first four grounds urged by the petitioner. Section 23 (1) of the Land Acquisition Act mentions the matters to be considered in determining the amount of compensation to be awarded for land acquired under the Act. The first is "the market value of the land at the date of the publication of the notification under Section 4, subsection (1)". The second is "the damage sustained by the person interested, by reason of the taking of any standing

crops or trees which may be on the land at the time of the Collector's taking possession thereof." The third is "the damages (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land". The fourth is "the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings". The fifth is that "if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change". The sixth and the last is "the damages (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under Section 6 and the time of the Collector's taking possession of the land". Sub-section (2) of Section 23 provides for the payment of solatium of 15 per cent. of the market value of the land in addition to the market value in consideration of the compulsory nature of the acquisition. Section 24 of the Land Acquisition Act lays down what should not be taken into consideration by the Court in determining the compensation. One of them is any disinclination of the person interested to part with the land acquired. Therefore, under the provisions of the Land Acquisition Act it is not open to the petitioner to raise any objection to the acquisition on the ground that it affects his right to carry on his trade or business on the particular land acquired for the public purpose. The question whether a particular land should or should not be acquired for a public purpose is left, under Section 4 (1) of the Land Acquisition Act, to the decision of the appropriate Government, which, when it is so satisfied, may make a declaration to that effect in the Official Gazette. The petitioner has not contended that Section 4 of the Act is ultra vires the central legislature. Sections 4 (1), 5-A and 6 (1) do not require service of the notification under Section 4 (1) and any notice personally for holding an enquiry under Section 5-A and the making of declaration that the particular land is needed for a public purpose, on the parties interested in the land. Section 5-A (1) lays down that any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality as the case may

be. Thereupon, the Collector, to whom the objections should be made, has to hold an enquiry and submit a report. If the appropriate Government is satisfied, after considering the report made under Section 5-A (2), that any particular land is needed for a public purpose, a declaration shall be made to that effect under the signature of the Secretary to such Government or of some officer duly authorised to certify the orders. Only Section 9 of the Act provides for the giving of the public notice by the Collector at the convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him. Sub-section (3) of Section 9 provides for service of that notice on the occupier if any, of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the concerned revenue district. The petitioner has admitted in his reply affidavit that the notice contemplated under Section 9 (3) of the Act has been served on him. The fact that the notification is said to have described the property sought to be acquired as only a building site, while, as a matter of fact, there were buildings on the land and compensation has been awarded for the same, would not, in our opinion, affect the acquisition proceedings, as 'land' would include any building standing thereon. The petitioner has not been deprived of his right to carry on his business by the acquisition in this case. Only he could not carry on his business in the property which, in public interest, has been acquired under the provisions of the Act. Therefore, there is no substance in the objection of the petitioner that any right has been affected by the acquisition. The learned Counsel for the petitioner perhaps thought that there is no substance in the first four grounds urged by the petitioner in the affidavit. That is perhaps the reason why only the fifth ground mentioned by the petitioner was urged before us and not the other four.

21. The President has, in the proceedings No. G2/Pond/119/18/63, Ministry of External Affairs, dated 5-11-1963 (hereinafter referred to as S. R. O. 3165) made the following notification regarding the delegation of his functions with regard to the acquisition in question:—

"In pursuance of Clause (1) of Article 239 of the Constitution, the President hereby directs that subject to his control and until further orders, the Administrator of the Union Territory of Pondicherry shall exercise the powers and dis-

charge the functions of the Central Government under—

(i) the Land Acquisition Act (1894) (I of 1894), except those under the provisions to sub-section (1) of Section 55; and

(ii) the Land Acquisition (Companies) Rules, 1963, within that Union Territory.”

It is not disputed that in pursuance of this delegation, the notification under Section 4 (1) of the Land Acquisition Act was approved by the Government of the Union Territory of Pondicherry in their Order No. 1-41/63-SEI, Finance Department, dated 10-11-1964, and the approved notification was published in the Pondicherry State Gazette No. 49 dated 8-12-1964. All the subsequent proceedings in respect of the acquisition have been taken by the Lt. Governor of Pondicherry. Section 3 (ee) of the Land Acquisition Act defines what “appropriate Government” means in relation to the acquisition of land and reads:—

“3 (ee). The expression ‘appropriate Government’ means, in relation to acquisition of land for purposes of the Union, the Central Government, and in relation to acquisition of land for any other purposes, the State Government.”

Section 4 (1) of the Act says that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. The acquisition in this case is for the putting up of Auto-Telephone Exchange for the Posts and Telegraphs Department. Posts and Telegraphs, telephones, wireless, broadcasting and other like forms of communication constitute Item 31 of List I of the Seventh Schedule to the Constitution. Article 246 (1) of the Constitution lays down that notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. List I of the Seventh Schedule relates to the Union Government. Therefore, the acquisition in this case for the Posts and Telegraphs and Telephones Department is for the purpose of the Central Government, and the ‘appropriate Government’ in Section 4 (1) of the Act would, therefore, be the Central Government. Under Article 298 of the Constitution, the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The respondents have admitted in their counter affidavit that the ‘appropriate Government’

in the instant case would be the Central Government. Therefore, as contended by the petitioner, the subjective satisfaction that the land in this case is needed for the public purpose should be of the Central Government, and then alone under Section 4 (1) of the Land Acquisition Act, the notification to that effect has to be published in the Official Gazette. But, in the instant case, that notification has been made by the Lt. Governor of the Union Territory of Pondicherry by virtue of the said delegation in S. R. O. 3165.

22. The respondents contend that the functions to be exercised by the Central Government under the Land Acquisition Act are executive in nature and could be delegated to any appropriate agency and that the Administrator of the Union Territory of Pondicherry within the scope of the authority given to him for administering that territory could be entrusted with other executive functions, namely, land acquisition by notification. When this is done, he acts as the Central Government within the meaning of Section 3 (8) (b) (iii) of the General Clauses Act, 1897. Thus they contend that the notification under Section 4 (1) is valid under Article 239 read with Article 53 (1) of the Constitution. They further contend that even otherwise, in view of the definition of the ‘Central Government’ in the General Clauses Act, the Administrator of the Union Territory of Pondicherry is entitled to exercise the powers of the Central Government. ‘Competent authority’, according to Section 2 (b) of the Requisitioning and Acquisition of Immovable Property Act, 1952, means any person or authority authorised by the Central Government by notification in the Official Gazette to perform the functions of the competent authority under this Act for such area as may be specified in the notification. Section 7 (1) of that Act reads:—

“Where any property is subject to requisition, the Central Government may, if it is of opinion that it is necessary to acquire the property for a public purpose at any time, acquire such property by publishing in the Official Gazette a notice to the effect that the Central Government has decided to acquire the property in pursuance of this section:

Provided that before issuing such notice, the Central Government shall call upon the owner of, or any other person who, in the opinion of the Central Government, may be interested in such property to show cause why the property should not be acquired; and after considering the cause, if any, shown by any person interested in the property and after giving the parties an opportunity of being heard, the Central Government may pass such orders as it deems fit.”

The procedure contemplated by Section 7 (1) and the proviso has not been followed in this case, and the acquisition was not under the provisions of the Requisitioning and Acquisition of Immovable Property Act, 1952. Therefore, the Lt. Governor of Pondicherry could not be stated to have been authorised by the Central Government to perform the functions of the competent authority under the Requisitioning and Acquisition of Immovable Property Act, 1952. The delegation in S. R. O. 3165 has been made in pursuance of Clause (1) of Article 239 of the Constitution, Article 239, which is in Part VIII relating to Union Territories, reads thus:—

"239. (1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."

Under Article 239-A, which was inserted by the Constitution (Fourteenth Amendment) Act, 1962, Parliament may, by law, create for any of the Union Territories mentioned in clause (1) of that Article including the Union Territory of Pondicherry a body, whether elected or partly nominated and partly elected to function as a Legislature for the Union Territory, or a Council of Ministers or both with such constitution, powers and functions in each case, as may be specified in the law. Clause (2) of that Article lays down that any such law as is referred to in clause (1) shall not be deemed to be an amendment to this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending the Constitution, Section 3 (58) of the General Clauses Act defines 'State' as:—

"(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."

In *T. M. Kannian v. I.-T. Officer, Pondicherry*, (AIR 1968 SC 637), where it has been held that Union Territories are centrally administered through the President acting through an administrator, it is observed:—

"In *Ram Kishore Sen v. Union of India*, (AIR 1966 SC 644) it was pointed out that having regard to Article 367, the definition of 'State' in Section 3 (58) of the General Clauses Act, 1897 applied for the interpretation of the Constitution unless there is anything repugnant in the subject or context. Under that definition, the expression 'State' as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory. But this inclusive definition is repugnant to the subject and context of Article 246. There the expression 'State' means the States specified in the First Schedule".

Article 368 lays down how an amendment of the Constitution may be made, and reads:—

"368 (2). An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each house by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill."

Clauses (2) and (3) of Article 372 read:—

"372 (2). For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause."

Relying on the definition of 'State' in Section 3 (58) of the General Clauses Act it was argued in *S. K. Singh v. V. V. Giri*, AIR 1970 SC 2097 that Union Territories are also States and consequently, the elected members of the Legislative Assemblies of the Union Territories must

also be included in the Electoral College. That contention has been repelled by the Supreme Court for two reasons in these words:—

"There are two reasons why, on the face of it the submission has to be rejected as untenable. Article 54, no doubt, lays down that all elected members of the Legislative Assemblies of the States are to be included in the Electoral College, but the word 'States' used in this Article cannot include Union Territories. It is true that, under Article 367, the General Clauses Act applied for interpretation of the Constitution as it applied for the interpretation of an Act of the Legislature of the Dominion of India; but that Act has been applied as it stood on 26th January, 1950, when the Constitution came into force, subject only to any adaptations and modifications that may be made therein under Article 372. The General Clauses Act, as it was in 1950 and as adapted or modified under Article 372, did not define 'State' so as to include a Union Territory. The Constitution was amended by the Constitution (Seventh Amendment) Act, 1956, which introduced Article 372-A in the Constitution permitting adaptations and modifications of all laws which may be necessary or expedient for the purpose of bringing the provisions of the law into accord with the Constitution as amended by the Seventh Amendment Act, 1956. It was in exercise of this power under Article 372-A that Section 3 (58) of the General Clauses Act was amended, so that thereafter, 'States' as defined included Union Territories also. The new definition of 'State' in Section 3 (58) of the General Clauses Act as a result of modifications and adaptations under Article 372-A would, no doubt, apply to the interpretation of all laws of Parliament, but it cannot apply to the interpretation of the Constitution, because Article 367 was not amended and it was not laid down that the General Clauses Act, as adapted or modified under any Article other than Article 372, will also apply to the interpretation of the Constitution. Since until its amendment in 1956, Section 3 (58) of the General Clauses Act did not define 'State' as including Union Territories for purposes of interpretation of Article 54, the Union Territories cannot be treated as included in the word 'State'.

The second reason why it must be held that members of Legislatures of Union Territories cannot form part of the electoral college under Article 54 is that Article confines the electoral college to members of Legislative Assemblies of the States and there are no Legislative Assemblies in the Union Territories. Under Article 168, for every State there is to be a Legislature which shall consist of the

Governor, in certain States two Houses, and in some other States one House. The Article further lays down that where there are two Houses of Legislature, one is to be known as the Legislative Council and the other as the Legislative Assembly and, where there is only one House it is to be known as the Legislative Assembly. On the face of it only members of Houses known as Legislative Assemblies under Article 168 can be members of the Electoral College under Article 54. In the case of Union Territories, the provision for Legislatures is contained in Article 239-A but that Article does not mention that any House of the Legislature created for any of the Union Territories will be known as a Legislative Assembly. All that that Article lays down is that Parliament may, by law, create a body whether elected or partly nominated and partly elected to function as a Legislature for the Union Territory. Such a Legislature created by Parliament is not a Legislative Assembly as contemplated by Article 168 or Article 54. Members of Legislatures created for Union Territories under Article 239-A cannot therefore, be held to be members of Legislative Assemblies for States."

In view of this decision, it has to be held that the Union Territory of Pondicherry, which is centrally administered through the President acting through an administrator is not a State within the meaning of the Constitution. In *Gobalously v. U. T. of Pondicherry*, (AIR 1968 Mad 298) a Bench of this court has observed:

"The affairs of the Central Government can be different from the affairs of a Part C State and the President, as the head of a Part C State, occupies different position from that as the head of the Central Government. By a logical extension of this principle, one can hold that, when the President administers a Union Territory he occupies a position different from that of the head of the Central Government."

Thus, it is clear that the President, while administering the Union Territory of Pondicherry by virtue of the powers conferred under Article 239, does not act as the head of the Central Government.

"What could be delegated by the President under Article 239 of the Constitution to an Administrator to be appointed by him with such designation as he may specify is the power to administer any Union Territory, as clause (1) of that Article, says:—

"Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify."

Article 239 does not provide for the delegation of anything concerning the administration of the Central Government to the Administrator appointed by the President under that Article for the administration of any Union Territory to such extent as the President thinks fit. As we have said, "Posts and Telegraphs, Telephones, wireless, broadcasting and other like forms of communication" constituting Item 31 of List I of the Seventh Schedule are Union subjects which could be administered only by the Central Government. The President, acting under Article 239 of the Constitution, cannot therefore delegate the powers and functions of the Central Government under the Land Acquisition Act for the acquisition of the land in question for the purpose of an Auto-Telephone Exchange for the Posts and Telegraphs Department at Pondicherry to the District Governor of Pondicherry, an Administrator appointed under that Article. It would follow that the notification under Section 4 (1) of the Land Acquisition Act made for the purpose by the Lt. Governor of Pondicherry and the further proceedings taken by the Government of that Union Territory in pursuance of that notification are not valid.

23. But the petitioner could not succeed in this petition for the issue of a writ of mandamus or any other appropriate writ, direction or order directing the respondents to release from the acquisition the land and building acquired in pursuance of the said notification for three reasons. The first reason is that the lease of a part of the property acquired, to which extent alone the petitioner was interested in the property acquired on the date of the notification, commenced on 1-10-1962 and was admittedly for a term of five years, which had expired on 1-10-1967. The petitioner's case is that as he was permitted to continue in possession of the demised property with some additions, which he claims to have made to the same even after the expiry of the lease on 1-10-1967, the lease stands renewed for a further period of five years under Article 1738 of the Code Civil of Pondicherry and that he is entitled to be in possession until 1972. Article 1758 of the French Code Civil reads thus:

"1758. When a lease of furnished apartments provides that the rent is to be so much a year, the letting is held to be a letting year by year. When the rent is to be at so much a month, the letting is held to be by the month; and when the rent is so much a day, it is held to be a letting by the day. If there is nothing to show whether the property is let by the year, by the month, or by the day, then the letting is held to be made according to the custom of the place."

Article 1759, which follows that Article, and reads as follows can, in our opinion, only relate to furnished apartments:

"1759. If a tenant who has a written lease continues to have the enjoyment of the property after the expiration thereof without the lessor raising any objection, he will be held to occupy it on the same terms and for the term fixed by the customs of the place, and can no longer quit or be ejected except after the notice required by the custom of the place has been given."

The petitioner has not mentioned Article 1759 in the affidavit and has not pleaded any custom. It has not been contended that the single room which is stated to have been let to him with some portion of the land acquired on 1-10-1962 was a furnished apartment. Having regard to that and the fact that the petitioner has not pleaded any custom, it cannot be stated that Article 1759, which was mentioned by the learned Counsel for the petitioner in the course of his arguments, would apply. Article 1737 reads thus:

"1737. The lease, if made in writing, comes to an end, ipso facto at the end of the period fixed, without it being necessary to give notice to quit."

Article 1738, which follows that Article, reads:—

"If the lessee remains and is left in possession at the end of the term mentioned in the written lease, a new letting takes place, the terms of which are governed by the Article relating to leases not made in writing."

Admittedly, the lease, which had come to an end under Article 1737 on 1-10-1967, has continued only for a further period of five years under Article 1738 and had come to an end on 1-10-1972. The petitioner has, therefore, no locus standi now to maintain the petition.

24. The second reason is that the notification under Section 4 (1) was made in this case on 8-12-1964. The report of the enquiry made under Section 5-A of the Act shows that the owner Grochil Jahan Khan participated in the enquiry and raised an objection to the proposed acquisition and that his objection had been held by the concerned officer to be not sustainable. Subsequently, the concerned officials including the representative of the Posts and Telegraphs Department inspected the property on 12-4-1965. It is seen from the general inspection report that measurements were taken and verified with the sketch and fresh measurements were taken and the discrepancies were jointly noted and the sketch was corrected. The petitioner, who was carrying on his hotel business in the premises, must have been aware of the enquiry conducted under Section 5-A on 25-3-1965 or at any rate the joint inspection made on 12-4-1965. The declaration

under Section 6 of the Land Acquisition Act was made on 5-7-1965 and the petitioner was admittedly served with the notice under the Section 9 (3) of the Land Acquisition Act. Possession of the land was taken by the Land Acquisition Officer on 23-2-1966, in pursuance of the proceedings taken in C. M. P. No. 37 of 1965 under Section 47 of the Land Acquisition Act. The records show that in a civil miscellaneous petition filed in 1969 by the petitioner this court ordered that the status quo shall be maintained until final orders were passed by the vacation court at Pondicherry in certain revision and connected petitions which were then pending before that court. The records further show that possession of the portion of the superstructure in which the petitioner was interested was admittedly taken on 11-4-1969 with the help of the police to the knowledge of the petitioner's brother Vembu Iyer, who was in charge of Raja Ganapathi Refreshment Stall at that time. Before this was done, it is seen from the records that the petitioner had been served on 7-2-1966 with a notice by registered post directing him to vacate and deliver possession of the building occupied by him before the evening of 25-3-1966. It is also seen from the records that the petitioner and the other tenants Alan Sandanasami and Devaraju had submitted a petition dated 3-3-1966 to the Prime Minister and the Minister for Transport and Communication, Government of India, requesting that an alternative site may be allotted to them for carrying on their business and to give them sufficient time to vacate until they get the alternative site and put up their building. The alternative accommodation was offered to the petitioner, who had been informed by letter dated 5-12-1968 that he would be provided with an alternative site for running the hotel either in the Tourist Home or in the New Assembly premises whichever he may choose. The petitioner does not appear to have taken advantage of this offer. The owner of the land Grochil Jahan Khan filed W. P. No. 3199 of 1965 for quashing the declaration dated 5-7-1965 made under Section 6 of the Land Acquisition Act. That petition was dismissed by Ramakrishnan, J., on 15-10-1965 on the ground that it had been filed without proper basis. Subsequently, Ghousia Begum, wife of Grochil Jahan Khan filed W. P. No. 361 of 1966 in this court for the issue of a writ of certiorari quashing the very same declaration dated 5-7-1965. That petition also has been dismissed by Ramakrishnan, J., on 16-11-1968. Writ Appeal No. 514 of 1968 filed against the dismissal of W. P. No. 361 of 1966 has been dismissed by this court on 19-12-1968 with an observation that it was open to Ghousia Begum, who claimed some mahar right,

to pursue her remedy under the common law. She accordingly filed O. S. No. 160 of 1969 in the court of the First Additional District Judge, Pondicherry, for a permanent injunction restraining the first respondent from taking possession of the property. That suit was dismissed on 18-3-1970. A. S. No. 167 of 1970 has been filed against that decree. The petitioner has come forward with this petition only in 1970 after a delay of four years from the date of taking possession of the land and over five years from the date of the declaration under Section 6. Therefore, we are of the opinion that the petitioner is not entitled to any relief on the ground of the inordinate delay.

25. The third reason is that the owner Grochil Jahan Khan had filed W. P. No. 3199 of 1965 on 29-7-1965. This was after the joint inspection of the property made on 12-4-1965 about which the petitioner must have been aware. The petitioner had not taken any steps till then, and the order passed in W. P. No. 3199 of 1965 on 15-10-1965 against the owner of the property, the petitioner's lessor, has become final. The petitioner must be deemed to have been aware of the notification under Section 4 (1) of the Land Acquisition Act published on 8-12-1964, the enquiry under Section 5-A conducted on 25-3-1965, in which the owner participated as mentioned above, and the declaration under Section 6 dated 16-7-1965 in pursuance of the report which followed the enquiry under Section 5-A of the Act. In *State of Bihar v. Motilal*, (AIR 1964 Pat 127), it is observed at page 134:—

"The words, 'right to sue' means a right to seek relief and there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement by the defendant. The question as to when a right to sue arises depends mostly on the facts and circumstances of each case".

The Privy Council has observed in *Mt. Bolo v. Mt. Koklan*, (AIR 1930 PC 270):

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted." Reference is made to this decision of the Privy Council in *Rukhmabai v. Lakshminarayan*, (AIR 1960 SC 335) where it is observed at page 349:—

"The legal position may be briefly stated thus: The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right however ineffective and in-

nocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right."

The notification under Section 4 (1) of the Act had been made on 8-12-1964 and further steps were being taken thereafter, and it cannot be stated that the petitioner was not under any impression that there was no effective threat to the right claimed by him by the acquisition proceedings. Therefore, he could have agitated the right claimed by him even when his lessor Grochil Jahan Khan filed W. P. No. 3199 of 1965 on 29-7-1965 itself. He has not done so, and the principle of constructive res judicata applies, and it is not open to the petitioner to agitate the matter once over again even though it may be on some other ground which was not put forward by his lessor. Therefore, we are of the opinion that the petitioner is not entitled to any relief. The petition fails and is dismissed with costs. Counsel's fee Rs. 250/-.

A. S. No. 167 of 1970:

26. Ghousia Begum had not given the notice required by Section 80 of the Code of Civil Procedure before she filed O. S. No. 160 of 1969 on 2-1-1969 in the Court of the Additional District Judge, Pondicherry, for a permanent injunction restraining the Union Territory of Pondicherry, from taking possession of the property acquired on the ground that she had a charge on the property for the mahar debt due to her. That suit was dismissed, as we have said, on the ground that the said notice has not been given the issue regarding that question having been tried by the District Judge as a preliminary issue by consent of the parties. Section 9 of the Pondicherry (Administration) Act, 1962, has extended the jurisdiction of this Court to Pondicherry as from 6-11-1962. Section 8 of that Act provides for the Central Government by notification in the official gazette extending, with such restrictions and modifications as it thinks fit, to Pondicherry any enactment which is in force in a State at the date of the notification. Section 3 (1) of the Pondicherry (Extension of Laws) Act, 1968, which received the assent of the President on 24-5-1968 and was published on that date, says that the Acts specified in Part I of the schedule as they are generally in force in the territories to which they extend and the Acts specified in Part II of the schedules as they were in force on the 1st day of August, 1966, in the State or Union Territory mentioned thereagainst shall extend to Pondicherry, subject to the modifications, if any, specified in the schedule. The Code of Civil Procedure, 1908, is one

of the Acts mentioned in Part II of the schedule. Column 2 of that schedule provides for that Code being applicable to Pondicherry as it was in force in the State of Madras on the first day of August, 1966. The modification adds Section 45-A after Section 45, and Section 45-A deals with execution of decrees etc., passed or made before the commencement of the Code in Pondicherry. The Code of Civil Procedure, as it was in force in the State of Madras on the first day of August, 1966 has thus been made applicable to Pondicherry with effect from 24-5-1968. The learned Counsel for the appellant would, however, contend that the appellant need not give the notice required by Section 80 of that Code having regard to clause (d) of sub-section (2) of Section 4 of the Pondicherry (Extension of Laws) Act, 1968. Section 4, which deals with repeal and saving, reads, thus:—

"4 (1). Any law in force in Pondicherry or any area thereof corresponding to any Act referred to in sub-section (1) of Section 3 or any part thereof (except in so far as such law continues to be applicable to Renoncants) shall stand repealed as from the coming into force of such Act in Pondicherry.

(2) Nothing in sub-section (1) shall affect—

(a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed;

Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, form, bye-law or scheme framed, certificate obtained, permit or licence granted, or registration effected under any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Pondicherry by this Act and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act."

We do not agree with the learned Counsel for the appellant that by reason of

clause (d) of sub-section (2) of Section 4 of the Pondicherry (Extension of Laws) Act, 1968, and the proviso it was open to the appellant to file the suit without issuing the notice required by Section 80 of the Code of Civil Procedure notwithstanding the fact that that Code, as it was in force in the State of Madras on the first day of August 1966, has been made applicable to Pondicherry with effect from 24-5-1968. The Indian Stamp Act, 1899, as it was in force in the State of Madras on the 1st day of August, 1966 with certain modifications, and the Court Fees Act, 1870 as it was in force in the Union Territory of Andaman and Nicobar Islands on the 1st day of August, 1966, with certain modifications, are also in Part II of the Schedule to the Pondicherry (Extension of Laws) Act, 1968, and they also have been made applicable to Pondicherry with effect from 24-5-1968. It cannot be stated that it was open to a party who filed his suit or proceeding after 24-5-1968, to continue to pay the stamp duty and court-fees which were payable on documents and in respect of suits and other proceedings in Pondicherry prior to 24-5-1968 ignoring the provisions of the Indian Stamp Act and the Court Fees Act which have been made applicable to Pondicherry having regard to Section 4 (2) (d) and the proviso. The learned Counsel for the appellant relied upon *Garikapati v. Subbiah Choudhry*, (AIR 1957 SC 540). There, the Court, Venkatarama Ayyar, J., dissenting, observed:—

"From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit;

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal;

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

This decision, in our view, does not help the appellant. In *Advance Insurance Co. v. Gurudasmal*, (AIR 1970 SC 1126) it is observed that provisions of law must be read as far as possible with a view to their validity and not to render them invalid. The Code of Civil Procedure as in force in the State of Madras on the 1st day of August, 1966, has been made applicable to the Union Territory of Pondicherry with effect from 24-5-1968 by Section 3 of the Pondicherry (Extension of Laws) Act, 1968. Section 4 (2) (d) of the same Act no doubt says that nothing in sub-section (1) shall affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed. Sub-section (1) says that any law in force in Pondicherry or any area thereof corresponding to any Act referred to in sub-section (1) of Section 3 or any part thereof except in so far as such law continues to be applicable to Renoncants shall stand repealed as from the coming into force of such Act in Pondicherry. The provisions of the Pondicherry (Extension of Laws) Act, 1968, as far as possible must be read with a view to their validity and not to render them invalid. If this is done, it will be clear that the appellant would be bound by the provisions of Section 80 of the Code of Civil Procedure which is a procedural matter, after 25-4-1968. As a matter of fact, she had filed the suit only under Order VII of the Code of Civil Procedure. Therefore, it is not open for her to contend that she was not bound to issue the notice required by Section 80 of the same Code before instituting the suit. Accordingly, we agree with the Court below and hold that the suit is not maintainable for want of notice under Section 80 of the Code of Civil Procedure. The appeal is dismissed with costs.

Appeal dismissed.

AIR 1975 MADRAS 360**SPECIAL BENCH****VEERASWAMI, C. J., NATARAJAN
AND SETHURAMAN, JJ.**

The Chief Controller, Revenue Authority, Petitioner v. Madras Fertilizers Ltd., Respondent.

R. C. No. 1 of 1971. D/- 10-10-1974.*

(A) Stamp Act (1899), Section 2 (17), Sch. 1, Article 40 (b) — 'Mortgage Deed', meaning of — Document sought to be registered by a Company styled as trust-deed securing debentures in favour of a Bank — Deed creating a floating charge — Held, on construction of deed that it was not a mortgage deed and hence Article 40 (b) was not attracted — (T. P. Act (1882), Section 58).

The document sought to be registered by the Madras Fertilizers Ltd. in favour of the First National City Bank was styled as trust-deed securing debentures. The document was preceded by an agreement called Loan and Purchase Agreement entered into between the Company and the Chemical Bank in the United States. That agreement contained terms for borrowing by the Company of a large sum of money in the form of U. S. Dollars secured by debentures to be issued. The agreement stipulated that the party should take such action as may be necessary or appropriate to effect on the first closing date, and thereafter, to protect and keep in full force and effect a legal and valid first floating charge in favour of a trustee approved by the Bank for the benefit of the holders of the notes (debentures) on the entire assets and undertaking of the company, then owned or thereafter acquired, present or future, including its uncalled capital, such floating charge to be created by trust deed in such form as the Bank may reasonably request. The recitals of the trust deed referred to the fact of the above loan and purchase agreement and the terms under which the trust deed was being executed. The trust deed contained definition clauses, one of which defined 'the mortgaged premises'.

Held on construction of the trust-deed that it was not a mortgage deed within the meaning of Section 2 (17) and therefore was not liable for stamp duty under Article 40 (b). (Para 4)

Section 2 (17) defines a mortgage deed. It is an inclusive definition. The expression, therefore, is not only to be understood in the sense of mortgage as defined by the Transfer of Property Act, but also as including, something more as

* (Case referred to High Court by Chief Controlling Authority, Board of Revenue; Madras under Section 57 of Indian Stamp Act, 1899).

mentioned in Sec. 2 (17). A "mortgage" under the T. P. Act is the transference of an interest in the specified immovable property as security for re-payment of money borrowed. So also, a charge, though not involving a transfer of interest in any specified property, creates a right over or in respect of specified property. (Para 4)

What the trust deed created was a floating charge, which means that, though it is intended to create a security, it is not a charge which involves any transfer of an interest in any specified property or creation of a right in any specified property. When the floating charge crystallises on the specified event, it becomes a charge, with the result that a right is created in or over or in respect of the specified property, so that a receiver at that stage can take possession of the property, manage the same and deal with it for enforcement of the security for payment to the debenture holders. (Para 3)

Cases Referred: Chronological Paras
AIR 1916 Mad 374 (2) = ILR 38 Mad 646 (FB). 5

Advocate-General for Addl. Govt. Pleader, for Petitioner; M. Uthama Reddy and G. Soundararajan, for Respondent.

VEERASWAMI, C. J.:— This is a reference under Section 57 of the Indian Stamp Act, the question being whether the document sought to be registered by the Madras Fertilizers Limited, styled as trust deed securing 5 1/2 per cent. bearer debentures 1973 and 5 1/2 per cent. bearer debentures 1981, to be executed by the Madras Fertilizers Limited, in favour of the First National City Bank, is a mortgage deed subject to levy of stamp duty under Article 40 (b) of the Indian Stamp Act, 1899. The respondent is a Company incorporated under the Indian Companies Act having its head office at Madras. Through its Counsel, the Company wanted an adjudication of stamp duty payable on the document. The Collector was of opinion that the document was chargeable to duty under Article 40 (b) of Schedule I of the Act and asked the respondent to pay Rs. 38,98,499.90 and to get the document certified under Section 32 of the Act. In the circumstances, therefore, the respondent asked for a reference under Section 56 (2) of the Act.

2. The document in question, which is styled as a trust deed, was preceded by an agreement called Loan and Purchase Agreement dated 19-12-1966, entered into between the respondent and the Chemical Bank, New York Trust Company, in the United States. This agreement contains terms for borrowing by the Respondent of a large sum of money in the form of U. S. Dollars secured by debentures to be issued. Section 6 (10) of this agreement stipulates that the party

should take such action as may be necessary or appropriate to effect on the first closing date, and thereafter, to protect and keep in full force and effect, a legal and valid first floating charge (hereinafter called the floating charge) in favour of a trustee approved by the Bank for the benefit of the holders of the notes (debentures) on the entire assets and undertakings of the company, then owned or thereafter acquired, present or future, including its uncalled capital, such floating charge to be created by trust deed in such form as the Bank may reasonably request. It was pursuant to this stipulation in the agreement that the trust deed dated April 6, 1968, was executed as between the respondent and the First National City Bank. The recitals refer to the fact of the loan and purchase agreement just now mentioned and the terms under which the trust deed was being executed. The trust deed contains definition clauses, one of which defines "the mortgaged premises". The definition says that the expression means and includes all the undertaking, property and assets comprised in the floating charge created by clause 6 (a) thereof, including any property or asset hereafter charged in accordance with clause 9 (b) thereof. The charging clause is clause 6. Sub-clause (c) of Clause 6 says this:

"The Company hereby charges in favour of the trustee by way of floating charge only with the payment of the debentures and other moneys hereby intended to be secured."
Clause 8:

The security hereby constituted shall (subject as hereinafter provided) become enforceable within the meaning of these presents in each and every (one) of the events following:

(a) Upon the happening of any event of default specified in Article VIII of the Loan and Purchase Agreement in the event of any such default continuing unremedied for the respective periods prescribed therein.

(b) If any *Pari Passu* floating charge created under Section 7.02 (A) of the Loan and Purchase Agreement or otherwise in excess of £ 1,000,000 or the rupees equivalent thereof is crystallised, and pursuant thereto, the Mortgage Premises or any part thereof have been taken possession of, or a Receiver has been appointed thereof, and the same have not been released or the Receiver withdrawn or discharged within seven days."

There are other events also mentioned on which the charge becomes crystallised.

3. From the above recitals it is clear that, what the trust deed created was a floating charge, which means that, though it is intended to create a security, it is not a charge which involves any

transfer of an interest in any specified property or creation of a right in any specified property. When the floating charge crystallises on the specified event, it becomes a charge, with the result that a right is created in or over or in respect of the specified property, so that a receiver at that stage can take possession of the property, manage the same and deal with it for enforcement of the security for payment to the debenture-holders. That, in substance, appears to be the tenor and effect of the deed of trust.

4. Section 2 (17) of the Indian Stamp Act defines a mortgage deed. It is an inclusive definition. The expression, therefore, is not only to be understood in the sense of mortgage as defined by the Transfer of Property Act, but also as included, something more as mentioned in Section 2 (17) of the Stamp Act. A 'mortgage' under the Transfer of Property Act is the transference of an interest in the specified immovable property as security for re-payment of money borrowed. So also, a charge, though not involving a transfer of interest in any specified property, creates a right over or in respect of specified property. As defined in Section 2 (17), the inclusive part of it says:

"Every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of, another, a right over or in respect of specified property."

Both in the concept of mortgage as understood in general law, and also in the extended definition of 'mortgage deed' in Section 2 (17), it is contemplated that there must be a transfer in present of an interest in specified property or creation in praesenti of a right in or over or in respect of specified property. The idea of transfer of an interest or creation of a right in such property is that it will serve as a present charge binding and annexed to or going with specified property. This is so unlike a floating charge, because such a charge, so to speak, is something like Damocles' sword which hangs and drops down, on a specified event, on properties then available for the Receiver to take charge on behalf of debenture-holders or for the trustee in this case. It is only then and then alone, which happened on the specified event, that there is any transfer of interest or creation of a right over or in respect of specified property. A perusal of the loan and purchase agreement and also the trust deed clearly brings out that the trust deed creates a charge of the latter description. In fact, it says in so many words, namely, that what was created under the trust deed was a floating charge. To make it clear, events are specified when the float-

ing charge will get crystallised and the recitals go further to state what should happen on such crystallisation of the charge in specified property. So long as the stipulation for repayment is adhered to, the charge is unenforceable. We cannot, therefore, agree with the Revenue that the trust deed is a mortgage deed within the meaning of Section 2 (17), and it will not attract duty under Article 40 (b) of Schedule I of the Stamp Act.

5. The Advocate-General for the Revenue, heavily relied on Secy. to Commr. of Salt, Abkari and Separate Revenue, Revenue Board, Madras v. Mrs. Orr, ILR 38 Mad 646 = (AIR 1916 Mad 374 (2)) (FB) and has contended that the transaction involved there was more or less similar to the transaction here, and that we must hold, following that judgment, that the trust deed is a mortgage deed. We have given our careful consideration to the contention, but are not persuaded that the transaction in the Secy. to Commr. of Salt, Abkari and Separate Revenue, Revenue Board, Madras v. Mrs. Orr, ILR 38 Mad 646 = (AIR 1916 Mad 374 (2)) (FB) is like the one in the instant case. There was a question of floating charge in that case. The transaction involved there was this. One Mrs. Orr was the sole executrix of Mr. M. W. Orr. He was the sole proprietor of certain gold and silver smith's business and indebted to a certain person. Mrs. Orr entered into an agreement with the Bank of Madras, by which the latter agreed to advance to the former a certain amount on a promissory note to be executed by one Thomas William Barton in favour of the firm, Messrs. P. Orr and Sons, and endorsed by them to the Bank of Madras, upon the said Mrs. Orr executing a declaration of trust of the machinery, plant, stock-in-trade, goods, chattels and effects in connection with the business, more particularly described in the Schedule to the instrument. In consideration of advances to be made by the Bank, Mrs. Orr declared that she held the said machinery, plant, stock-in-trade, etc., on trust, for and on behalf of the Bank. The loan granted by the Bank bore interest. There was also a provision that the trustee, namely, Mrs. Orr, should have full power to use and employ the trust property in certain ways and to replace and make good such portions of the trust property as may be sold or otherwise dealt with and the substituted goods should be included in the security. There was also a further declaration that the trustees stood in possession of the net profits realised after payment of all expenses, including the retention by the trustees of a sum not exceeding Rs. 20,000/- annually in trust to pay and apply the same in payment of sums advanced by the Bank. It will at once be obvious that the difference be-

tween the transaction just now mentioned and dealt with in that case and the one in the present case is that in the former the charge was enforceable eo instanti and enforceability of the charge did not depend upon a particular event in which case the charge would crystallise. In other words, that case was not one of the floating charge, but a case of mortgage, for, there was transfer of an interest in specified immovable property, or in any case, there was creation of a right over or in respect of specified property, as recited. The essence of the difference between the two transactions, the one in the case cited by the learned Advocate-General and the other here, is that the character of a floating charge, which, on the happening of an event, would crystallise and result in the trustee or Receiver taking possession, was not present at all in the former case.

6. We, therefore, answer the question referred to us against the Revenue with costs. Counsel's fee Rs. 2,500/-.

Answered accordingly.

AIR 1975 MADRAS 362

SPECIAL BENCH

VEERASWAMI, C. J., NATARAJAN
AND SETHURAMAN, JJ.

The Chief Controlling Revenue Authority, Petitioner v. The Madras Refineries Ltd., Respondent.

R. C. No. 4 of 1968, D/- 9-10-1974.*

(A) Stamp Act (1899), Section 3, Proviso (1) — Exemption under — Document executed by the President by way of guarantee, in his capacity as President, is not liable for stamp duty. (Para 1)

(B) Stamp Act (1899), Sch. 1, Articles 40 (b) and (c), 27 and Section 4 — Loan and note purchase agreement between a company and a Bank — Notes to be issued under and secured by mortgage-cum-trust deeds — Notes to be guaranteed by the President of India pursuant to terms of guarantee agreement — Deed of trust and mortgage held was liable for stamp duty under Article 40 (b) and not under S. 40 (c).

By a document described as a Loan and Note purchase agreement the Madras Refineries Ltd., a Government public limited company entered into an agreement with the First National City Bank as trustee. It was agreed that the company would authorise the creation of and issuance of secured notes for certain

* (Case referred to High Court by Chief Controlling Authority, Board of Revenue, Madras, under Section 57 of Indian Stamp Act, 1899).

amount of U. S. Dollars in two series at certain rates of interest. The notes of both the series, which in legal parlance are debentures, were to be issued under and secured by a deed of trust and mortgage and the Bank was to be the trustee and the essential terms on which the debentures would be issued would be those mentioned in the mortgage-cum-trust deed. There was a further stipulation in the agreement that the President of India and the trustee shall enter into a guarantee agreement which shall be in full force and effect. Pursuant of that agreement a deed of trust and mortgage was executed. An agreement was entered into between the President of India and the Bank as trustee under the deed of trust and mortgage. This guarantee agreement provided that the trustee entered into and accepted the agreement of guarantee upon the terms and conditions set forth in the mortgage.

Held that the deed of trust and mortgage was chargeable as the primary instrument under Article 40 (b). It could not be said that the primary instruments were the debentures and they were chargeable as such under Article 27 read with Article 40 (c). (Para 5)

Where a transaction of such a nature, namely, borrowing on security offered in that pattern, is brought about by the several instruments, Section 4 directs that the principal instruments only shall be chargeable with duty prescribed in Schedule I. (Para 7)

The deed of trust and mortgage was the primary principal instrument, under and in terms of which the debentures were issued. The guarantee of the President, though he rendered himself liable as the original guarantor, was not the principal instrument. The guarantee by the President in spite of its recital that the President shall be regarded as the primary or original obligor, could not be regarded as the principal instrument for, by itself, it could not stand. It did not create any security by itself. (Para 7)

Cases Referred: Chronological Paras
(1962) 3 All ER 843 = (1962) 3 WLR 1292 9

Advocate-General for Addl. Govt. Pleader, for Petitioner; C. Ramakrishna and M. Shakir Ali, for Respondent.

VEERASWAMI, C. J.:— This is a reference under Section 57 of the Indian Stamp Act, 1899. The Board has proposed to this court the following questions—

“(1) Whether the decision of the Board of Revenue that the instrument relating to the deed of Trust and mortgage would attract the levy of stamp duty as laid down in Article 40 (b) of Schedule I of the Indian Stamp Act and that the de-

bentures would be exempted from the levy of Stamp Duty is correct or not; and

(2) Whether the claim of the respondent herein that the stamp duty is payable on the debentures under Article 27 (a) and on the deed of Trust and mortgage, under Article 40 (c) is tenable or not?”

This reference was heard before by the then Chief Justice along with two other learned Judges, who expressed no final opinion, but in exercise of the powers under Section 58 of the Stamp Act, called for a further reference propounding the following additional questions:

“1. Whether the President's guarantee in this case is a document liable to stamp duty under the Indian Stamp Act?

2. If it is liable to stamp duty, whether it is entitled to the exemption contained in any of the provisions of the Indian Stamp Act; and

3. If it is found that it is not entitled to the exemption but is liable to stamp duty whether such stamp duty has been levied and paid in any proceedings which the law permits the concerned Revenue Authority to initiate for the purpose?”

The answer to these questions by the Board is that the President's guarantee having been executed by him in that capacity is not liable for stamp duty under Section 3, Proviso (1) of the Stamp Act. It is also stated that under Section 29 of the Indian Stamp Act, in the case of a bond as defined under Section 2 clause (5) of the Act, the Stamp Duty is payable by the person executing the instrument and that if, in the normal course, therefore, there is any stamp duty payable on this instrument, it is to be borne by the President. Under Proviso (1) to Section 3 of the Indian Stamp Act, in respect of any instrument executed by or on behalf of the Government, where but for this exemption the Government will be liable to pay the duty, no duty shall be chargeable. We may at once say that the additional questions propounded by this court in respect of which the Board has made a report, do not, on the view we take, arise in the case and, in any case, we agree with the Board that the document executed by the President by way of guarantee does not attract stamp duty for the reasons stated by the Board.

2. To appreciate the questions which had been originally referred by the Board of Revenue to this court, it is necessary to notice the essential facts. The respondent, the Madras Refineries Ltd., is a Government public limited company incorporated under the Indian Companies Act, 1956. By a document described as a loan and note purchase agreement dated 20-12-1966, which it entered into with the First National City Bank as trustee for various Pension trusts and six others,

it was agreed that the company would authorise the creation and issuance of secured notes for 14,880,000 U. S. Dollars at certain rates of interest called series A and another set of secured notes for 7,440,000 U. S. Dollars at the same interest, as series B. The notes were to be issued under and secured by a deed of trust and mortgage between the company and the First National City Bank, trustee. The notes shall be dated, shall mature, shall bear, interest, shall be payable, shall be secured and shall have such other terms and provisions as provided in the mortgage and shall be guaranteed by the President of India pursuant to the terms of a guarantee agreement in the form attached to the agreement. Then followed various covenants in the agreement which it is not necessary for us to notice, except that most of the terms in this agreement refer to those in the mortgage-cum-trust deed. For instance, one of the clauses in the covenants is that in order to obtain the necessary funds for the construction of the Refinery and for working capital the company proposes to issue and sell equity shares of its capital stock for a cash consideration, aggregating the rupee equivalent of \$ 18,000,000, computed, at the time of payment, at the exchange rate specified in Section 14.06 of the mortgage. Again, we find it stated that the borrowing to be evidenced by, and the sale of, the notes pursuant to the agreement and the execution and delivery of the agreement, the mortgage and the notes have been duly authorised by all necessary corporate action on the part of the company. There is a further stipulation in the agreement that the President of India and the trustee shall enter into a guarantee agreement which shall be in full force and effect. In short, a perusal of this agreement shows that the notes of both the series, which in legal parlance are debentures, were to be issued under and secured by a deed of trust and mortgage and that the First National City Bank was to be the trustee and that the essential terms on which the debentures would be issued would be those mentioned in the mortgage cum trust deed. Pursuant to this agreement was executed on 29-6-1967, a deed of trust and mortgage. This document was executed as between the Madras Refineries Ltd., and the First National City Bank, which is a national banking association incorporated and existing under the law of the United States of America having its corporate trust office in New York. The very first recital in this document is—

"Whereas, the company is in the process of constructing a refinery for the refining of crude oil and deems it necessary from time to time to borrow money to finance such construction and to issue its notes therefor and to mortgage and

charge its properties hereinafter described to secure the payment of such notes, and to that end has authorised the issuance of its notes to be issued in two series; and

Whereas the company has determined to issue its 5 1/2 per cent. secured notes series A in the aggregate principal amount of \$ 14,880,000 in lawful money of the United States of America and its 5 1/2 per cent. secured notes series B in the aggregate principal amount of \$ 7,440,000 in lawful money of the United States of America."

We may notice the following further recital which also throws light on the problem which we have to answer.

"Whereas, all acts and proceedings required by law and by the Memorandum of Association and Articles of Association of the company, including all acts requisite on the part of the share-holders, directors, and officers necessary to make the notes of the company provided for herein, when executed by the company, authenticated and delivered by the trustee and duly issued, whether upon the sale, pledge, or other disposition thereof by the company, the valid, binding and legal obligations of the company and to constitute this Indenture the valid, binding and legal instrument of the security of such notes, in accordance with its and their terms have been done and taken;"

We may mention that this indenture has been defined to mean the deed of trust and mortgage as originally executed or as it may from time to time be supplemented, modified or amended by any supplemental indenture. On the 10th June 1967 came the agreement between the President of India and the First National City Bank as trustee under the deed of trust and mortgage dated 29-6-1967. Recitals are found as to the need of the company to raise loans and the arrangement that has been made and then the operative part said—

"Without limitation or restriction on any of the other covenants on his part of this agreement contained, the Guarantor hereby unconditionally guarantees, as primary obligor and not as surety merely, the due and punctual payment from time to time of sums secured by the mortgage."

The 12th paragraph of this guarantee agreement said that the trustee entered into and accepted the agreement of guarantee upon the terms and conditions set forth in Article 12 of the mortgage.

3. The Board of Revenue considered that the deed of trust and mortgage was the primary document which attracted stamp duty under Article 40 (b) and charged accordingly. It was also of the view that because of the exemption contained in Article 27, the debentures did

not attract stamp duty. In taking that view, the Board rejected the respondent's contention that the primary instruments were the debentures and that they were chargeable as such under Article 27 (b) read with Article 40 (c). This is upon the assumption that the deed of trust and mortgage constituted a collateral, auxiliary or additional security for the debenture holders.

4. During the hearing of the reference on the earlier occasion, apparently, this court thought that the nature of the Presidential guarantee for purposes of the Stamp Act should also have to be determined and it was on that view, as we mentioned earlier, a further reference was called for on the additional questions above referred to.

5. In our opinion, on the first question, the answer should be in the affirmative, that is to say, that the decision of the Board charging the deed of trust as the primary instrument under Article 40 (b) is correct, and on the second question, in the negative, that is to say, that the contention contained therein is not tenable.

6. The Indian Stamp Act, by Section 3, and subject to the provisions of the Act and the exemptions contained in Schedule I require the instruments mentioned therein to be chargeable with duty of the amounts indicated in that schedule. In passing we may refer to Section 4, which applies to several instruments used in bringing about a single transaction by way of sale, mortgage or settlement. The relevance of this section will appear in due course. The related Articles are these. Article 27 deals with stamping of debentures, whether a mortgage debenture or not, being a marketable security transferable by endorsement or by delivery. The exemption to this Article reads—

"A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing makes over, in whole or part, their property to trustees for the benefit of the debenture holders."

Such a debenture will not attract duty under Article 27, due to this exemption. Article 40 relates to mortgage deed, not being an agreement relating to deposit of title deeds, pawn or pledge, bottomry bond, mortgage of a crop, respondentia bond or security bond, each of which is separately dealt with by several Articles in the Schedule. Clause (a) applies when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given. Obviously, this clause will have no

application to the instant case, whatever may be the ultimate view we may take, Clause (b) is attracted when possession is not given or agreed to be given as in clause (a). There is an explanation to clause (b), which we need not read for the purposes of this reference. Then clause (c) applies when it is a collateral or auxiliary or additional or substituted security or is by way of further assurance for the purpose above mentioned where the principal or primary security is duly stamped. These are the provisions in the Act in the light of which we have to frame our answer. The application of one or the other Article to the instant case will make a large difference in the quantum of the rate of stamp duty. The stamp duty actually charged and paid under Article 40 (b) was Rs. 37,66,500/-. If the respondent's contention were accepted, it would make a difference of at least about Rs. 12,00,000/-.

7. In deciding under which Article the stamp duty will have to be levied, what is essential to determine is as to the nature and character of the instrument because the charge depends on the instrument, as for instance, whether it is a debenture, or a mortgage deed, or a document of any other description having regard to its true effect and tenor. In the present case, there are three documents as we have already indicated, (1) the loan and note purchase agreement dated 20-12-1966, (2) the deed of trust and mortgage dated 29-6-1967 and (3) the guarantee agreement dated 10-6-1967. The whole purpose of these transactions is to enable the respondent to borrow on security. For this purpose, the usual device adopted by incorporated companies has been followed, that is to say, issue of debentures, secured by a mortgage-cum-trust deed. What is peculiar here is the guarantee of the President because the company worked in the public sector. The entire money to be covered by the two series of debentures was to come from the United States in the form of dollars. Where a transaction of such a nature, namely, borrowing on security offered in that pattern, is brought about by the several instruments, Section 4 directs that the principal instruments only shall be chargeable with duty prescribed in Schedule I. A great deal of argument at the Bar and on behalf of the respondent has centred round as to which of the documents constitutes the principal instrument. The learned Advocate-General for the Revenue has contended that the deed of trust and mortgage is the primary principal instrument, under and in terms of which the debentures were issued and that the guarantee of the President, though he rendered himself liable as the original guarantor, is not the principal instrument. On the other hand, for the res-

pondent, it was strenuously contended by Mr. Ramakrishna that the debentures were the principal instruments which were to be delinked from the deed of trust and mortgage and that, in any case, in view of the fact that the President's guarantee stipulated that the President should be regarded as the original obligor and that the debentures could be enforced directly against him, it should at least be treated as the principal instrument. Obviously, the attempt of this argument is to make the mortgage a collateral, auxiliary or additional security. We are of opinion that the respondent's contention cannot prevail in view of the terms and tenor of the documents. We have already mentioned that in the agreements of 20-12-1966, it was clearly agreed between the company and the First National City Bank that the debentures were to be issued under and secured by a deed of trust and mortgage between the company and the First National City Bank, trustee, in the form attached thereto and that further the debentures should be dated, mature, bear interest, be repayable, be secured and contain such other terms and provisions as provided in the mortgage and shall be guaranteed by the President of India. These words are very clear, in that they point to the fact that the mortgage is the primary instrument and under and in terms thereof, the debenture notes of both the series were to be issued. Without the mortgage and without reference to the terms thereof, the debentures would have no existence, having regard to the agreement of 20-12-1966. Though the counsel for the respondent invited our attention to some parts of the agreement and the other two documents, we are not persuaded that they contain any recitals which would enable us to come to the conclusion that either the President's guarantee or the debentures should be regarded as the principal instrument. On the other hand, the debentures have their origin to the mortgage not only for their issue, but also for their security for repayment. The guarantee by the President in spite of its recital that the President shall be regarded as the primary or original obligor, cannot be regarded as the principal instrument for, by itself, it cannot stand. It does not create any security by itself. It is only a promise that the President will make himself liable even directly for repayment to the debenture holders. But this does not mean that the guarantee serves as a mortgage or even as security in the sense of the Stamp Act. The agreement of 20-12-1966, says that the security is the mortgage for the debentures and the repayment shall be guaranteed by the President, though as the original obligor.

8. Mr. Ramakrishna invited our attention to certain passages in Sergeant

on 'Stamp Duties', 5th Edn., at page 170. But it may be seen that the scheme of the English Stamp Act is different. Mortgage, Bond, debenture and covenant are all treated for purposes of stamp duty as falling under the same category, which is not the case in the Indian Stamp Act. Apart from that, Sergeant himself observes at page 171—

"In the case of a trust deed securing debenture stock it is the trust deed itself which, as a rule, bears the ad valorem duty as the 'only or principal or primary security'."

No doubt he proceeds to say—

"In the case of a trust deed securing debentures, the debentures are as a rule 'marketable securities', and payment of the ad valorem duty thereon relieves the trust deed securing the debentures from payment of the 2 s. 6 d. per £ 100 duty. In cases where the debentures or some of them are not yet issued, the Commissioners allow the trust deed to be stamped with the 10 s. duty if the duty payable upon the debentures at the rate of 2 s. 6 d. per £ 100 (to which the trust deed is prima facie liable) is deposited with the Commissioner, to be applied pro tanto in stamping the debentures as and when issued."

These observations are made with reference to the structure and scheme of the English Stamp Act, which is not in our opinion, identical with the provisions of the Indian Stamp Act. Apart from that, we are of opinion that the exemption under Article 27 itself is an indication of the Legislative mind that a debenture of the type contemplated by the exemption should be free from charge under Article 27 itself. In effect, it amounts to as if a debenture of the description contemplated by the exemption is not within the charging purview of Article 27. Further, that exemption itself points to the fact that the debentures are issued by the incorporated company in terms of a registered mortgage deed duly stamped, that is to say, in such a case, the principal instrument is the mortgage deed, which attracts stamp duty, and when it is duly stamped, the debenture issued under and in terms of such a mortgage duly stamped attracts exemption and, therefore, such debentures will be free from charge under Article 27.

9. Mr. Ramakrishna, with great conviction in his own argument, also refers to certain observations of Monroe which are practically the same as we have set out above from Sergeant and, therefore, do not require a separate treatment. Reliance was also placed on *Inland Revenue Commrs. v. Henry Ansbacher and Co.*, 1962-3 All ER 843. But we do not think that this is of assistance to us in answering the questions. The res-

pondents in that case by agreement under hand agreed to purchase all the ordinary stock of a company for a price payable in two instalments, the first of which was duly paid, but the second of which remained outstanding as the amount due depended on the outcome of claims for compensation due by reason of the acquisition by certain Governments of assets owned by the sellers. By Cl. 11 of the sale agreement the respondents agreed to procure that the sum payable as the second instalment should be guaranteed to the extent of £ 750,000 by a bank. The stamp duty payable on this guarantee was assessed at £ 1875 on the ground that the guarantee came within the heading 'mortgage, bond, debenture, covenant (1) being the only or principal or primary security for the payment or repayment of money' in Schedule I to the Stamp Act, 1891. The House of Lords held that although the guarantee came within the heading 'Mortgage, bond, debenture, covenant' in Schedule I to the Stamp Act, yet it was not caught by the words that followed, viz., 'being the only principal or primary security for the payment or repayment of money' because, if money become payable, the primary obligation for payment was that of the respondents under the sale agreement, which was a 'security' for payment within the words last quoted, although it was not a kind of security that attracted *ad valorem* duty under the heading 'Mortgage, bond, ...'. But in the instant case, the facts are different and as we have already mentioned, the debentures were issued under and in terms of the mortgage, which formed the security therefor and the debentures were further guaranteed by the President's guarantee, who figured as the original guarantor. The essence of the matter being that the company borrowed on security in the particular form contemplated by the exemption of Article 27, the principal instrument within the meaning of Section 4 of the Stamp Act, was the mortgage. Even apart from Section 4 of the Act, we would have come to the same conclusion that the principal instrument which attracted stamp duty is the deed of trust and mortgage. In that case, the document shall be chargeable under Article 40 (b). We have, therefore, answered the questions as we have already done, that is to say, the first question is answered in favour of the Revenue and the second question against the respondent. The Board will be entitled to its costs, which we fix at Rs. 5,000/-.

Answered accordingly.

AIR 1975 MADRAS 367

V. RAMASWAMI. J.

(On difference of opinion between Venkataraman and Maharajan, JJ., D/- 18-4-74) and

Final Judgment by Venkataraman and Maharajan, JJ., D/- 12-12-1974.

Kamalammal, Petitioner v. Krishnan Nair, Respondent.

C. R. P. No. 2582 of 1971, D/- 12-12-1974.*

(A) Madras City Tenants Protection Act 1921 (3 of 1922) (as amended by Act 19 of 1955), Section 9 — Tenancy in Madras created before 1955 by life-estate holder in favour of A — A, if can enforce the right to purchase the property from the remainderman when latter files suit for ejectment against him — (Transfer of Property Act, Section 116.)

M, the owner of a land in Madras, executed a settlement deed under which he gave a life-estate to G his wife, then a life-estate to K, his daughter and the remainder to K's sons. G leased the property to A before 1955. He continued in possession till 1963 when G died. After her death K filed a suit for ejectment against A and the latter claimed under Section 9 that K should be directed to sell the land to him for the value of the property. It was found that K had received rent from A, after the death of G but there was no contract of tenancy entered into between K and A.

Held,

(a) Where there is a statutory immunity from eviction such as that under the City Tenants Protection Act, and there is no evidence that the parties intended to create a fresh tenancy the provisions of Section 116 of the Transfer of Property Act could not be invoked in support of a fresh tenancy on the termination of earlier tenancy, merely because rent is received. AIR 1972 SC 819, Rel. on.

(Paras 5, 6, 12)

(b) In order to claim the benefits under the provisions of the City Tenants Protection Act the tenant need not have entered into a tenancy agreement with the person who actually sues to evict him. It is enough if he had entered into possession of the land under a lawful tenancy agreement. 1956-1 Mad LJ 34, Rel. on.

(Para 8)

(c) K being entitled to collect the rent of the land as a life estate owner would be a landlord as defined in Section 2 sub-section (3) of the City Tenants Protection Act, and therefore, in a suit by K for ejectment A would be entitled

*(Petition under Section 115 of Act 5 of 1908 praying High Court to revise order of Sm. C. C., Madras, D/- 27-2-1971).

to claim the benefit of Section 9 of the said Act. (Para 9)

(d) (Agreeing with Venkataraman, J. and disagreeing with Maharajan, J.) On a plain reading of Section 9 (3) what that section requires to be conveyed and what the Court could direct to convey is the interest of the landlord in the land and not anything more or less.

(Paras 10, 11 12)

(e) (Per Venkataraman and Maharajan, JJ., differing from V. Ramaswami, J.) The value to be paid by the tenant would be the value of the life interest of K and not the full and absolute title in the land.

(Para 13)

Cases Referred: Chronological Paras

AIR 1972 SC 819 = (1972) 2 SCR 890 5

AIR 1961 SC 1067 = 1961 Andh LT 364 5

(1956) 1 Mad LJ 34 = 69 Mad LW 172 7

AIR 1954 Mad 805 = (1954) 1 Mad LJ 277 7

O. V. Baluswami and P. P. Selvaraj, for Petitioner; P. S. Chinnappa and K. Hariharan, for Respondent.

V. RAMASWAMI, J. (On difference of opinion between Venkataraman and Maharajan, JJ.):— The suit property which is situated within the City of Madras originally belonged to one Murugesu Mudaliar. By a settlement deed dated 17-4-1941 he gave a life interest in it in favour of his wife Gnanambal and after her death to his daughter Kamalammal for life with the vested remainder in favour of sons of Kamalammal. Both the life interest holders Gnanambal and Kamalammal were prohibited from alienating the property or in any way encumbering the same except under certain circumstances which have not arisen in this case. Gnanambal the first life estate holder leased the suit site in favour of the defendant-respondent herein sometime in the year 1950. There is a dispute as to the exact extent of the land leased but that is not material for the purpose of disposal of this case. After obtaining the lease the tenant had put up a superstructure thereon and had been in possession and enjoyment of the same. Gnanambal filed an ejectment suit No. 246 of 1962 on the file of the Court of Small Causes, Madras, against the tenant. It appears that the tenant claimed his right under Section 9 of the Madras City Tenants Protection Act, 1921 (Act 3 of 1922) (hereinafter called the Act) for purchasing the site on which he had constructed the superstructure. Pending this suit, Gnanambal died on 26-9-1963. Kamalammal was brought on record as legal representative of Gnanambal but she did not proceed with the suit and withdrew the same with liberty to file a fresh suit. Thereafter she filed an ejectment suit No. 8012/67 against the respondent here-

in and that suit was dismissed for lack of notice terminating the tenancy. In the meanwhile subsequent to the death of Gnanambal the respondent was paying the rent in respect of the suit site to Kamalammal. The present suit was filed by Kamalammal after notice terminating the tenancy for ejectment.

2. In this suit the Defendant-Respondent filed M. P. 1855 of 1968 under Section 9 of the Act praying for a direction to Kamalammal to sell the suit site to him. The present petition arises from this suit. It was the case of the plaintiff-petitioner herein that the tenancy created by Gnanambal came to an end with her death on 26-9-1963 that subsequent to her death at the request of the respondent she agreed and entered into a fresh agreement of tenancy on a monthly rent of Rs. 10/- and since the tenancy was subsequent to 1955 the provisions of the Act are not applicable to the same. It was the case of the Respondent that he was a tenant under Gnanambal, that after her death he was paying the rent to Kamalammal, the petitioner herein, but there was no fresh tenancy agreement between the petitioner and the respondent. It was contended by him that he continued to be a tenant under the original tenancy agreement entered into by him with Gnanambal in the year 1950 and that therefore he is entitled to the protection under the Act and has a right of purchase under Section 9 of the Act. The trial Court decreed the suit. But the lower appellate Court dismissed the suit holding that the respondent is entitled to claim a right of purchase under Section 9 of the Act. Hence the plaintiff has filed the present revision petition.

3. The matter came up for hearing before a Division Bench consisting of Venkataraman and Maharajan, JJ. Since the learned Judges have differed, the matter has been referred to me under Clause 36 of the Letters Patent. In the order of reference, the learned Judges have pointed out that the ultimate point on which they have differed was on the question whether the plaintiff Kamalammal can be directed to sell to the defendant the required extent of the land under Section 9 (3) of the Act. In addition to this point, the learned Judges have referred also the following questions and required an answer as they have differed on those points as well:

I. Is the plaintiff, who does not claim title through her mother, Gnanambal, and not bound by the tenancy agreement between Gnanambal and the defendant, bound under Section 9 of the Act to convey absolute title to the land in favour of the Defendant?

II. Did a fresh tenancy arise between Kamalammal and the Defendant in 1963

of Civil Procedure that since there was no specific denial of the averments in paragraph 1 of the petition, the facts alleged therein must be taken to have been admitted. In such a case, the onus clearly shifts to the respondent to prove that such admission is wrong. Mere stating by way of reply that "the facts stated in paragraph 1 are not admitted" does not constitute a specific denial.

19. The first part of the aforesaid contention may now be noticed. It is true that the validity of the entry in the electoral roll is not open to challenge, but that does not absolve the petitioner from satisfying the Court or the Tribunal about the identity of the description of the person in the entry in the electoral roll with him. Where there is lapse of time between preparation of the electoral roll and the holding of the election which is challenged by an election petition, a presumption which arises from the electoral roll that a person registered therein is free from disqualification and, as such, is entitled to vote in the Constituency for which the electoral roll had been prepared, will continue until it is rebutted by counter evidence showing that subsequent to registration the person has incurred disqualification. In that view, the petitioner may be presumed to be free from all disqualifications and it would be clearly the burden of the respondent to disprove that presumption. Such a presumption will certainly operate in favour of the petitioner only after he establishes his identity with the description of the person who has been registered against entry No. 2444 in part 16 of the electoral roll (Ext. 23). By giving prima facie proof of such identity, he will raise the presumption in his favour and, as such, be deemed to have discharged the initial burden of proof that he is an elector free from any disqualifications envisaged in Section 16 of the 1950 Act and as defined in the Explanation to Section 81 (1) of the Act. But in the present case, the petitioner has not led even that prima facie evidence to raise the presumption in his favour, as will be shown hereinafter. The cases referred to at page 398 in the Law of Elections and Election Petitions in India by Nanak Chand Pandit and Gyan Chand Mathur, 3rd Edition, 1962, on which the petitioner's counsel rely merely decide that the burden is on the respondent to show that the petitioner is disqualified, in other words, it is the respondent's duty to positively establish that the petitioner as an elector has incurred disqualifications subsequent to the preparation of the electoral roll. They do not appear to lay down the proposition that the petitioner is absolved even from discharging his burden of establishing the fact that he has been registered in the electoral roll and, as such, he is an elector, as defined in Section 2 (e) of the Act. This part of the contention of the petitioner does not appear to be sound.

20. Coming to the second part of his contention, it is necessary to look to the law

of pleadings and the judicial decisions rendered in regard to the same. Rule 3 of Order 8 of the Code of Civil Procedure provides that the denial must be specific and it shall not be sufficient to make general denial. Rule 4 of Order 8 of the Code similarly prohibits an evasive denial as an effective denial. The respondent here must answer the point of substance specifically. Rule 5 of Order 8 of the Code provides :—

"5. Specific denial— Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability;

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." The facts in paragraph 1 of the election petition are within the special knowledge of the petitioner and not of the respondent. In the circumstances, the respondent stated in paragraphs 21 and 22 of her written statement that "the facts stated in paragraph 1 of the election petition are not admitted" and that "such facts which are not specifically admitted shall be deemed to have been denied." Keeping the language of Rule 5 of Order 8 in view and of the written statement, the averments of paragraph 1 of the election petition cannot be said to have been admitted. Judicial decisions referred to hereinbelow are also to the same effect.

In the case of Surendra Bahadur v. Behari Singh, AIR 1939 PC 117, in similar circumstances, it was held that the execution of a mortgage deed was not admitted. Their Lordships say :

".....It is clear that Lachman Singh in his written statement pleaded that he did not admit the execution of the mortgage deed, and it appears from the judgment of the Subordinate Judge that at the trial the pleader who appeared for Lachman Singh 'hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client'. In those circumstances, in their Lordships' opinion, it must be held that the execution of the mortgage deed by Mt. Jamna Kunwar was in fact specifically denied by Lachman Singh."

Dealing with the rule of pleading, Lord Denning, in the case of Warner v. Sampson, 1959 (1) All ER 120 at page 123 stated as follows :—

"Whenever he knows there is a serious contest, he takes the allegation separately and denies it specifically. But when he has no instructions on a particular allegation, he covers it by a general denial of this kind, so that he can, if need be, put the plaintiff to proof of it at the trial. At one time the use of this general denial was said to be embarrassing, ... but since 1893 it has been recognised as convenient and permissible, see Adkins v. North Metropolitan Tramways

Co., (1893) 63 LJQB 361, Sometimes the pleader 'denies', sometimes he 'does not admit' each and every allegation, but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded 'as if it were specifically set out and traversed seriatim'. In short, it is a traverse, no more and no less."

In the book "Precedents of Pleadings" by Bullen & Leake, at page 664, Section 2 states the law on the point as prevalent in England. The English rule is similar to Rule 5 of Order 8 of the Code. Referring to that, it is stated:—

"The primary object of the Defence is, as we have seen; to inform the plaintiff precisely how much of the Statement of Claim the defendant admits and how much he denies. The counsel for the defendant should therefore commence his pleading by dealing with the material facts alleged in the Statement of claim in the order in which they are alleged, either admitting or denying each of them. If he omits to deny any material allegation in the Claim or to state expressly that he does not admit it, he will be taken to admit it. He need not plead to any allegation of law, but he will be taken to admit every allegation of fact, unless he either denies it or says expressly that he does not admit it."

Further, in the instant case, the Court instead of construing such denial as vague or constituting by itself an admission, framed a specific Issue which is Issue No. 15 in the case and thereby exercised its discretion as provided in the Proviso to Rule 5 of Order 8 of the Code, in requiring that fact to be still proved. In the circumstances, it is no longer open to the petitioner to plead that the matter is to be decided on the basis of admission. In this connection, it may be recalled that the petitioner himself submitted draft Issues on 10-5-1973 of which Issue No. 17 which is the same as Issue No. 15 framed by the Court, related to the question whether the petitioner was an elector. The parties also led evidence on that Issue, as would be indicated, by filing of Ext. 23 by the petitioner. The petitioner, therefore, cannot escape his obligation of proving the facts which make him an elector within the meaning of the Explanation to Section 81 (1) of the Act to maintain the election petition. (See AIR 1966 Pat 75, *South Bihar Sugar Mills v. Maharaj Prasad Singh* and AIR 1966 All 39 *Abdul Sami v. Mohammad Noor*).

When parties have framed a specific Issue as to whether the petitioner is an elector or not and were aware that it involved a substantial question, the petitioner cannot rely upon the rule of pleading to infer an admission in substitution of lack of evidence. See the case of

Bhagwati v. Chandramaul, AIR 1966 SC 735, where it is stated:—

"..... The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?"

For the aforesaid reasons, the second part of the petitioner's contention must also be negatived.

21. It is next to be considered whether the petitioner has been able to establish that he is an elector of the Constituency in question. The only evidence adduced on this aspect of the case is Ext. 23, the certified copy of the electoral roll. Again the Entry No. 2444 in this document, the name of one Ajit Prasad Narayan Singh, son of "R. P.", aged 26 years, is shown as the person who has been registered as an elector for the Cuttack City Assembly Constituency. This electoral roll was admittedly prepared on 1-1-1971. The petitioner who has examined himself in this case on 13-11-1972 has stated his age to be 26 years. The father's name as deposed to by the petitioner may or may not be "R. P." as noted in the electoral roll. The description in Entry No. 2444 in Ext. 23, therefore, does not tally with the petitioner's identity. No prima facie evidence has been given to connect the petitioner's identity with the description of the person registered against Entry No. 2444 in Ext. 23, which, if given, would have raised a presumption that he was entitled to vote at the election to which the election petition relates.

In the case of *Hemanta Kumar v. Alliantz Ins. Co.*, AIR 1938 Cal 120, it was said

"..... As was held in (1718) 1 ER 1501, entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of birth, death or marriage of such persons unless their identity is fully proved;"

In the case of *Biseswar Misra v. The King*, AIR 1949 Orissa 22, it was said—

"..... The birth certificate does not prove itself and is no proof of age of any particular person unless the person connected with that entry either by making the entry or giving information comes forward and speaks to the entry and connects the entry with the individual concerned."

In the case of *State v. Kamruddin*, AIR 1956 Nag 74, it has been held:—

"..... A mere entry in a Birth and Death register to the effect that a daughter was born to a person without any statement as to the identity of the girl is not sufficient to prove the birth of a particular person. The identity of that person has to be fully established by other evidence."

In the case of *Paryanibai v. Bajirao*, AIR 1963 Bom 25, it has been held that mere filing of a copy of an entry in the Birth register or the Kotwari book does not prove ipso facto that the entry relates to or proves the birth of the person concerned and evidence has to be introduced to connect that entry with the person whose date of birth has to be established.

Similarly in the case of *Didar Singh v. Sohan Singh*, AIR 1966 Punj 282, it was held that:—

"..... But, all these factors notwithstanding, it appears that mere production of a copy of this document would not, as a matter of law, connect the entry with the appellant's father, particularly when the appellant too has, in his own statement as a witness, omitted, for reasons best known to him, to say anything about this entry. This document has, therefore, to be excluded from consideration."

The learned counsel for the petitioner has cited three English cases ((1817) 106 ER 67, *Hennell v. Lyon*; (1842) 152 ER 21, *Simpson v. Dismore*; and (1843) 114 ER 1034, *Sewell v. Evans*) in support of the proposition that Ext. 23 is the presumptive evidence of identity of the petitioner with the description of the person in the Entry No. 2444 in that document. In these cases the question of identity did not arise as a specific issue but came in incidentally. That apart, unlike in *Hennell's* case, the description in that entry does not tally in every particular with the description of the petitioner given by himself at the top of his deposition, as already indicated. Further this document was produced at a stage when the respondent had closed her evidence and had no opportunity to rebut whatever presumption it gave rise to. The proposition in these cases is nothing more than a practice followed in administration of justice in England as a matter of public convenience and is not followed in criminal cases. Adoption of such a practice is inappropriate in case where requirements of election law are to be strictly applied. These cases, therefore, are of no assistance to the petitioner.

Thus, the petitioner having omitted to connect the identity of the person under Entry No. 2444 in Ext. 23 with himself, either by his own statement or

by other evidence, the only available conclusion is that he has failed to prove that he is an elector, who was entitled to vote at the election to which the election petition relates. In other words, he has failed to establish that he is an elector within the meaning of Explanation to Section 81 (1) of the Act. The inevitable conclusion is that the petition must be held to be not maintainable by him.

22. A petition was filed by the petitioner on 7-12-1973 praying for permission to examine a witness for the limited purpose of bringing on record "some formal statement regarding the Voters' List", as such statement was omitted through inadvertence. An objection petition was filed on behalf of the respondent. The objection was that at this stage the petitioner was not entitled to fill up the lacuna of a substantial character and to open up a new point of evidence against the respondent. In view of the specific Issue No. 15 as to whether the petitioner was an elector and entitled to vote at the election from the Cuttack City Assembly Constituency by-election, and the petitioner having omitted to give legal evidence upon that Issue at the trial, he was not entitled at this late stage to reopen the case and lead fresh evidence upon that Issue. The order-sheet shows that the petitioner concluded leading his evidence on the preliminary Issues on 27-11-1973 and evidence on behalf of the respondent commenced on that date. The leading of the evidence on behalf of the respondent was concluded on 28-11-1973. Thereafter, arguments were advanced by the counsel for the respective parties. This argument continued from day to day. On 5-12-1973, the petitioner for the first time filed a certified copy of the Voters' list which was marked as Ext. 23 on the respondent's waiving its formal proof. The petitioner's counsel concluded his argument and the respondent's counsel commenced his reply. It is only when the respondent's counsel argued on absence of evidence regarding Issue No. 15, that the petition under Section 151 of the Code of Civil Procedure was filed by the petitioner. In the aforesaid circumstances, I do not think it to be just and proper to allow this application and to re-open Issue No. 15. Accordingly, I reject this application.

23. In the net result, Issue No. 15 is answered in the negative, which means that the petitioner has failed to prove his locus standi as an "elector" to maintain this election petition.

24. The next question to be considered is whether the election petition has been presented as required under subsection (1) of Section 81 of the Act. Section 81 of the Act provides for "presentation" of an election petition. The Act

nowhere designates the special mode of presentation. Orissa High Court has framed certain Rules to regulate the proceedings under the Representation of the People Act, 1951 (Act 43 of 1951). Rule 4 of the High Court Rules provides that:—

"Every Election petition accompanied by copies as prescribed under Section 81 (3) of the Act shall be presented under S. 81 of the Representation of the People Act, 1951 (hereinafter referred to as the Act), either in person or by an Advocate duly authorised by the parties concerned, to the Registrar or in his absence to the Deputy Registrar, Additional Deputy Registrar or the Assistant Registrar during usual office hours of any working day." Rule 6 provides that

"The election petition shall be presented along with the necessary copies. All copies of the petition shall conform to the original, page by page. Immediately after its presentation, the date of presentation shall be endorsed thereon and shall be entered in a special register maintained, for the registration of election petitions in the following form—

xx xx xx xx"

Rule 7 provides that

"Every election petition shall, on presentation, be examined by the Stamp Reporter, who shall certify thereon whether the petition is in conformity with the requirements of law and the rules applicable to the same and the petition with the defects or omissions if any, as reported by the Stamp Reporter, shall be referred to the Judge who has been assigned by the Chief Justice for the trial of the Election petition for orders under Section 86 of the Act."

On 10-1-1973, the election petition was presented before the Deputy Registrar (P. W. 2) as the Registrar (P. W. 1) was absent. This petition bears an endorsement (Ext. 7) of the Deputy Registrar, which is as follows:—

"Presented on 10-1-1973.

Sd/- Bm./10-1-73
D. R."

It also bears Deputy Registrar's oval-shaped seal containing within it the following inscription:

"10th Jan. 1973
2nd. Clearance"

The Stamp Reporter on the reverse of the first page of the election petition has made an endorsement of some defects noticed in the election petition, which are of very formal nature. He has not appended his certificate as required under Rule 7 of the High Court Rules referred to above. After the petition went to the Section concerned, the Clerk-in-charge of the Section attached an order-sheet to the petition and typed out the first order dated 10-1-1973 and put it up before the

Deputy Registrar for his signature. That typed order runs thus:—

"Filed. Put up for orders.

Sd/- Bm.

Dy. Registrar."

According to P. W. 1, the Registrar's Lawazima register is maintained in the High Court office in which all kinds of presentations either before the Registrar or in his absence before the Dy. Registrar or in his absence before the Asst. Registrar are entered. In normal course this election petition should have been entered in the Lawazima register, but as a matter of fact, it has not been so entered. P. W. 2, the Deputy Registrar, has stated that unless the papers are put in the box, the filing seal is not annexed and that when a paper bears the seal of "2nd clearance" that says that it was removed from the filing box at about 2.30 P. M.

In view of these circumstances, it is contended on behalf of the respondent that if the election petition had been duly presented, it would have been registered in the Lawazima register and the first typed order on the order-sheet of the petition would have shown "presented" and not "filed" and the petition should not have borne the Deputy Registrar's seal of 2nd Clearance and the clear inference, therefore, is that the petition was not presented before the Deputy Registrar, but the latter in order to conceal his lapses of duty has made the endorsement Ext. 7 on the election petition.

I do not agree that this logic is inexorable. It may as well be that after the proper presentation before the Deputy Registrar, the other acts which are expected to be performed by other officials of the High Court were not duly carried out. Omission to carry out the functions of other officers would not necessarily lead to the inevitable conclusion that presentation as endorsed by the Deputy Registrar was untrue. To determine whether the petition was presented or not, it is immaterial as to how the ministerial officer treated the petition subsequent to the presentation. The Deputy Registrar (P. W. 2) has stated on oath that the election petition was presented before him and he made the endorsement (Ext. 7). He thereby corroborates the express averment of the petitioner himself that he presented the petition on 10-1-1973. Nothing has been shown as to why the Deputy Registrar's testimony is to be disbelieved. He is an officer of this Court. He has not been shown to suffer from any bias against the respondent. The Superintendent (P. W. 3) also corroborates the Deputy Registrar that when the petition came to him, he found the endorsement (Ext. 7) already on it. There may be slight discrepancies in the testimonies of P. Ws. 3 and 2 on this point, but those

are of very trivial in nature. I see no reason at all to disbelieve the statement of P. W. 2 that the election petition was presented to him on 10-1-1973, which has been corroborated by P. W. 3. In the state of evidence on record, I, therefore, come to the conclusion that the election petition has been "presented" in accordance with Section 81 (1) of the Act. The election petition, therefore, is not liable to be dismissed on this ground.

25. The next question to be considered is whether the election petition was accompanied by a true copy attested by the petitioner under his own signature indicating the copy to be true copy at the time of presentation. If this question is answered in the negative, then necessarily it must have to be held that Section 81 (3) of the Act has not been complied with which would perforce entail a dismissal of the election petition on that ground alone.

We have on record three election petitions — one is the original election petition; the second is a copy, but not a true copy, of the election petition (Ext. 6) and the third is a copy of the election petition produced by the respondent as having been served on her through Court (Ext. 5). Ext. 6 is apparently not a true copy. The differences between it and the main election petition which have been brought out in the evidence of the petitioner (P. W. 4) are both major and minor and that apart it has not been attested by the petitioner as required by law. There is no serious dispute over the fact that Ext. 6 is not a true and attested copy as required by law. Ext. 5 is a cyclostyled copy of the main election petition and according to the petitioner (P. W. 4) it was cyclostyled one week after presentation of the election petition and was not presented along with it. That apart, there are a number of discrepancies between it and the original as has been elicited in course of cross-examination of P. W. 4 in paragraphs 38 to 48 of his testimony. Therefore, Ext. 5 is also not a true copy though every page of it bears the signature of the petitioner as well as of his Advocate and the Court seal. Therefore, filing of Ext. 5 does not amount to a compliance of Section 81 (3) of the Act. The petitioner's counsel, therefore, contends that a third copy was filed along with the election petition which was sent out to be served by post. That copy was a true, attested copy and has been served on the respondent, but the latter is suppressing it. The petitioner himself has stated that apart from Ext. 6, he filed another copy at the time of presentation and that copy was a true and attested copy. If this evidence of the petitioner is accepted then the inevitable conclusion would be that Section 81 (3) of the Act was complied with, because of

the two copies if one of them is a true and attested copy and the requirement being to only file one such copy, the legal requirement will be satisfied notwithstanding that the other copy (Ext. 6) is not a true and attested copy.

It is argued on behalf of the respondent that only one copy was filed at the time of presentation and that is Ext. 6. The other copy which is said to have been served by post and which is not forthcoming was subsequently filed along with Ext. 5 in compliance with the order of the Chief Justice directing service of notice in two ways, namely, through Court and by post. Therefore, the evidence is to be scanned to find out as to

(i) how many copies were filed at the time of presentation; and

(ii) whether any copy was served on the respondent by post.

If one copy is found to have been filed along with the main election petition at the time of presentation that copy would necessarily be Ext. 6 which is not a true and attested copy, and the point No. (ii) will not arise for determination. If two copies are found to have been filed at the time of presentation, the question of any copy being served on the respondent by post will become relevant for probalising the petitioner's story that the second copy was a true copy and has been deliberately withheld.

26. Point No. (i). The petitioner (P. W. 4) has deposed in his examination-in-chief:—

"..... I filed Exhibit 6 along with the original petition which I presented before the Deputy Registrar. Besides this, another exact copy I filed along with the main election petition. This copy bore my signature on all pages."

In paragraph 13 of his deposition in cross-examination, he stated—

"Immediately after the filing of the main petition, I filed another copy of the said petition, which is my office copy."

In paragraph 14, he further stated—

"In the first instalment, I presented my main election petition accompanied by one copy with the Deputy Registrar. Subsequently, in the second instalment, I also gave my office copy as the second copy to the Deputy Registrar."

This amended version of filing Ext. 6 before the Deputy Registrar subsequently is not borne out by the Deputy Registrar. At this stage it is necessary to recount the practice of filing in the Deputy Registrar's office. There is a box kept in his office where documents intended to be filed are placed. The Deputy Registrar (P. W. 2) deposes regarding this practice in the following words:

"The box in which the filings are put by the parties is opened at 12.30, 2.30 and between 4.30 and 5.00 p. m. every day

which are respectively called "First Clearance", "Second clearance" and "Third clearance".

At each clearance, the documents from the box are stamped with the filing stamp kept with me.

After the first clearance is over, the bit indicating the time of the clearance is changed by my orderly peon (Number of clearance).

Unless the papers are put in the box, the filing seal is not affixed thereon.

.....
The Deputy Registrar's seal showing that it was taken out of the box during Second Clearance and absence of any endorsement on it by the Deputy Registrar, both negative the truth of this amended version.

In the petition filed by the petitioner on 26-7-1973, which is exhibited as Ext. P, it was stated as follows:—

"2. That the respondent has alleged that the petition is liable to be dismissed for non-compliance with the provisions of Section 81 (3) of the Representation of the People Act, 1951. There being only one respondent the petition was accompanied by one copy of the petition attested by the petitioner as true copy of the petition in compliance with that section. That subsequently the petitioner was asked to take out summons on the respondent by both ways. Hence the petitioner supplied another copy of the petition for the purpose."

Earlier, on 1-6-1973, the petitioner filed an affidavit (Ext. Q) in which he stated in paragraph 6 as follows:—

"..... I may submit that one copy as required under the Representation of the People Act (wrongly stated as Representative of People Act) was filed along with the petition. The other copies were filed as required subsequently for facility of service."

Thus all told, only three copies were filed. The statement extracted from Ext. Q indicates that only one copy was filed along with the petition and two other copies were filed subsequently. This averment in Ext. Q was sought to be explained away by the learned Counsel for the petitioner by saying that one attested true copy was filed along with the petition and of the two other copies one was filed subsequently in the second instalment on the date of presentation and the second subsequently much later, in compliance with the order of the Court to take out notice in both ways. It is a very strange explanation and runs directly counter to the categorical statement in Ext. P that there being only one respondent, the petition was accompanied by one copy of the petition attested by the petitioner as true copy of the petition.

Inherently, the petitioner's statement in paragraph 14 of his deposition, extracted above, is improbable. If the second copy was filed on the advice of the lawyers in the second instalment, it is really beyond comprehension as to why an unattested and incomplete copy was filed as it served no purpose. No corroborative testimony in this regard is forthcoming from P. W. 2, the Deputy Registrar, P. W. 3, the Superintendent, however, supports the petitioner's case by stating—

"8. Two copies of the election petition were filed along with the main petition."

This statement of P. W. 3 is hard to swallow for the simple reason that it conflicts with his testimony in paragraph 23 of his deposition that he cannot say about the details regarding the steps taken in different cases unless he refers to the records of those cases and with his further admission that he has not noted in the order-sheet of the election petition or in the special register in which election case is registered or in any portion of the office note of the order-sheet on 10-1-1973, 16-1-1973, 18-1-1973 or 25-1-1973 that two copies were filed along with the original petition. He has admitted that he was not present at the time of presentation of the election petition and, therefore, could have no direct knowledge of the number of copies filed at the time. Further, it appears from Ext. H that he notified on the office notice board calling upon the petitioner to file requisites for service of summons both through Court and by registered post. "Requisites" includes as per Rule 12 of Chapter VIII of the High Court Rules, "process fee and typed copies of applications for purpose of service". The court ordered on 16-1-1973 for effecting service in both ways and in pursuance of that order, P. W. 3 issued Ext. H. If, in fact, there were two copies on record, he should not have called for complete requisites, but only should have called for process fee and postal requisites for despatching notice by registered post. There was, therefore, no occasion to publish the notice Ext. H dated 18-1-1973, calling upon the petitioner to file complete requisites inclusive of two copies for service in both ways. In paragraph 15 of his deposition, he has insisted that the copy that was sent for service to the District Judge was a typed copy and the copy that was sent through post was a cyclostyled copy. That in fact is not true because the copy that was sent through the District Judge is Ext. 5, which is a cyclostyled copy. This indicates that this P. W. 3 is depositing to events occurring long ago and most probably has become faint in his memory and yet, he is making categorical statements which do not always accord with truth. For instance, at one place P. W. 3 has stated that the ori-

ginal election petition was not available to the petitioner or to the petitioner's counsel for correction. This statement is obviously incorrect. The order sheet dated 16-1-1973 shows that Mr. Das, counsel for the petitioner, was permitted to correct and initial the date "15th November" occurring in the first sentence of sub-para. (iv) of paragraph 13 as "25th November" and he made the corrections accordingly. The order sheet dated 16-3-1973 clearly indicates that no Advocate other than Mr. Das was permitted to make the correction in any document other than the original petition. But Ext. 6, the typed copy of the petition indicates that some other Advocate had carried out many corrections. Those corrections obviously were carried out without order of the Court and since those corrections do not bear the initials of the Stamp Reporter in red ink, they must have been carried out subsequent to presentation and facility for correction was, therefore, afforded by somebody in the office. Thus, as already stated, P. W. 3's evidence that two copies of the election petition were filed along with the main petition cannot be accepted.

The petitioner's counsel next relies on the memo (Ext. G) dated 10-1-1973 in proof of filing of two copies on the date of presentation of the election petition. It is a memo under the signature of Mr. Behera, one of the counsel of the petitioner, as admitted by him. This memo bears Deputy Registrar's seal indicating that it was filed in the Deputy Registrar's box. The petitioner does not depose to have presented this memo along with his election petition and is positive that no memo was filed when he filed his second extra copy subsequently. This memo reads that the petition along with "two" other copies was filed. The word "two" appears to have been over-written. It may be that the word "two" has been subsequently converted to "two" which may also be read as "true". Assuming that the word is "two", the memo Ext. G was accompanied by two copies, all of which were filed in the box. Ext. 6 bears the Deputy Registrar's seal like Ext. G. Therefore, the truth appears to be that Ext. 6 was filed in the box along with Ext. G. This memo contains the statement of the petitioner's counsel that two copies were filed along with Ext. G and non-examination of the lawyer to clarify the position raises a strong presumption that the statement in Ext. G as to filing of two copies with the memo is correct. In the circumstances, Ext. G demolishes the petitioner's case rather than support it.

I think, the truth has come out in Exts. P and Q. Ext. Q is in accord with Ext. P. Ext. Q was filed, as already stated, on 1-6-1973, after filing of the written statement on 7-5-1973 and framing of

Issues on 16-5-1973. This document has, therefore, a great probative value. It is noteworthy that the petitioner has not in his testimony explained this admission in Ext. Q. On the contrary, he has reiterated that the contents of that affidavit are true and correct. It is a well-known principle in law that what is admitted by a party to be true must be presumed to be true unless the contrary is shown and that that admission, though not conclusive, is decisive of the matter it admits. It is, of course, open to the party against whom the admission is sought to be used to explain it or to prove that such admission is wrong. In this case, the petitioner has not only owned the admission, but has refrained from giving any explanation other than what it states. The explanation which was sought to be advanced was by the counsel only and not by the person who made it and that explanation, as already indicated, is a far-fetched one and not acceptable at all. I am inclined to believe that, if at all, only one copy was filed along with the main election petition at the time of presentation. The petitioner has admitted that Ext. 6 is one such copy and, therefore, my conclusion is that the Election petition at the time of presentation was accompanied by Ext. 6 only.

This conclusion is reinforced by certain circumstances which are indicated hereinbelow: The first circumstance is that if two copies were already on record with effect from 10th of January, 1973, there was no occasion to file extra copies subsequently, unless the petitioner's counsel were aware that either both or any of the two copies filed on 10th January, were not true copies. It is unnatural and unlikely for lawyers to file unnecessary copies unless they were under the impression that they were true copies and were not for mere ornamental purpose. It was the duty of the petitioner to lead such evidence which was surely available as would have offered the explanation as to why an untrue copy or copies were filed on the date of presentation of the election petition. That would have clarified many matters relevant to the present enquiry. Both the counsel of the petitioner were available for testifying. Instead of coming forward to clarify matters, they have been withheld from the box and thus allowed the mystery to remain. That raises an adverse inference against the petitioner.

The second circumstance which carries great weight to me is the absence of certificate of the Stamp Reporter which he was required to append on the petition under Rule 7 of the Rules framed by the High Court under the Representation of the People Act, already extracted above. The rule casts a duty on the Stamp Reporter to certify on the election petition,

whether the petition is in conformity with the requirements of law and the Rules applicable to the same. Such a certificate is not there, but the Stamp Reporter's endorsement merely shows that some formal defects have been pointed out. One of the requirements of law is filing of a true and attested copy. The Stamp Reporter withheld this certificate presumably because he did not find that requirement to have been fulfilled. Ext. 6, as has been admitted and as I see now, is not a true and attested copy and that presumably was the only copy which accompanied the petition when it came before the Stamp Reporter for examination. The petition being not in conformity with the requirement of law, the Stamp Reporter presumably withheld the certificate. The petitioner examined the Registrar, the Deputy Registrar and the Superintendent, but refrained from examining the Stamp Reporter whose express duty was to see if the petition was in conformity with law and to append his certificate if satisfied that it was so. The inference is strong that except Ext. 6, no true and attested copy accompanied the election petition.

27. Point No. (ii). In view of my conclusion that only one copy was filed and that was Ext. 6, which was not in accordance with the requirements of law, the other aspect as to whether any copy of the election petition was served on the respondent by post loses importance. Therefore, I do not propose to deal with this aspect of the case.

28. Section 117 of the Act requires deposit of a sum of Rs. 2,000/- as security for costs. The petitioner deposited such amount, as per Challan (Ext. 4), on 10-1-1973, the day when the election petition was presented. Thus Section 117 of the Act was fully complied with.

29. Verifications and affidavits in the election petition are matters pertaining to Section 83 of the Act. As already indicated this section is not mandatory and Section 86 (1) of the Act does not enjoin a dismissal of the election petition for non-compliance with the provisions of Section 83. It must be held that the election petition is not liable to be rejected on account of any infirmity in the verification or on account of material particulars of corrupt practice not being duly supported by affidavit. Those defects can be removed later on by order of the Court. Thus, part of Issue No. 6 regarding liability of the petition to be dismissed for non-compliance of Section 83 of the Act is answered in the negative. Similarly, Issues Nos. 7 and 10 (part) are answered in the negative.

30. With regard to Issue No. 8, it must be held that if a true and attested copy had been filed along with the petition but a discrepant copy has been serv-

ed, that would not entail dismissal of the petition because it would not violate any mandatory requirement of law. So, this Issue No. 8 is answered in the negative.

31. With regard to Issue No. 11, the evidence is not sufficient to hold that the original petition had been subsequently tampered with, altered, or corrected without authority of law or without a formal petition by way of amendment. The matter of dismissal is to be determined with reference to facts at the time of presentation of the election petition and, therefore, subsequent tampering, even if true, would not attract Section 86 (1) of the Act. The election petition is not liable to be dismissed on that ground. Issue No. 11 is decided in the negative.

32. Similarly, the evidence is not sufficient to hold that there has been any alteration or modification in the verification and affidavit annexed to the petition without authority of law for which the petitioner is responsible. Section 86 of the Act is not attracted and the petition is not liable to be dismissed on that account. This Issue No. 12 is decided in the negative.

33. Coming to Issue No. 14, the answer is that the petition is not liable to be dismissed on the ground that it has become infructuous on account of dissolution of the Orissa State Legislative Assembly under the Proclamation issued by the President under Article 356 of the Constitution. The reason is that corrupt practices have been alleged in the election petition and if those practices are proved against this respondent, she is liable to be disqualified. This Issue, therefore, is answered in the negative.

34. In view of my findings recorded above, there has been non-compliance of some of the requirements of Section 81 of the Act and, as such, the election petition is not in accordance with law, is liable to be dismissed for non-compliance of Section 81 of the Act and is not maintainable on those grounds as well as on the ground that the petitioner has failed to establish that he is an elector. Thus, Issues Nos. 1 and 15 are answered in the negative and Issue No. 3 is answered in the affirmative and Issue No. 6 is partly answered in the affirmative and partly in the negative.

35. In the net result, the election petition is dismissed, but since the respondent has succeeded on preliminary grounds, I would not saddle the petitioner with any costs.

36. Election petition dismissed without costs.

Petition dismissed.

AIR 1975 ORISSA 201**FULL BENCH**

**G. K. MISRA, C. J., P. K. MOHANTI
AND N. K. DAS, JJ.**

Lakshna Mohapatra, Petitioner v.
State of Orissa and others, Opposite Parties.

O. J. C. No. 318 of 1973, D/- 7-4-1975.

(A) Orissa Education Code (15° of 1969), Article 347 — Compliance with — Is obligatory.

The payment of grant in aid is subject to the condition that the application for the renewal of grant should be made at least three months before the expiry of the current grant and the application must be accompanied by a return showing the financial position of the school. Even where no form for the return is prescribed, it is the duty of the Managing Committee of the school to furnish a statement of the financial position. Compliance with the provisions of Article 347 is obligatory. (Para 7)

G. A. R. Dora, for Petitioner; R. K. Mohapatra, Govt. Advocate, for Opposite Parties.

P. K. MOHANTI, J.:— The petitioner is the Secretary of the Managing Committee of Majhiakhanda M. E. School in the Educational District of Nayagarh. He challenges the action of Opposite Parties in withholding the grant in aid for the school for the years 1971-72 and 1972-73.

2. The case of the petitioner is that though the school was receiving grant in aid regularly from its inception, the District Inspector of Schools (Opposite Party No. 3) has not released the same for the years 1971-72 and 1972-73 on account of some disputes between the petitioner and the opposite parties. It is alleged that at the instance of the ruling party in the Government, a new Managing Committee for the school was constituted. The petitioner filed a writ petition challenging the constitution of the new committee in O. J. C. No. 730 of 1970 and was successful. It is out of that grudge that payment of the grant in aid was stopped. The petitioner prays for issue of a writ of mandamus commanding the Opposite Parties to release the grant in aid for those two years.

3. The opposite parties filed counter contending that the grant in aid has not been sanctioned on the following amongst other grounds:—

(a) Failure to submit application for renewal of recognition of the school as required by the provisions of the Orissa Education Code.

(b) Illegal constitution of the Managing Committee and continuance of the members in the committee in contravention of Article 286 of the Orissa Education Code;

(c) Arbitrary termination of services of teachers;

(d) Appointment of teachers in contravention of the orders of the Director of Public Instructions;

(e) Improper maintenance of the records of the school;

(f) Non-compliance with the audit objections.

4. The learned Government Advocate candidly conceded that the grounds taken by the opposite parties for withholding the grant in aid are irrelevant. He however submitted that the grants in aid for the years 1971-72 and 1972-73 cannot be released since no application and financial return as required under Article 347 of the Orissa Education Code have been filed by the Managing Committee.

5. Article 347 reads as follows:—

"347. Renewal and Termination of grants:— Applications for the renewal of grants should be made to the proper authority at least three months before the expiry of the current grant. The application shall be accompanied by such returns as the Director may from time to time prescribe with the view of ascertaining the financial position of the schools and its eligibility for aid. Submitting officers must pass on the applications with recommendations at once. Save when prolonged enquiries are necessitated, or under other exceptional circumstances, grants for the period between the expiry and renewal of the grant will not be given."

6. The petitioner filed an affidavit on 20-3-1975 stating that no particular form of application for renewal of grant has been prescribed under Article 347 and the Director of Public Instructions has also not prescribed any return for ascertaining the financial position of the school. He however submitted statements showing anticipated requirement of grant in aid for the years 1971-72 and 1972-73 on 14-8-1971 and 21-8-1972 respectively. Copies of those statements have been filed as Annexures 1 and 2 to the said affidavit. The District Inspector of Schools Nayagarh Opposite Party No. 3 filed a counter-affidavit on 21-3-1975 stating that under Article 347 the District Inspector of Schools is the proper authority to whom the application for renewal of grants has to be made and since the petitioner did not make the requisite applications for the years 1971-72 and 1972-73 at the appropriate time, the grant in aid was rightly withheld. The relevant file of the office of the District Inspector of Schools dealing with the sanction of grant in aid was

made available to us by the learned Government Advocate at the time of hearing of this writ application. The statements said to have been submitted by the petitioner on 14-8-1971 and 21-8-1972 are not available in the file. There is also nothing to show that such statements were submitted by the petitioner.

7. Article 319 of the Orissa Education Code dealing with grants in aid to Middle English Schools provides that Government will pay as grant in aid two thirds of the net deficit subject to the minimum of Rs. 30/- a month and the Managing Committees of aided schools shall be responsible to bear the remaining one-third of the net deficit. Reading this article along with Article 347 as quoted above it is clear that the payment of grant in aid to cover two thirds of the net deficit is subject to the condition that the application for the renewal of the grant should be made at least three months before the expiry of the current grant and the application should be accompanied by a return showing the financial position of the school. It is required obviously for the purpose of determination as to whether the financial condition of the school makes it eligible for the grant in aid. Even assuming that no form has been prescribed for filing the return, the Managing Committee has the duty to furnish a statement showing the financial position of the school along with the application for the renewal of the grant. The grant in aid will not be sanctioned as a matter of course but after determination by the proper authority as to whether the financial position of the school discloses any deficit which requires to be covered by the grant. It is therefore obligatory on the Managing Committee of an aided school to comply with the provisions of Article 347.

8. In the course of hearing of this writ application the learned Government Advocate agreed that the arrears of pay and allowances for the years 1971-72 and 1972-73 will be paid directly to the teachers and the non-teaching staff of the school by the opposite parties within a time to be fixed by the court. He also conceded that the grant-in-aid for the expenditure on account of building repairs and contingencies for the years 1971-72 and 1972-73 will be paid on receipt of applications and returns in accordance with the provisions of Article 347 of the Orissa Education Code. Mr. Dora the learned counsel appearing for the petitioner agreed to these terms.

9. In view of the above agreement between the parties, the writ application is allowed but without any order as to costs. Issue writ of mandamus commanding the opposite parties to disburse the arrears of pay and allowance to the tea-

chers and the non-teaching staff of the school for the years 1971-72 and 1972-73 within two months hence and also to release the grant-in-aid for the expenditure on account of building repairs and contingencies for these two years within two months from the date of submission of applications and returns by the petitioner in accordance with Article 347 of the Orissa Education Code.

G. K. MISRA, C. J.:— I agree.

N. K. DAS, J.:— I agree.

Writ petition allowed.

AIR 1975 ORISSA 202

FULL BENCH

G. K. MISRA, C. J., P. K. MOHANTI
AND N. K. DAS, JJ.

Abdul Yakub, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. No. 75 of 1973, D/- 12-3-1975.

(A) Constitution of India, Article 226 — "Person aggrieved" — Petitioner, a forest contractor and highest bidder at auction sale of forest produce in Orissa — Condition of sale that contractor gets no right until ratification order was communicated by Government — Writ petition to enforce right as highest bidder before communication of Government's ratification — Not maintainable.

Held: It would be apparent from the General Condition of Auction Sale of forest produce in Orissa, that a contractor gets no right until the ratification order is communicated to him and a formal agreement is executed on behalf of the Government. Where it is admitted that the ratification order has not been communicated to the petitioner, who was the highest bidder at auction sale of forest produce and had done everything that could be done by him, but no formal agreement had been executed on behalf of the Government, the petitioner has acquired no right which can be enforced through a writ application, as he is not a person aggrieved. AIR 1975 Orissa 33, Approved; AIR 1973 Orissa 217, Ref.

(Para 2)

Cases Referred: Chronological Paras
AIR 1975 Orissa 33 = 41 Cut LT 238 2
AIR 1973 Orissa 217 = ILR (1973) Cut
243 1, 2

S. S. Basu, for Petitioner; B. B. Mohanty, Addl. Govt. Advocate, for Opposite Parties.

G. K. MISRA, C. J.:— The petitioner is a forest contractor. On 8-9-1972 there was auction sale of Divisional Lots Nos. 63, 77 and 94. The petitioner was the highest bidder. The bid sheet was signed by him and he executed an agreement to be scrutinised and accepted. He made

security deposits and filed sales tax clearance certificate. All that could be done on behalf of the contractor was done by him. The bid was ratified by the Conservator of Forest, Angul Circle on 30-9-1972. The ratification order was however, not communicated to the petitioner. Before communication the forest department authorities had known about the negligence in working of the petitioner in some other coupe. The ratification order was therefore kept under suspension and was ultimately cancelled on 20-12-1972. The coupes were put to auction again. The writ application has been filed by the petitioner under Articles 226 and 227 of the Constitution of India for issuing a writ of mandamus to direct opposite parties 3 and 4 to issue the ratification order and the work order.

A counter has been filed on behalf of the opposite parties wherein facts averred in the writ application have not been disputed. Their case, however, is that on the general condition of sale as incorporated in the notice for leasing of forest coupes it was specifically mentioned that no right would accrue to any contractor until the ratification order is communicated to the bidder and the formal agreement is executed on behalf of the Government. The writ application is therefore stated to be not maintainable. This case was referred to a larger Bench to examine the correctness of Santosh Kumar v. State of Orissa, (AIR 1973 Orissa 217).

2. In our view this case should not have been referred to a larger Bench. Nothing was urged before us to show that ILR (1973) Cut 243 = (AIR 1973 Orissa 217) was wrongly decided. That apart, the petitioner has no enforceable right and consequently the writ application was liable to be dismissed. Item No. 1 of General Condition of Sale runs thus:—

"The right to take contract for exploiting Forest produce in the lots advertised for sale in part I of the sale notice will be granted to the bidder whose bid is conditionally accepted by the Divisional Forest Officer subject to the approval of the competent authority and the latter authority so approves it. No sale shall be binding on the Government until such approval has been obtained and communicated to the bidder and the formal agreement is executed on behalf of the Government."

It would be apparent from this condition of sale that a contractor gets no right until the ratification order is communicated to him and a formal agreement is executed on behalf of the Government. It is admitted that the ratification order has not been communicated and no formal agreement has been executed on behalf of the Government. It follows that

the petitioner has acquired no right which can be enforced through a writ application.

The position of law is directly concluded by a Bench decision of this court reported in Nilgiri Contractors' Society v. State of Orissa, (AIR 1975 Orissa 33). The legal position was carefully examined therein. It is unnecessary to repeat the same. We endorse the correctness of the conclusion arrived at in the decision.

3. On the aforesaid analysis we find no merit in this writ application which is accordingly dismissed. But in the circumstances there would be no order as to costs.

P. K. MOHANTI, J.:— I agree.

N. K. DAS, J.:— I agree.

Petition dismissed.

AIR 1975 ORISSA 203

G. K. MISRA, C. J. AND

P. K. MOHANTI, J.

Sachidananda Misra, Appellant v. Executive Engineer, Earth Dam Division Balimela Dam Project and another, Respondents.

Misc. Appeal No. 154 of 1970, D/- 27-2-1975.*

(A) Arbitration Act (1940), Sections 16, 30 and 39 (1) (vi) — Order refusing to remit award — Order is not appealable under Section 39 (1) (vi) because it does not amount to order refusing to set aside award. AIR 1968 Delhi 188, Followed.

(Para 6)

Cases Referred: Chronological Paras

AIR 1968 Delhi 188 5

(1964) Civil Appeal No. 1094 of 1963, D/- 9-9-1964 (SC) 5

AIR 1963 Cal 583 = 67 Cal WN 947 5

R. N. Sinha and S. N. Sinha, for Appellant; B. B. Mohanty, Addl. Govt. Advocate, for Respondents.

MOHANTI, J.:— The relevant facts are as follows:—

The State of Orissa had undertaken the construction of the Balimela Dam Project in Koraput District and the appellant had entered into a contract with the respondents to execute the work styled as "Excavation of Drainage Channel at Dyke III". The agreement was executed on 18-3-1965. Differences having arisen between the parties both as to the rates payable to the appellant and the quantum of work done and also about the interpretation of the agreement, the work could not be proceeded with. Res-

*(From decision of H. Misra, Sub-J., Jey-pore, in Title Suit No. 44 of 1967, D/- 20-8-1970).

pendent No. 1 having terminated the contract the appellant felt aggrieved by the loss suffered by him. As the agreement provided for the appointment of a sole arbitrator of the rank of a Superintending Engineer, the appellant requested the Chief Engineer by an application dated 1-8-1967 to appoint an arbitrator. As no such appointment was made, the appellant filed a petition under S. 20 of the Indian Arbitration Act in the court of the Subordinate Judge of Jeypore. The court appointed Shri M. L. Das, Superintending Engineer, Balimela Civil Circle as the sole arbitrator. The arbitrator submitted his award on 31-10-1969. After service of the notice of the filing of the award, the appellant filed an objection and prayed for remission of the award to the arbitrator on the grounds stated therein. In a composite order dated 20-8-1970 the learned Subordinate Judge rejected the prayer for remitting the award and passed judgment according to the award which was followed by a decree. On 25-11-1970 the appellant filed the present appeal under Sec. 39 of the Arbitration Act.

2. It is contended on behalf of the appellant that the order of the court below refusing to remit the award to the arbitrator amounted to an order refusing to set aside the award and hence it is appealable under Section 39 (1) (vi) of the Act.

3. The jurisdiction of the Civil Court to set aside the award or to remit it for reconsideration is circumscribed by the provisions of Section 30 and Section 16 of the Act.

4. Section 30 of the Act enumerates the grounds for setting aside award which are as follows:—

"(a) That an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid."

The objection filed by the appellant would not fall either under clause (a) or under clause (b) nor under the first part of clause (c). Mr. Sinha's contention is that it falls within the second part of clause (c), that is, the award is "otherwise invalid". The grounds of invalidity of an award contemplated by clause (c) refer to those matters which apparently go to the root of the award. Moreover, when the first part of this clause refers to the improper procurement of the award, it contemplates the improper procurement of the award as a whole and not a part of it, and if that be so, then

the invalidity of the award otherwise would also refer to the award as a whole and not a part of it. The second part of this clause would get colour from the first part.

5. Section 16 of the Act enumerates the grounds on which an award may be remitted to the arbitrator for reconsideration. The grounds are:

"(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to the arbitration and such matter cannot be separated without affecting the determination of the matters referred,

(b) where the award is so indefinite as to be incapable of execution.

(c) Where an objection to the legality of the award is apparent upon the face of it."

Interpreting this section in AIR 1968 Delhi, 188, (Mehta Teja Singh and Co. v. Fertilizer Corporation of India, Ltd., Dua, C. J. (as he then was) observed that Section 16 of the Act dealing with the power of the court to remit the award should be construed independently and the remission of the award or any matter contemplated by this section is not intended to include within its fold setting aside of the award or a part of it as contemplated by Section 30, which is apparently an exhaustive provision specifically dealing with setting aside of awards. It was also observed that refusal to remit an award cannot constitute refusal to set aside an award and, therefore, was not appealable. Reliance was placed on a decision of the Supreme Court in B. C. Madhava and Co. v. Kapila Textile Mills Ltd., Civil Appeal No. 1094 of 1963, decided on 9-9-1964 (SC), in which it was observed that an order under Section 16 (1) (c) of the Act refusing to remit an award to the arbitrators or the umpire is not appealable under the Act.

Under sub-section (1) of Section 16, the court can remit the award or any matter referred to arbitration to the arbitrator or umpire for reconsideration upon such terms as it thinks fit. If only one or some of the matters referred to arbitration is or are remitted to the arbitrator for reconsideration, pending the second reference, the award as to the matters not sent back to the arbitrator remain suspended. The arbitrator is *functus officio* as to those matters and cannot alter its judgment as to them: vide AIR 1963 Cal 583, (Brahma Swaroop Gupta v. Diwan Chand).

6. In his objection petition dated 23-1-1970 the appellant did not challenge the legality or validity of the award. The grounds of attack were as follows:—

(i) Cost of blasting for excavation of the rocks was not awarded.

(ii) The claim for excess work of 1,05,205 Cfts. should not have been rejected.

(iii) Interest should have been allowed at 12 p. c. p. a. for unjustly withholding the appellant's bills from 31-5-1966.

(iv) The work done by the appellant after termination of contract should have been paid at the lowest of the tendered rates, but not at the old rate.

(v) The appellant's claim for compensation had not been properly considered.

(vi) The arbitrator had not given the total amount due by the Department to the appellant, but had left the same to be calculated by them.

The objections come clearly within the ambit of Section 16. There was no allegation that the arbitrator had committed any legal misconduct or that his decision on any question of law was erroneous. There was also no allegation that the arbitrator acted dishonestly. It is, therefore, difficult to appreciate how the objection filed by the appellant falls within the second part of clause (c) of Section 30. In each and every paragraph of the objection petition, it was specifically stated that the award should be remitted to the arbitrator for reconsideration and at the end of the petition the following prayer was made:

"The applicant therefore prays that award be remitted to the arbitrator on the above grounds and for stating the definite amount due to the applicant by the Department."

Even in the memorandum of appeal there is a prayer for remitting the award to the arbitrator for reconsideration. When there was no prayer for the setting aside of the award, no question of refusing to set it aside can arise. For the aforesaid reasons, we hold that the order refusing to remit the award does not fall within clause (vi) of sub-section (1) of Section 39 of the Act as it does not amount to an order refusing to set aside the award and, therefore, the appeal is not maintainable.

7. Section 17 of the Act provides that where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow. This section bars an appeal against the decree except on the ground that it is in excess of, or not otherwise in accordance with the award. The appel-

lant has not preferred any appeal against the decree which has now become final and conclusive between the parties. Consequently, the present Miscellaneous appeal is incompetent.

8. In view of our above findings, we dismiss the appeal with costs.

G. K. MISRA, C. J.:— I agree.

Appeal dismissed.

AIR 1975 ORISSA 205

G. K. MISRA, C. J. AND N. K. DAS, J.
Collector, Ganjam, Appellant v.
Chandrama Das and others, Respondents.

First Appeals Nos. 89 and 90 of 1971,
D/- 18-2-1975.*

(A) Tort — Negligence — Maxim "res ipsa loquitur" — Govt. Hospital building newly constructed — Deceased going to Hospital on cycle for treatment getting down under portico — Portico meant for parking vehicles to get into out-patient block — While deceased was under portico it fell down and killed him — Fall of portico held must be ascribed to inherent defect — Maxim "res ipsa loquitur" applied — Govt. held was liable to pay compensation.

Where the deceased who had been to the Government Medical College Hospital for treatment got down from his cycle under the cantilever portico which was intended for parking of vehicles and while he was there the portico slab fell down and killed him on the spot it was held that the collapse of the portico of the costly building of the Hospital within three years of its construction told its own story and must be ascribed to the inherent defect in the construction and the maxim "res ipsa loquitur" applied to the case as it was exclusively within the special knowledge of the Govt. to explain how the portico of a new building collapsed and since it had failed to do so, it was liable to pay compensation to the dependants of the deceased. AIR 1966 SC 1750 and AIR 1974 SC 890, Rel. on.

(Paras 2, 9)

Cases Referred: Chronological Paras
AIR 1974 SC 890 = 1974 Lab IC 598 8
AIR 1966 SC 1750 = (1966) 3 SCR 649 7

Advocate General, for Appellant in both the Appeals; A. K. Tripathy and A. Rath (in F. A. No. 89 of 1971) and A. K. Tripathy (in F. A. No. 90 of 1971), for Respondents.

MISRA, C. J.:— First Appeal No. 89 of 1971 arises out of Money Suit No. 46 of 1970 and First Appeal No. 90 of

*(From order of D. Panigrahi, Sub. J., Berhampur in M. S. Nos. 46 and 47 of 1970, D/- 25-2-1971).

1971 arises out of Money Suit No. 47 of 1970. Both the suits were analogously tried in the court of the Subordinate Judge, Berhampur, as they arise out of the same facts. These two appeals have been analogously heard by us.

2. In Money Suit No. 47 of 1970, plaintiff No. 1 is the widow, plaintiffs 2 and 3 are the sons and plaintiffs 4 and 5 are the daughters of deceased Nirakar Sahu. In Money Suit No. 46 of 1970 plaintiff No. 1 is the widow and plaintiffs 2 and 3 are the sons of deceased Suma Das. Nirakar Sahu and Suma Das died in the morning of 5-9-1969 as a result of the fall of the southern cantilever portico slab of the out-patient block of the Maharaja Krishna Chandra Gajapati Medical College Hospital, Berhampur. Plaintiffs in both the suits have claimed compensation from the State of Orissa.

Nirakar Sahu was the Cashier in the office of the Superintending Engineer, Electrical, at Berhampur. He was getting Rs. 270/- per month as pay and D. A. at the time of his death. He was born on 23-2-1926 and was appointed in Government service on 24-9-1949. The Medical College is a Government institution. Nirakar was quite hale and hearty. His life expectancy was more than sixty years. He had been to the Medical College Hospital on a cycle for treatment. He got down from the cycle under the cantilever portico. While he was there the cantilever portico slab fell down on him and he died immediately on the spot. The place where he got down is intended for parking of vehicles to get into the out-patient block of the Medical College Hospital. The portico fell down due to inherent defect. Nirakar would have received pay and emoluments of Rupees 37,788/- till retirement and the plaintiffs would have been the beneficiaries of the income. The plaintiffs, however, claimed Rs. 25,000/- by way of compensation.

Deceased Suma Das was a rickshaw puller. He used to earn Rs. 8/- to Rs. 10/- per day and the plaintiffs in M. S. No. 46 of 1970 used to depend upon his income for their maintenance. He carried a passenger to the out-patient block of the Medical College Hospital and parked the rickshaw underneath the portico. The passenger went inside the block and while Suma Das was about to leave the portico it fell down and killed him at the spot. The plaintiffs claimed a sum of Rs. 15,000/- as compensation.

Defence in both the suits was almost identical. Death of Nirakar and Suma Das by fall of the cantilever portico is admitted. It was, however, asserted that the Chajja was not meant for parking of vehicles underneath. It was meant only to prevent rainfall and sun entering the entrance room. The Chajja stood for 21

months and no defect was visible during that period it was handed over to the Principal, M. K. C. G. Medical College, Berhampur, in November, 1968. Had there been any defect the structure would have fallen just after the centering was removed. As it stood for a long period and withstood the unprecedented cyclone in October, 1968 and heavy intensity of rainfall in 1969 it cannot be said that the portico fell down due to defective construction. It must have collapsed for reasons beyond the control of anybody and must be due to sudden heavy rain accompanied by thunder and lightning which must have resulted in heavy vibration causing heavy bending movements for which the normal design does not provide. The death of the two persons was due to vis major and the defendants were not liable to pay any compensation.

3. The learned Subordinate Judge decreed both the suits. In M. S. No. 46 of 1970 he granted a decree for Rupees 10,000/- while in M. S. No. 47 of 1970 the decree was for Rs. 25,000/-. It is against these decrees that the first appeals have been filed by the Collector of Ganjam representing the State of Orissa.

4. The learned Advocate-General does not dispute the quantum of damages. The relevant materials in that regard need not, therefore, be discussed. The learned Subordinate Judge found that there was no vis major and that the cantilever portico did not fall on account of heavy rain, thunder or lightning. This finding is not also assailed before us.

5. With regard to whether there was inherent defect in construction the learned Subordinate Judge gave a somewhat confused finding. While at one stage he held that there was no defect in construction, he ultimately concluded that it was due to inherent defect that the portico fell down.

6. Before examining the correctness of the conclusion of the learned Subordinate Judge it would be appropriate to indicate the relevant law applicable to the facts of this case. The law has been laid down in paragraphs 79 and 80 of Halsbury's Laws of England, 3rd Edition, Vol. 28. Those two paragraphs may be extracted:

"Res Ipsa Loquitur

79. Inference of defendant's negligence. An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence "tells its own story" of negligence on the part of the defendant, the story so told

being clear and unambiguous. The plaintiff cannot rely upon an inference of negligence unless he has alleged in the pleadings and proved at the trial the facts from which the inference is to be drawn. To these cases the maxim *res ipsa loquitur* applies.

80. Effect of application of maxim *res ipsa loquitur*. Where the maxim *res ipsa loquitur* applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence. The burden on the defendant is to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. Where, therefore, there is a duty on the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance on the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate. If the surrounding circumstances are not wholly within the defendant's control, or the injurious agency is animate, there is frequently no certain inference, and the plaintiff will not have discharged the burden without proof of some negligent act or omission on the part of the defendant. Injuries to animals do not give rise to any certain inference if the facts are consistent with the animals having injured themselves."

7. The law so laid down was approved in AIR 1966 SC 1750 (Municipal Corporation of Delhi v. Subhagwanti). In that case it was found that the Clock Tower in Delhi which collapsed causing loss of life was exclusively under the ownership and control of the Municipal Corporation or its servants and it was 80 years old. It was found that having regard to the kind of mortar used, the normal life of the structure of the top storey of the building, could be only 40 or 45 years. There evidence of the Chief Engineer was that the collapse was due to thrust of the arches on the top portion and the mortar was deteriorated to such an extent that it was reduced to powder without any cementing properties. It was not the case of the corporation that there was any earthquake or storm or any other natural event which was unforeseen and which could have been the cause of the fall of the Clock Tower. Their Lordships held that the mere fact that there was fall of

the Clock Tower told its own story in raising the inference of negligence so as to establish a *prima facie* case against the corporation.

8. The same view was taken in AIR 1974 SC 890 (Shyam Sundar v. State of Rajasthan). Therein their Lordships held that the maxim *res ipsa loquitur* does not embody any rule of substantive law nor a rule of evidence. The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it, even when the facts bearing in the matter are at the outset unknown to him and often within the knowledge of the defendant. Though the parties' relative access to evidence is an influential factor it is not controlling. The fact that the defendant is as much at a loss to explain the accident or himself died in it does not preclude an adverse inference against him, if the odds otherwise point to his negligence. The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on common sense and its purpose is to do justice when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. (See paragraph 10).

9. The facts of the case may now be examined in the light of the aforesaid tests. On the admitted case of the defendants the building of the M. K. C. G. Medical College was handed over to the Principal after construction in November 1968 and the portico fell down on 5-9-1969 — hardly within one year. The collapse of the cantilever portico which was newly constructed speaks its own story. There was no earthquake, thunder or lightning by which it fell down. The fall must be ascribed to the inherent defect in the construction. Public honesty has very much deteriorated in recent times. It is more or less a matter of common knowledge that contractors do not give the requisite quantity of cement and iron in the construction of buildings which would guarantee safety. Obviously there must have been bad design. We are not prepared to accept the evidence of the engineers examined on behalf of the defendants that there was no defect in the construction. If there was no defect it is difficult to imagine that the portico of such a costly building would collapse

within two to three years of its construction. The maxim *res ipsa loquitur* fully applies to the facts of this case. It was exclusively within the special knowledge of the defendants to explain how the portico of a new building collapsed. They have failed to do so by any satisfactory account. The engineers examined on behalf of the defendants who were in charge of the construction are bound to say that there was no defect in the construction. They shall have to justify their own stand; otherwise, they are liable to departmental action. In this view of the matter it is unnecessary to discuss in detail their evidence which has not been rightly accepted by the learned Subordinate Judge.

10. It was stated in the written statement that the two deceased persons had no business to come under the portico. The contention is so fantastic that it needs no notice. Patients in ordinary course of business are to have access to the hospital and they have to pass through the portico to have entry inside.

11. We find no merit in both the appeals which are dismissed with costs.

DAS, J.:— I agree.

Appeals dismissed.

AIR 1975 ORISSA 208

G. K. MISRA, C. J. AND N. K. DAS, J.
Hemalata Dei, Appellant v. Umasankari Moharana and others, Respondents.

A. H. O. No. 2 of 1974, D/- 12-2-1975.*

(A) Hindu Succession Act (1956), Section 23 — Scope and applicability — Hindu male dying intestate leaving only one male heir and other female heirs — Right of female heirs to claim partition of dwelling house — Section 23 will be no bar — F. A. No. 108 of 1970, D/- 10-12-1973 (Orissa), Reversed.

When a Hindu male dies intestate, a female heir is not entitled to enforce her right of partition of dwelling house, under Section 23 unless the male heirs exercise their right. If there are more than one male heir then there is a possibility of anyone of such heirs asking for a partition of the dwelling house and the female heir in such a case can claim her legitimate share. But where there is a single male heir, there is no possibility of that male heir claiming any partition against another male heir. Thus where there is a single male heir and others are female heirs, then those female heirs are entitled to claim partition. Their right to

claim partition of the dwelling house is not excluded by Section 23: F. A. No. 108 of 1970, D/- 10-12-1973 (Orissa), Reversed. (Para 4)

B. H. Mohanty and P. K. Sahu, for Appellant; B. B. Mohanty and Miss R. Natia, for Respondents.

G. K. MISRA, C. J.:— The disputed properties belonged to one Hadibandhu Moharana who died in 1943 leaving behind Chanda, Dinabandhu and Hemalata who were respectively his widow, son and daughter. Chanda filed a suit for partition in forma pauperis against Dinabandhu and Hemalata. While the pauper application was pending, Dinabandhu died on 2-4-1964. His widow Umasankari (defendant No. 1-ka) and his two daughters Jyoshnarani (defendant No. 1-kha) and Sandhyarani (defendant No. 1-ga) and his son Satchidananda (defendant No. 1-gha) were impleaded as parties in his place. On 4-8-1964 Chanda died. Hemalata was transposed as the plaintiff, paid court-fees on the plaint and the application was numbered as T. S. No. 96 of 1965. On 2-3-1965 Hemalata amended the plaint to bring it in consonance with her claim. It is to be noted that in the original claim Chanda would have been entitled to half interest while Hemalata would have been entitled to 3/10th interest in the total property. On 30-10-1965 the trial Court gave a direction to the plaintiff to file a consolidated plaint incorporating the amendment. Such a plaint was filed on 9-12-1965.

The plaintiff averred that in the ancestral house the defendants were residing while the other house was let out to tenants. This averment was not disputed in the written statement and the only plea taken was that Hemalata cannot sue for partition under Section 23 of the Hindu Succession Act, 1956 (hereinafter to be referred to as the Act). The trial Court decreed the suit, but gave a direction that the plaintiff would get 3/10ths interest out of the building which was not in occupation of the defendants. The defendants filed First Appeal No. 108 of 1970. The learned Single Judge dismissed the suit holding that the claim of Hemalata was not in consonance with the plaint filed by Chanda. He unfortunately overlooked that the plaint had been amended and a consolidated amended plaint had been filed incorporating the amendment. He did not advert to any discussion under Section 23 of the Act and dismissed the suit. The plaintiff has filed this appeal.

2. Mr. B. H. Mohanty for the plaintiff-appellant advanced two contentions:—

(i) Section 23 of the Act does not stand as a bar to the plaintiff's suit for partition, and

* (Against Judgment of K. B. Panda, J., in F. A. No. 108 of 1970, D/- 10-12-1973).

(ii) Even if Section 23 of the Act stands as a bar, the plaintiff is entitled to partition of the house which is not in occupation of the defendants.

3. Section 23 of the Act runs thus:—

"Special provision respecting dwelling-houses — Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The proviso has no application to this case. Hemalata is a female heir of deceased Chanda as daughter. She is married and is not either unmarried nor has she been deserted by or separated from her husband nor she is a widow.

4. The main part of the section requires consideration. Mr. B. B. Mohanty contends that the plaintiff as a female heir shall be entitled to a right of residence in the disputed houses, but she has no right of partition. A bare perusal of the section indicates that a female heir is not entitled to enforce her right of partition unless the male heirs exercise their right. If the male heirs ask for partition, the female heir can claim her legitimate share so far as the dwelling house is concerned. In this case the only male heir of Hadibandhu is Dinabandhu. There are no plurality of male heirs. Consequently the question of any other male heir claiming a partition with Dinabandhu does not arise. Where there is a single male heir, the right to claim partition of the dwelling house by a female heir is not excluded. The expression "the male heirs" towards the last part of the main section furnishes the clue to the meaning of the section. If there are more than one male heir then there is a possibility of anyone of such heirs asking for a partition of the dwelling house and the female heir in such a case can claim partition. But where there is a single male heir, there is no possibility of that male heir claiming any partition against another male heir. We are therefore clearly of opinion that where there is a single male heir and others are female heirs then those female heirs are entitled to claim partition.

5. On the aforesaid analysis the plaintiff is entitled to claim partition of both the houses to the extent of 3/10ths interest.

6. In view of our conclusion on the first point, the second point does not arise. The plaintiff would get her interest in both the houses unless in the final decree proceeding the court for purposes of convenience or on account of agreement of the parties allots one house to each giving compensation to the other on account of inequality of share.

7. In the result the appeal succeeds, the judgment of the learned Single Judge is set aside and the suit is decreed. A preliminary decree for partition be passed declaring that the plaintiff is entitled to 3/10ths interest in both the houses. In the circumstances, parties would bear their own costs throughout.

DAS, J.:— I agree.

Appeal allowed.

AIR 1975 ORISSA 209

R. N. MISRA AND K. B. PANDA, JJ.

P. Appa Rao, Petitioner v. Additional District Magistrate, Koraput and others, Opposite Parties.

O. J. C. No. 960 of 1973, D/- 30-1-1975.

(A) Stamp Act (1899), Section 29 (c) — Sale — Demand for additional duty on vendor — No finding that there was 'agreement to the contrary' — Demand is illegal — Vendee and not vendor is liable. (Paras 3, 4)

(B) Stamp Act (1899), Sec. 47-A (3) (Orissa) read with Rule 30 — Limitation for appeal — Period of 30 days starts from date of knowledge of order and not from date of order — Rule is valid. AIR 1961 SC 1500, Rel. on. (Para 5) Cases Referred: Chronological Paras AIR 1961 SC 1500 = (1962) 1 SCR 676 5

Y. S. N. Murty, for Petitioner; Addl. Standing Counsel, for Opposite Parties.

R. N. MISRA, J.:— Petitioner before us was one of the vendors of a sale deed registered on 30th of April, 1970, in favour of one Smt. Sunakari Narayanamma, wife of Sunkari Satyanarayana of Nawarangpur in the District of Koraput. Under the conveyance, a homestead plot within the said town was transferred for a consideration of Rs. 20,000/-. Upon a reference made under Section 47-A of the Indian Stamp Act (as amended in Orissa) (hereinafter referred to as "the Act") by the registering authority, the Additional District Magistrate of Koraput registered a miscellaneous proceeding bearing No. M. C. 75 of 1970. By order dated 23-12-1972, he came to find that the proper

CS/ES/A985/75/JHS

valuation of the property conveyed would be Rs. 58,364/- in place of Rs. 20,000/- which was disclosed as consideration for the sale. He assessed the stamp duty payable on the higher amount and required the petitioner to pay the difference of Rs. 2,965.05 vide Annexure-1. A notice was issued under Annexure-2 which the petitioner received on 23-1-1973. In paragraph 3 of the said notice it was specified as follows:—

"If you are dissatisfied with my order you may present an appeal to the District Judge within 30 days from the date of receipt by you of the said order."

On 21-2-1973, the petitioner preferred an appeal to the District Judge which was registered as C. M. A. 2/1973. Along with the memorandum of appeal the petitioner presented an application for condonation of delay. The learned District Judge, by his judgment, dated 4th July, 1973 (Annexure-4) came to hold that the excess stamp duty was not payable in law but found that the appeal was barred by limitation and refused to exercise the discretion vested in him in the matter of condonation of limitation. Ultimately the appeal was, therefore, dismissed on the ground that it was barred by time. This writ application is directed against the said appellate order and the petitioner has asked for quashing of the demand as affirmed by the said decision by issue of a writ of certiorari.

2. Three questions arise for decision on the contentions raised at the Bar.

1. Is the petitioner the appropriate person liable to be proceeded against under Section 47-A of the Indian Stamp Act as amended in Orissa?

2. Has there been any delay in presentation of the appeal?

3. Is the learned District Judge right in coming to his conclusion that in the facts of this case the demand was not justified?

3. Question No. 1. Admittedly the petitioner was one of the vendors in respect of the disputed sale deed. Mr. Murty for the petitioner places reliance on the provisions of Section 29 (c) of the Act in support of his contention that the vendor has no liability to pay the stamp duty. As far as material, Section 29 of the Act provides:—

"Duty by whom payable. — In the absence of an agreement to the contrary the expense of providing the proper stamp shall be borne—

- | | | | |
|---------|----|----|----|
| (a) xx | xx | xx | xx |
| (b) xx | xx | xx | xx |
| (bb) xx | xx | xx | xx |

(c) In the case of a conveyance (including a re-conveyance of mortgaged property) — by the grantee, in the case of a lease or agreement to lease — by the lessee or intended lessee;"

In Annexure-1 there is no finding that there was an agreement to the contrary so as to take the matter out of the purview of sub-section (c).

4. Learned Additional Government Advocate contends that we should not assume that there is no agreement to the contrary because, before the learned District Judge, petitioner had not raised such a contention. We do not accept the objection of learned Additional Government Advocate. It was obviously the duty of the Additional District Magistrate while raising the demand to record that this was a case covered by the exception and not by sub-section (c). There is no such finding. We must, therefore, proceed on the footing that it was a case to which normal rule applied and being a vendor, petitioner had no liability under sub-section (c) of Section 29 of the Act. In view of that position, the proceeding against the petitioner was misconceived. Liability if any, in terms of Section 29 (c) of the Act would be on the purchaser.

5. Point No. 2:— The learned District Judge has proceeded on the footing that "Neither under the Act nor under the rules any provision has been made to the effect that an appeal could be preferred within 30 days of the receipt of the order." Factually, this is not so. A set of rules called the Orissa Stamp Rules have been framed by the State Government in exercise of the powers vested in them under Sec. 75 of the Act read with the amendment under Orissa Act 35 of 1962. Rule 30 thereof provides:—

"Any person aggrieved by an order of the Collector under sub-section (2) of Section 47-A, within 30 days from the receipt of such order, prefer an appeal to the District Judge against such order."

Section 47-A (3) of the Act provides:—

"Any person aggrieved by any order of the Collector under sub-section (2) or sub-section (2-a) may, within thirty days from the date of the order, prefer an appeal before the District Judge and all such appeals shall be heard and disposed of in such manner as may be prescribed by rules made under this Act."

The Appellate Authority proceeded on the footing that limitation of 30 days began to run from the date of the order and, therefore, came to hold that the appeal was barred by limitation though presented within 30 days from the date of communication of the order. Apparently the rule appears to be contrary to the term of the statute. Mr. Murty rightly relies upon a decision of the Supreme Court in Harish Chandra v. Deputy Land Acquisition Officer, AIR 1961 SC 1500 wherein a similar position was being examined by the court. Under the Land Acquisition Act, 1894 the party aggrieved by

the award in regard to the quantum of compensation is entitled to apply to the Collector under the Act to make a reference to the court in adjudication of the dispute. For doing so, under the Land Acquisition Act, limitation runs from the date of the award. Dealing with this provision the court stated:—

"..... The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair-play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way."

Referring to precedents at length, the court ultimately formulated the rule thus:—

"..... These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned, ..."

The statutory rule referred to above requires that under Section 47-A (2) of the Act the appeal has to be filed within 30 days from the date of receipt of such order. It is not the contention of learned Additional Government Advocate that the statutory rule is ultra vires the Act. We find the rule to be keeping with the principles of natural justice as indicated by the Supreme Court. The notice issued to the petitioner rightly required the appeal to be filed within 30 days from the receipt of the order. As a fact, the appeal was filed within the period of 30 days. Merely because the petitioner filed an application under Section 5 of the Limitation Act not being sure of the position, does not preclude him from contending that the appeal was in time. We are, therefore, satisfied that the appeal had been presented within time and was not liable to be dismissed on the ground that it was barred by limitation. The learned District Judge was not required to exercise his discretion under Section 5 of the Limitation Act. The second question, therefore must also be answered in favour of the petitioner.

6. Ordinarily after having answered the first question in favour of the petitioner, we would not have dealt with the second question because it was not necessary for the disposal of this writ ap-

plication but as we were of the view that factual position should be clarified, we went into the matter. We are, however, of the view that the third question need not be examined. Learned Additional Government Advocate requires us to state that the view expressed by the learned Appellate Authority on the question of liability is not correct. Since we are not examining the correctness of the respective contentions on that question, it must be left open to be examined in an appropriate case. We would, however, make it clear that in case the Collector considers to proceed against the appropriate person, he would not be bound by the order of the Appellate Authority in regard to the question of liability.

The writ application is allowed and the amount under the demand is quashed. The petitioner shall have his costs of this case. Hearing fee is assessed, at Rs. 50/-.

K. B. PANDA, J.:— I agree.

Application allowed.

AIR 1975 ORISSA 211

S ACHARYA AND P. K. MOHANTI, JJ.

Krutibasa Nayak, Appellant v. Sri Jagannath Mahapravu and others, Respondents.

A. H. O. No. 31 of 1974, D/- 21-1-1975.

(A) Civil P. C. (1908), Section 151 — Inherent power — Court-fee paid on appeal filed on mistaken impression of grant of leave to appeal — If and when power available to direct refund. (Court Fees Act (1870), Section 13).

When a memorandum of appeal against the judgment of a Single Judge of the High Court is filed paying the court-fee but no leave to appeal has been granted, just because the memorandum has been numbered neither does it become an appeal for any purpose nor can it be entertained. When no order has been passed on that appeal and the lawyer at the time of filing honestly believing the grant of the necessary leave has sought the refund immediately after realising the mistake, it is a fit case to exercise the powers under the section to direct refund of the court-fee for doing justice. AIR 1958 All 766 (FB) and AIR 1966 Cal 267 (FB). Distinguished. Case Law Referred. (Para 7)

Cases Referred: Chronological Paras

AIR 1966 Cal 267 = 69 Cal WN 1025 (FB) 3, 6

AIR 1961 Orissa 89 = 26 Cut LT 480 3

AIR 1960 Andh Pra 34 = (1959) 1 Andh WR 389 3

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AIR 1958 All 766 = 1958 All LJ 469 (FB) 5

AIR 1950 Bom 4 = 51 Bom LR 602 3, 7

AIR 1943 Bom 50 = 44 Bom LR 912 3, 7

AIR 1939 Lah 257 = 41 Pun LR 796 3

AIR 1936 Cal 347 = 39 Cal WN 1074 3, 7

AIR 1935 Cal 707 = 40 Cal WN 309 3, 7

AIR 1934 Mad 566 = 67 Mad LJ 321 3

AIR 1933 Oudh 170 (1) = 10 OWN 292 3

(1868) 9 Suth WR 402 = Beng LR Supp
Vol 985 4

K. C. J. Ray, for Appellant; B. B. Mohanty, Addl. Govt. Advocate, for Respondents.

ACHARYA, J.:— The petitioner has filed a petition praying for the refund of the court-fee of Rs. 490.50 paise paid by him on the memorandum of this appeal. The petitioner was respondent No. 5 in Second Appeal No. 91 of 1971 which was allowed by Hon'ble R. N. Misra, J., by his judgment dated 18-7-1974. As the said judgment was delivered by Misra, J., while he was sitting in a Divisional Bench, Mr. Ray, the learned counsel for the petitioner, orally moved Misra, J., in his chambers on the same day for granting him leave to file appeal against the aforesaid decision. In the petition before us (at flag W) it is stated on affidavit that the petitioner's lawyer on the said occasion returned from the chamber of Misra, J., with the impression that the leave prayed for was granted by the Judge and with that impression the memorandum of appeal with court-fee of Rs. 490.50 was filed in this Court endorsing therein that the required leave for the purpose had been granted by the Judge. The memorandum of appeal was registered in the High Court office as A. H. O. No. 31 of 1974 and was placed before a Division Bench of which Misra, J., was not a member.

As in the connected records there was no order granting leave to appeal by Hon'ble R. N. Misra, J., that Division Bench directed that matter to be placed before a Division Bench consisting of Hon'ble Misra, J. When the matter thereafter came up before a Division Bench consisting of R. N. Misra, J., that Bench ordered the said matter to be placed only before R. N. Misra, J., in the Single Bench. Accordingly the matter was placed before R. N. Misra, J., in the single Bench, and he, on the question as to whether leave was granted by him or not in that case, stated in his order dated 3-10-74 that after he delivered the judgment in the aforesaid second appeal Mr. Ray came to his (Misra J.'s) chambers and prayed for the said leave. But as the lawyer for the other side was not present at that time in the chambers, Misra, J., could not entertain the said prayer of Mr. Ray and expressed that Mr. Ray might make a written application to that effect. It is stated in the said order

that no leave was granted by him in this case and so it was not open to the petitioner to file an A. H. O. After stating as above, Misra, J., desired the matter to be placed again before a Division Bench.

2. After the said order of Misra, J., the petition in question was filed on 19-11-1974 praying for the refund of the court-fee paid on the memorandum of appeal filed under aforesaid circumstances. This petition has been filed invoking the court's inherent jurisdiction under Section 151, Civil Procedure Code. Mr. Ray urges that on the facts and circumstances of this case this is a fit case in which the court, in the interest of justice, should exercise its inherent powers and order refund of the court-fee paid on the memorandum of appeal.

Mr. Mohanty, the learned Additional Government Advocate, opposes the petitioner's said prayer by submitting that the provisions in the Court Fees Act for the refund of court-fee are not applicable to the facts of this case; that the court, on the facts of this case, should not exercise its inherent power to order refund of the said court-fee; and that only in cases where the court-fee is paid on a mistaken or wrong calculation of the same, or by inadvertence or being called upon by the court to pay excess court-fee, which was not required under the law to be paid, then alone the court-fee paid can be ordered to be refunded and in no other case. According to Mr. Mohanty the court-fee paid on the memorandum of appeal is in accordance with law and the prayer for refund of the same is not on the basis of any mistake in the payment of the same but only on the basis of the mistake in filing the appeal as stated above, and so the prayer for refund cannot be granted.

3. In the Division Bench decision of this Court reported in AIR 1961 Ori 89 (Syed Sakhawwat Hossain v. State of Orissa) it has been held:—

"It is well settled that even in those cases which do not come within the scope of Sections 13, 14 and 15 of the Court Fees Act, a court has inherent power in certain circumstances to grant a refund of the court-fee already paid."

That view has been taken on a consideration of the decision reported in AIR 1934 Mad 566 and AIR 1960 Andh Pra 34. In the decisions reported in AIR 1936 Cal 347 (Kumud Nath Das v. Govt. Pleader); AIR 1943 Bom 50 (Ahmed Ebrahim Vorajee v. Govt. of the Province of Bombay); AIR 1950 Bom 4 (Vishnuprasad Narandas v. Narandas Mohanlal); AIR 1935 Cal 707 (Indu Bhusan Roy v. Secy. of State); AIR 1933 Oudh 170 (1) (Mohammad Sadiq Ali Khan v. Ali Abbas) and AIR 1939 Lah 257 (Firm Hari Ram and Sons v. H. O. Hay) the Courts by exercis-

ing their inherent power under Section 151, Civil Procedure Code ordered refund of the court-fee paid in those cases.

In the Full Bench decision reported in AIR 1966 Cal 267 (*Eagle Plywood Industries (P) Ltd. v. Amulya Gopal*) it has, amongst other things, been held in paragraph 8 thereof that where the matters are within the scope of Sections 13 to 15 of the Court Fees Act, the provisions of those sections must be strictly applied, and in matters out of the scope of those sections the court has in certain circumstances inherent jurisdiction to order refund of court-fee on the principle that every court has inherent power to do real and substantial justice for the administration of which it exists.

Thus there is no doubt that the provisions of Sections 13 to 15 of the Court Fees Act are not exhaustive and that the inherent power of the court under Section 151, Civil Procedure Code can be exercised for the purpose of ordering refund of court-fee in a fit case even though that case does not come within the scope of Sections 13, 14 or 15 of the Court Fees Act.

4. It was observed by Peacock, C. J., in *Hurro v. Sooraothonee*, (1868) 9 Suth WR 402:

"Since laws are general rules they cannot regulate for all times to come so as to make express provisions against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it."

The inherent powers of this court, provided under Section 151, Civil Procedure Code are meant for the purpose of doing real and substantial justice in matters before it, and the said power can justly and properly be invoked in the interest and/or to meet the ends of justice where there is no other remedy available to a party. Every court has power to act *ex debito iustitiae* to prevent injustice or unnecessary hardship to a party. The inherent power has been conferred on the courts to do the right and/or to undo a wrong in the administration of justice, and in that direction all necessary orders can be passed by virtue of the inherent powers excepting those which are expressly or by necessary implication prohibited by the law.

Excepting such cases of prohibition, the law, for obvious reason, does not limit or restrict the exercise of the inhe-

rent powers by courts to any particular type or class of cases; and the courts also do not hazard to give an exhaustive list of cases in which the said power can be exercised. Exercise of such powers has to be left to the discretion of the courts who in the interest of justice and to prevent any abuse of the process of the court can and should pass necessary and substantial order in that direction, though there may not be any provision for the same in the relevant law.

5. In the Full Bench decision reported in AIR 1958 All 766, (*Munna Lal v. Abir Chand*) cited by Mr. Mohanty, the learned Judges on the facts of that case disallowed the prayer of the appellant to refund the court-fee paid on that appeal. The facts, in short, on which the above decision was arrived at, are that the defendants filed the First Appeal and paid the *ad valorem* court-fee on the valuation of the suit. The decree against which the appeal was preferred was a conditional decree and it had been provided in that decree that if the plaintiff-decree-holder made any default in making a certain payment within the time allowed then the suit must stand dismissed. After the appeal was filed the plaintiff-decree-holder made a default which resulted in the automatic dismissal of the suit. Accordingly the appeal became infructuous. The appellants therefore applied for the withdrawal of the same before it was formally admitted by the court and the court allowed the said prayer.

The appellant thereafter filed an application for the refund of the court-fee paid on the memorandum of the said appeal, and that matter was referred to a Full Bench of that court, which rejected the said prayer on the ground that the amount of court-fee in that case was paid properly and intentionally as the appeal otherwise would not have been entertained at all. On these facts they did not exercise their inherent power to grant the said prayer. Thus the facts and premises in which the said decision was arrived at are entirely different from those in the present case before us and so the same is not an apt citation for this case.

6. In the case reported in AIR 1966 Cal 267 relied upon by Mr. Mohanty, the court, on the facts of that case, held that no equitable consideration arose for making the order of refund of the court-fee. The facts of this case were that a memorandum of appeal was filed out of time, together with an application under Section 5 of the Limitation Act for condonation of the delay. In order to make the application under Section 5, it was necessary to affix stamps of the full value upon the memorandum of appeal. Without affixing such stamps, the appli-

cation under Section 5 could not be entertained. The petitioner moved that application and lost it. On these facts the learned Judges observed that the appellant had taken the risk of either being successful or losing the said application and simply because the said application became unsuccessful that is no reason for exercising the inherent powers of the court for passing an order of refund. Thus the said decision is distinguishable on facts.

A few other decisions in which the prayer for refund of court-fees has been disallowed are all on facts different from the facts of the present case and do not afford a proper guideline to decide a matter of the present nature.

7. The memorandum of appeal filed in this case cannot at all be accepted and entertained as an appeal, as no leave for the filing of the appeal had actually been obtained, and accordingly in the eye of law there was no appeal before this court against the judgment and decree of the Single Judge. Merely because a memorandum of appeal with court-fee paid thereon was filed in the office of this court and the office appended a number to it, it did not become an appeal for any intent or purpose. This memorandum of appeal, as stated earlier, was filed because of the mistaken impression of the counsel of the petitioner that leave to appeal as required had been granted in the case, though in fact no such leave had been granted.

Relying on the mistaken impression of the lawyer the petitioner had to pay good money for no cause or purpose. As is evident from the facts of the case the lawyer, at the time he advised his client to pay the court-fees, was certainly labouring under an honest belief that the required leave had been granted. As soon as it was discovered that no leave had been granted to file the appeal, the petitioner's lawyer made this move for the refund of the court-fee. The appeal thus was filed with the abovementioned mistaken impression of the lawyer and the lawyer immediately on the discovery of the real fact has made a move for the refund of the court-fee. The appeal as such has not been entertained, nor any order on that appeal has so far been passed by this court. The only matter which so far has been dealt with by this court is relating to the fact as to whether leave, as required, was granted or not. The matter which has come before us is only a matter relating to the refund of the court-fee and we are called upon to decide that matter on the petition filed to that effect.

In the decisions reported in AIR 1936 Cal 347, AIR 1943 Bom 50, AIR 1950

Bom 4. and AIR 1935 Cal 707 the principle upon which the courts acted under Section 151, Civil Procedure Code seems to be that if a party paid court-fees which he was not liable to pay or paid court-fees more than what he was liable to pay through mistake or inadvertence, Government could not be allowed to take advantage of such mistake.

In the facts and circumstances under which court-fee was paid in this case and as matters stand at present as stated above, in our view this is a fit case in which on equitable considerations and for doing proper justice to the case, the inherent powers of the court can justly be exercised for passing an order directing refund of the court-fee paid on the memorandum which has been numbered as A. H. O. No. 31 of 1974.

8. Accordingly a certificate be issued in favour of the petitioner authorising him to take refund of the court-fee paid by him on his aforesaid memorandum. The said memorandum be struck off from the registry of this court and be returned to the petitioner.

MOHANTI, J.:— I agree.

Petition allowed.

AIR 1975 ORISSA 214

G. K. MISRA, C. J. AND

P. K. MOHANTI, J.

Raghunath Panda, Appellant v. Radhakrishna Panda and others, Respondents.

A. H. O. No. 17 of 1972, D/- 23-1-1975.*

(A) Hindu Law — Joint family — Severance of joint status — Any acquisition subsequent to severance of joint status is self acquisition of person who acquires property. (F. A. No. 26 of 1965, D/- 5-7-1972 (Orissa) Reversed). (Para 6)

(B) Hindu Law — Alienation — Madras School — Coparcener can alienate his undivided interest without consent of other coparceners. (F. A. No. 26 of 1965, D/- 5-7-1972 (Orissa), Reversed). (Para 7)

B. K. Pal, for Appellant; N. V. Ramdas and P. V. Ramdas, for Respondents.

G. K. MISRA, C. J.:— One Sitaram Panda had three sons — Kalia Kanhu (who died in 1952), Jagannath (who died in 1925) and Khetrabati (Plaintiff No. 1). Raghunath (defendant No. 1) is the son of Kalia Kanhu and Gelha (defendant No. 2) is the widow of Debraj, another son of Kalia Kanhu, who died in 1937. Jagannath's widow Subarni died in 1959.

*(Against Judgment of B. K. Ray, J., in F. A. No. 26 of 1965, D/- 5-7-1972).

BS/DS/A567/75/MBR

Hema (defendant No. 9) is the wife of plaintiff No. 1 and Radhakrishna (plaintiff No. 2) is the son of plaintiff No. 1. Plaintiffs' suit was one for partition of half interest in Schedules A, B and C properties of the plaint. While asking for partition they also challenged the validity of the sale deeds Ext. 2 dated 26-11-34 and Ext. J dated 20-1-36. Plaintiffs also asked for half share in the properties covered by Ext. H which were given to Subarni towards her maintenance and which defendant No. 1 alone appropriated. Items 14 and 16 to 22 of the B Schedule property were claimed to be the self-acquisition of defendant No. 1 purchased by him on 6-5-1940 for which no document has been filed and on 30-9-1956 by Ext. 6. Plaintiffs claim half share in these properties also.

The defence case was that there was a partition by metes and bounds near about the year 1927. The acquisitions made by defendant No. 1 under Exts. J, H and 6 are valid and defendant No. 1 alone is exclusively entitled thereto. The properties referred to in Items 14 and 16 to 22 of the B Schedule of the plaint were acquired by defendant No. 1 on 6-5-1940 and 30-9-1956 and are his self-acquisitions and are not partible.

The trial court found that there was a partition by metes and bounds in 1927 and that the suit for partition must fail. He, however, granted a decree for partition in respect of the properties covered by Ext. H as those properties were allotted to Sabarni towards her maintenance and on her death in 1959 both the plaintiffs and the defendants were entitled to divide the same. The trial court also found that defendant No. 1 would be entitled to the entire share of defendant No. 2 and he has acquired a title by adverse possession.

Against the finding in respect of the properties covered by Ext. H, the defendants did not file any appeal or cross-objection in the High Court. The decision of the trial court is accordingly concluded so far as Ext. H is concerned. In other words, the subject-matter of Ext. H is liable to partition between the plaintiffs and the defendants.

Being aggrieved by the judgment of the trial court, the plaintiffs carried an appeal to the High Court. The First Appeal was ultimately heard by our learned brother Justice B. K. Ray. He recorded the following findings:—

(1) There was no partition by metes and bounds near about 1927;

(2) There was severance of joint status amongst the parties 20 to 30 years prior to the filing of the suit in 1962;

(3) Defendant No. 1 is not entitled to claim Items 14 and 16 to 22 of the B Schedule property as his self-acquisition;

(4) Transfer by plaintiff No. 1 in favour of defendant No. 9 under Ext. 2 dated 26-11-1934 did not convey a valid title and consequently the father of defendant No. 1 did not acquire a valid title in respect of the same property under Ext. J dated 20-1-1936;

(5) The property that fell to the share of defendants would be divided amongst them equally.

2. The findings of the learned single Judge that there was no partition by metes and bounds near about 1927 and that there was severance of joint status amongst the parties 20 to 30 years prior to the suit were assailed before us in a somewhat luke-warm manner. After having gone through the evidence and having carefully heard the learned Advocates we are satisfied that those findings are unassailable and they are accordingly confirmed.

3. It has already been stated that the finding of the trial court that the properties covered by Ext. H are partible was not challenged in the High Court by the defendants either by way of appeal or cross-objection. That finding accordingly has become concluded.

4. The only points for consideration in this appeal are:—

(1) Whether plaintiff No. 1 conveyed a valid title in favour of defendant No. 9 by Ext. 2 dated 26-11-1934?

(2) Whether the properties covered by Items 14 and 16 to 22 of the plaint B Schedule are the self-acquisitions of defendant No. 1?

(3) Whether defendant No. 1 has acquired a valid title to the properties to which defendant No. 2 is entitled by adverse possession.

5. On the last point the learned single Judge held against defendant No. 1 and in our opinion rightly. This is not a suit in which the inter se right, title and interest of defendants 1 and 2 were litigated. The suit was filed by the plaintiffs for partition. Defendant No. 1 did not even take up the plea that he has acquired a title by adverse possession to the properties of defendant No. 2. We accordingly confirm the finding of the learned single Judge on this point.

6. The learned single Judge held that Items 14 and 16 to 22 of the B Schedule property are not the self-acquisitions of defendant No. 1 as there was sufficient nucleus in the family from out of which these properties could be acquired. This conclusion is directly contrary to his earlier finding that there was severance of joint status in the family 20 to 30 years prior to the suit. After severance of joint status is made, the erstwhile coparcener ceased to be a member of the coparcenary. The doctrine of nucleus has application only when there is existence of a co-

parcenary. Any acquisition subsequent to the severance of joint status is the self-acquisition of the person who acquires the property. This aspect of the matter was unfortunately overlooked. The learned single Judge's finding must accordingly be reversed. We hold that Items 14 and 16 to 22 of the B Schedule property are the self-acquisitions of defendant No. 1.

7. The learned single Judge found that the alienation by plaintiff No. 1 in favour of defendant No. 9 by Ext. 2 dated 26-11-1934 is invalid as by then there was existence of a coparcenary and one of the coparceners cannot alienate his undivided interest without the consent of the remaining coparceners. This conclusion is fallacious. It is untenable in its application to the Madras school of Hindu law where a coparcener can alienate his undivided interest without the consent of the other coparceners. It is unnecessary to refer to any authority (See paragraph 259 of Mulla's Hindu Law). The legal position is sufficient to dislodge the finding. It is unfortunate that the learned advocates for the parties did not bring this aspect of law to the notice of the learned single Judge. Plaintiff No. 1 was therefore entitled to transfer his undivided interest in favour of defendant No. 9. Ext. 2 is valid. The validity of Ext. J was not challenged on any other ground excepting on the basis that Ext. 2 did not convey a valid title. Defendant No. 1 has therefore a valid title to the property under Ext. J.

8. We sum up our conclusions thus:—

(1) There was no partition by metes and bounds near about 1927 as pleaded by defendant No. 1;

(2) There was a severance of joint status about 20 to 30 years prior to the suit;

(3) The properties covered by Ext. H are partible;

(4) The properties covered by Ext. J are the self-acquisition of defendant No. 1;

(5) Items 14 and 16 to 22 of the plaintiff B Schedule property are the self-acquisitions of defendant No. 1.

9. On the aforesaid conclusions the suit for partition must succeed subject to our observations in respect of different classes of properties over which there was dispute. Any alienation made by the parties would be adjusted towards their share. If there was unequal land falling to the respective shares, it is open to the parties to ask for accounts in the final decree stage.

10. In the result, the judgment of the learned single Judge is set aside in part and appeal is allowed in part. The preliminary decree for partition be modified

accordingly. In the circumstances, parties would bear their own costs throughout.

MOHANTI, J.:— I agree.

Appeal partly allowed.

AIR 1975 ORISSA 216

R. N. MISRA, J.

Sailabala Baxi, Appellant v. Johanas Bissoi and others, Respondents.

Second Appeal No. 233 of 1971, D/- 6-1-1975.*

(A) Constitution of India, Article 341, — Orissa Scheduled Areas Transfer of Property (by Scheduled Tribes) Regulation 1956 (2 of 1956), Section 2 (e) — "Scheduled Tribes" under, includes "Bhotrada" or "Dhotada" as indicated in Constitution (Scheduled Tribes) Order 1950 and refers to the same community as "Bhotras" — Does not relate to any sub-caste of the named caste. AIR 1969 SC 597 and AIR 1965 SC 1269 and AIR 1965 SC 1557, Disting. (1969) 35 Cut LT 139, Ref. to.

(Para 7) Cases Referred: Chronological Paras AIR 1969 SC 597 = (1969) 2 SCR 997. 7 (1969) 35 Cut LT 139 = ILR (1969) Cut 202

AIR 1965 SC 1269 = (1965) 1 SCR 316 7 AIR 1965 SC 1557 = (1965) 2 SCR 877 7

P. C. Mohapatra and D. Mohanty, for Appellant; Y. S. N. Murty and S. P. Raju, for Respondents.

JUDGMENT:— Defendant No. 1 is in second appeal against the affirming decision of the learned District Judge, Koraput in a suit for title, recovery of possession or alternatively for recovery of the consideration money paid for the sale.

2. Defendant No. 1, plaintiff alleged, sold the land covered by plots numbers 267, 238, 239 and 482 appertaining to khata No. 137 of village Kenduguda to plaintiff under a registered sale deed dated 31-12-1962 (Ext. 1) for a consideration of Rs. 1,000/-. During the recent settlement operations, plaintiff claimed patta on the strength of his title and possession. Defendants 2 to 6 contested plaintiff's claim on the allegation that they were in possession before plaintiff got into possession and their surrender to defendant No. 1's father-in-law for arrears of revenue was invalid and contrary to the provisions of Orissa Regulation 2 of 1956. The final record-of-rights was published in the names of defendants 2 to 6. After receiving the record of rights, defendants 2 to 6 forcibly entered

*(From order of S. K. Mohanty, Dist. J., Koraput, in Title Appeal No. 29 of 1969, D/- 15-5-1971).

BS/BS/A586/75/SVM

into the property on 27-10-1965 and cut away the standing crop. A proceeding under Section 145 of the Code of Criminal Procedure was initiated which terminated in favour of the defendants. Plaintiff thereafter filed the suit on 8-7-1967.

3. Defendant No. 1 took the stand that plaintiff knew that the other defendants were not able to pay the dues and had given up cultivation and relinquished the land in favour of the land-holder Binayak Baxi and plaintiff had also made due enquiries and had come to learn that defendant No. 1 as pattadar was in possession of the land. Plaintiff had made due enquiries and was satisfied about the defendants' title and thereafter had entered into the sale transaction. According to defendant No. 1, Orissa Regulation 2 of 1956 had no application because defendants 2 to 6 are not members of the Scheduled Tribes.

Defendants 2, 3 and 6 who entered contest in a joint written statement took the stand that defendant No. 1 is the daughter-in-law of Binayak Baxi, the ex-intermediary of the inam village. Defendant No. 1 was not the pattadar of the suit property and had no right, title or interest to convey to plaintiff. The contesting defendants were Bhotras by caste and, therefore, belonged to the scheduled tribes and were entitled to the protection of Regulation 2 of 1956. The disputed property was never in khas possession of the ex-intermediary and the unregistered deed of relinquishment from the second defendant was invalid in law because no permission had been obtained as envisaged under the aforesaid Regulation. Even if there were a valid relinquishment, the fresh settlement had to be with the necessary permission; otherwise it is bound to be affected in view of the provisions of the Regulation. Defendants 4 and 5 laid no claim to the property.

4. The learned Trial Judge found that the inami estate vested with effect from 1-7-1954 under the provisions of the Orissa Estates Abolition Act; Binayak had no title to the disputed property and, therefore, defendant No. 1 acquired no title under the patta in her favour. While refusing to declare the title of plaintiff, the learned Subordinate Judge gave a decree for refund of the consideration money together with interest. He further recorded a finding that defendants 2 to 6 were Bhotras — a community covered by Orissa Regulation 2 of 1956.

5. The learned District Judge in appeal came to hold that the inamdar continued to have title to the property until 1-7-1963 on the basis of the compromise (Ext. K). He further found that defendants 2 to 6 were members of the Scheduled Tribes and, therefore, the Orissa Regulation had application to

them. In the absence of the requisite permission the learned Appellate Judge held in agreement with the learned Subordinate Judge that the relinquishment under Ext. B by the second defendant in favour of the inamdar Binayak was invalid. He further found that the patta in favour of defendant No. 1 by Binayak was contrary to Section 5 of the Regulation as there had been no requisite permission and accordingly defendant No. 1 obtained no title to the property. Accordingly he affirmed the decree of the learned Subordinate Judge. This affirming decree is impugned in second appeal.

6. Three contentions have mainly been raised on behalf of the appellant:

(1) Defendants 2 to 6 are not members of the Scheduled Tribes and the finding reached in the courts below is contrary to law;

(2) Even if they are members of the Scheduled Tribes, Section 5 of the Regulation has no application to the facts of the case; and

(3) The order of refund of the consideration money is unwarranted.

7. Contention No. 1: — Defendants 2, 3 and 6 in their written statement said that they were Bhotras by caste and were "covered by Scheduled Tribes as contemplated by the Constitution of India and Regulation 2 of 1956 of Orissa". Plaintiff as P. W. 1 stated:—

"Defendants 2 to 6 are Bhotras by caste and they are of Scheduled Tribes."

Defendant No. 1 did not examine herself, but her father-in-law was examined as D. W. 1. He did not lead any evidence in support of the plea that defendants 2 to 6 were not members of the Scheduled Tribes. The other defendants led evidence to support the contention that they were Bhotras and belonged to the Scheduled Tribes.

Both the courts below have come to find that these defendants (2 to 6) are Bhotras. Under Section 2 (e) of the Regulations, "Scheduled Tribes" shall mean "the Scheduled Tribes specified in respect of the State of Orissa in the Constitution (Scheduled Tribes) Order, 1950", and in the said Order, so far as the State of Orissa is concerned, "Bhotada" or "Dhotada" occurring as Item No. 5 in the list declares members of the said community to be a Scheduled Tribe.

Learned counsel for the appellant relies upon certain decisions of the Supreme Court. In the case of Parsram v. Shivchand, AIR 1969 SC 597, the court approved the earlier decisions in the case of Basavalingappa v. D. Munichinappa, AIR 1965 SC 1269 and in the case of Bhैया Lal v. Harikrishen Singh, AIR 1965 SC 1557. In Basavalingappa's case (AIR 1965 SC 1269), it had been said:—

"..... Wherever one caste has another name it has been mentioned in brackets after it in the Order. Therefore, generally speaking, it would not be open to any person to lead evidence to establish that caste B is part of Caste A notified in the order."

In the second case (AIR 1965 SC 1557), the court held:—

"..... the plea that the Dohar caste is a sub-caste of the Chamar caste cannot be entertained in the present proceedings in virtue of the Constitution (Scheduled Castes) Order, 1950. In order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar, Jatav or Mochi and so in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar, Jatav or Mochi. The plea that though the appellant is not a Chamar as such, he can claim the same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an inquiry of this kind would not be permissible having regard to the provisions contained in Article 341."

Dealing with the point raised in Parsram's case (AIR 1969 SC 597), the court held:—

"These judgments are binding on us and we do not therefore think that it would be of any use to look into the gazeteers and the glossaries on the Punjab castes and tribes to which reference was made at the Bar to find out whether mochi and chamar in some parts of the State at least meant the same caste although there might be some difference in the professions followed by their members, the main difference being that Chamars skin dead animals while Mochis do not. However that may be, the question not being open to agitation by evidence and being one the determination of which lies within the exclusive power of the President, it is not for us to examine it and come to a conclusion that if a person was in fact a mochi, he could still claim to belong to the scheduled caste of Chamars and be allowed to contest an election on that basis."

Relying on these decisions, Mr. Mohanty for the appellant contends that "Bhotras" have not been declared as members of the Scheduled Tribes. The Presidential order refers to "Bhottada" and not to "Bhotra". Therefore, evidence could not have been received from the parties in support of the contention that defendants 2 to 6 were really "Bhottadas". Accord-

ing to Mr. Mohanty, some observations of this court in the case of Damodar Mohapatra v. Raghunath Pradhani, (1969) 35 Cut LT 139 cannot be taken to be good law in view of the pronouncements of the Supreme Court referred to above. This Court said in paragraph 5 of the judgment:

"Whether a Bhotra comes within any of the sub-groups of Scheduled Tribes enumerated in Part IX is a pure question of fact. The decree-holder from the very start accepted the position that judgment-debtor No. 1 was a member of the Scheduled Tribe. If any objection had been raised that he was not a member of the scheduled tribe the purchaser from judgment-debtor No. 1 and judgment-debtor No. 1 could have pleaded and proved that they belonged to one of the sub-groups of the Scheduled Tribes. I accordingly do not find any substance in the contention of Mr. Ramdas that on a bare comparison of the various classes of Scheduled Tribes in Part IX of the Order the court would come to a conclusion that judgment-debtor No. 1 was not a member of the Scheduled Tribe."

Some of these observations may run counter to the rule indicated by the Supreme Court in the cases referred to above, but it is unnecessary to reach a final conclusion in this case on such score.

Plaintiff and defendants 2 to 6 have taken the stand that defendants 2 to 6 are Bhotras belonging to the Scheduled Tribes. The dispute in the present case does not relate to any sub-caste of the named caste. Bhotras as pleaded in the case and Bhottadas as indicated in the Presidential Order refer to the same community and the courts below appear to have come to the correct conclusion. I do not think, on the basis of the decisions of the Supreme Court referred to above, defendant No. 1 can succeed in her contention that defendants Nos. 2 to 6 are not members of the Scheduled Tribes. The first contention must accordingly fail.

8. Contention No. 2. Section 5 of the Regulation 2 of 1956 provides:—

"(1) No surrender or relinquishment of any holding or a part of a holding by a tenant to a landlord under any law for the time being in force and applicable to such tenancy, such tenant being a member of a Scheduled Tribe, shall be valid unless after such surrender or relinquishment the landlord thereof by whatever name called either settles the said holding or part of the holding as the case may be, with another member of a Scheduled Tribe or else retains it in his possession or settles it with any other person with the approval of the competent authority when such member of a Scheduled Tribe is not available.

(2) Any surrender or relinquishment shall be deemed to be a transfer of immovable property within the meaning of this Regulation and except as otherwise provided in sub-section (1) the other provisions of this Regulation shall, so far as may be, apply.

(3) According to defendants 2, 3 and 6, they were tenants in possession of the property. Defendant No. 1 took the stand that defendant No. 2 had relinquished the tenancy interest in the property by Ext. B dated 8-6-1959 in favour of her father-in-law Binayak. Binayak in his turn, according to defendant No. 1, granted a patta in her favour two days thereafter under Ext. C. Once it is held that defendants 2, 3 and 6 were members of the Scheduled Tribes and in view of the conceded position that defendant No. 1 is not a member of the Scheduled Tribes, Section 5 of the Regulation is certainly attracted. Only when the settlement was in favour of a member of the Scheduled Tribes Binayak's action would not have been open to dispute. The view taken by the courts below about the effect of Section 5 of the Regulation is thus not open to challenge.

9. Contention No. 3. The finding of the courts below is that the sale deed (Ext. 1) is for good consideration and a sum of Rs. 1,000/- had been received by defendant No. 1 from plaintiff. Accordingly on the finding that plaintiff is not entitled to have his title declared on the footing of Ext. 1, the learned Subordinate Judge decreed refund of the consideration money for which there is a specific prayer in the plaint. The Lower Appellate Court has upheld that part of the decree. Defendant No. 1 has failed to establish her specific plea that her defect of title was known to plaintiff at the time the sale transaction took place. I do not think there is any justifying circumstance to relieve defendant No. 1 — vendor from the direction in the decree for refunding the consideration money. There is no justification for defendant No. 1 to appropriate the consideration money when she is unable to pass good title to plaintiff. That part of the decree also is not open to attack in my view.

10. The second appeal must accordingly fail. It is dismissed with costs throughout.

Appeal dismissed.

AIR 1975 ORISSA 219

FULL BENCH

G. K. MISRA, C. J., P. K. MOHANTI
AND N. K. DAS, JJ.

Magulu Jal and others, Appellants v.
Bhagaban Rai and others, Respondents.

Second Appeal No. 340 of 1970. D/-
15-4-1975.*

(A) Constitution of India, Art. 162 —
Executive instruction — Bhogra Tenures
in ex-State of Sonepur in Orissa — Inci-
dents of — Abolition of Tenures by exe-
cutive instruction in the form of Press
Note — Validity.

Bhogra lands in all the former States of Orissa (in the ex-State of Sonepur in the instant case) which had been granted to headmen differently called in different States, belonged to the State and they had been granted towards remuneration of the headman for management of the villages. (Para 5)

The gaontias had no proprietary rights in the Bhogra lands which they enjoyed towards remuneration for management of the villages. Their rights were wholly precarious. They had no right of transfer in any manner excepting by way of lease for a short period. They were liable to be evicted for contravention of the law unless the Durbar (Ruler) condoned the delinquencies. AIR 1975 Orissa 146, Rel. on. (Para 5)

The source of the Collector's authority to convert Bhogra lands into raiyati lands and to settle them on tenants is derived from a Press Note issued by the Government on 2-2-1956. The Press Note is a piece of executive instruction. By the Press Note itself there is a declaration that the Gauntia system prevailing in the ex-State of Sonepur was abolished with effect from 1st April, 1956. The abolition of Bhogra lands was, therefore, the result of the policy decision taken by the Government. In the absence of any law to the contrary, the State, as the proprietor, had full power and authority to abolish the Gauntia system and to issue administrative instruction to subordinate officers as to how to deal with those lands for conferment of occupancy right. (Paras 6, 7)

(B) Constitution of India, Article 162 — Executive instructions — Press Note issued by Government relating to abolition of Bhogra tenancies and abolition of Gauntia system — Instructions issued by Orissa Board of Revenue — Procedure to be followed by authorities — Principles of natural justice, applicability.

*(From decision of R. N. Panda, Sub-J., Bolangir, in T. A. No. 68/18 of 1966-67, D/- 18-8-1970).

The Press Note does not prescribe any procedure of enquiry as to how settlement is made by subordinate Officers. There is, therefore, no statutory or codified rule and the enquiry must proceed in accordance with the principles of natural justice. The principles of natural justice in a case of this nature will be fulfilled by the Collector even by obtaining information in any way he thinks best. He would, however, give a fair opportunity to parties in knowing the information and in correcting or contradicting it. That means, he must fairly listen to both sides and must act in good faith. There is, therefore, no substance in the contention that in the absence of any procedure prescribed in the Press Note it is invalid or without jurisdiction. AIR 1972 Orissa 224 (FB), Rel. on. (Para 3)

However, after the Press Note was given by the Government, Instructions, intituled as "Board's Instructions on the Disposal of Gaunti Abolition and Bhogra Conversion Proceedings in the Sonepur Sub-Division of Bolangir District", were issued by the Orissa Board of Revenue. In those instructions, detailed procedure was laid down as to how enquiry is to be made in Bhogra conversion proceeding.

(Para 9)

The Board's Instructions were *intra vires* and were supplementary to the Press Note and the Press Note was to be implemented in accordance with the Board's instructions. These instructions lay down in clear terms the procedure to be followed which conforms to the principles of natural justice. On this ground also the contention that no procedure was prescribed for settlement of raiyati lands on occupancy tenants must be rejected. O. J. C. No. 261 of 1966, D/- 11-2-1970 (Orissa), Approved. (Para 9)

(C) Civil P. C. (1908), Section 9 — Jurisdiction of Civil Court — Press Note issued by Government abolishing Gauntia system and converting Bhogra lands — Order of Collector under the authority of Press Note — Remedy of aggrieved party. (Constitution of India, Article 226).

An appeal to the Revenue Divisional Commissioner against the order of settlement made by the Collector within a period of thirty days was provided in the Board's instructions. On the conclusion that the Board's instructions are valid and legal, the contention that no right of appeal was provided against the Collector's order of settlement is without substance. (Para 10)

When an appellate forum was provided, the Revenue Divisional Commissioner should go into merits and could not dismiss the appeal on the ground that a civil suit was pending and the dismissal of the appeal on that ground, is clearly without jurisdiction. The Civil

Court has a very limited jurisdiction. The remedy open to the appellant in such a case is to challenge the appellate order of the Revenue Divisional Commissioner under Article 226 of the Constitution for a writ of certiorari to quash the order and for a writ of mandamus to direct the Revenue Divisional Commissioner to hear the appeal on merits. Where they did not take such a step, the adverse appellate order against them stands. AIR 1966 SC 1438, Rel. on. (Para 10)

(D) Civil P. C. (1908), Section 9 — Jurisdiction of Civil Court—Exclusion — Principles — In case jurisdiction is excluded if it can interfere with orders of statutory tribunals. 1973 (1) CWR 203, Overruled. Observation to the contrary in (1970) 36 CLT 519, Dissented from.

On the question of exclusion of jurisdiction of Civil Courts, the following principles may be laid down as well settled:

(i) Exclusion of the jurisdiction of Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.

(ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.

(iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it, a remedy provided by the statute must be followed and the Court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil Suits are prescribed by the statute.

(iv) The Legislature may entrust the special tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction.

(v) Even in a case when the Civil Court would have jurisdiction on a find-

ing that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law. (1968) 34 Cut LT 1169 and ILR (1973) Cut 826, Approved. Case law discussed. (Para 20)

Held (applying the aforesaid principles to the facts of the instant case), that the Press Note which was an administrative instruction conferred jurisdiction on the Collector to settle the resumed Bhogra lands on occupancy rights on persons in possession on 1-7-1955. The right to get such land on occupancy tenancy did not exist at common law and was created by the Press Note. The Press Note also provided special remedy before the Collector against whose order an appeal was provided to the Revenue Divisional Commissioner under the instructions of the Board of Revenue. The Press Note read with the instructions of the Board of Revenue prescribed procedure and remedies normally associated with actions in civil suits. The intendment of the administrative instruction is to impliedly oust the jurisdiction of the Civil Court. (Para 21)

Under the Press Note the Collector had the jurisdiction to determine as to which persons were in possession of the Bhogra lands on 1-7-1955. This fact is not a jurisdictional fact. The Collector in the exercise of jurisdiction determined the factum of possession and in so doing he might decide the question wrongly. The mistake, if any, could be corrected by way of appeal to the Revenue Divisional Commissioner. The Civil Court has no jurisdiction to examine the sufficiency or adequacy of the materials in support of the Collector's decision and cannot sit in appeal over the Collector's order. (Para 22)

The resumed lands belonged to the State which is to settle occupancy raiyats therein. It is a matter which lies entirely in the discretion of the State. The State as a benevolent landlord resorted to a fair and equitable policy decision that the lands would be settled on those who were in actual physical possession on 1-7-1955. Civil Courts are not to settle those lands. (Para 23)

In such a case also, the Civil Court cannot take fresh evidence to determine which person was in possession on the particular date and as such is entitled to settlement. The Civil Court can only examine if the Collector's order is unfair, arbitrary or capricious. Such a conclusion can be reached if on the materials placed before the Collector a reasonable man could not have reached the same conclusion. However unsatisfactory the Collec-

tor's conclusion may be, it cannot be set aside merely because a different view could be taken by the Civil Court on the materials before the Collector. Similarly, the correctness of the Collector's view cannot be tested in the light of evidence adduced before the Civil Court. (Para 24)

Held further that in making the settlement, provisions of the Press Note and Board's instructions were fully and meticulously complied with and the Collector did not fail to act in accordance with the fundamental principles of judicial procedure.

As the Courts below were not alive to the aforesaid legal position, allowed fresh evidence to be taken in the suit and on that evidence recorded the conclusion that plaintiffs were in possession on 1-7-1955 and declared title in their favour as if the Civil Court had authority and jurisdiction to settle the lands on occupancy right on the plaintiffs, they clearly acted without jurisdiction and their judgments were liable to be set aside. 1973 (1) Cut WR 203, Overruled. Observations to the contrary in (1970) 36 Cut LT 519, Dissent from; (1971) 37 Cut LT 1152 and (1974) 40 Cut LT 549, Approved. (Paras 27, 28)

(E) Orissa Merged Territories (Village Offices Abolition) Act (10 of 1963), Sections 1 (3), 3 — Act was brought into force by notification in the ex-State of Sonepur on 1-12-1972 — Retrospective operation.

The Act which was brought into force by notification in the ex-State of Sonepur on and from 1-12-1972, is not retrospective in operation. The Act has no application even though it came into force during the pendency of the second appeal arising out of a suit which challenged a completed settlement.

Once the Bhogra lands vested in the State under the Press Note, Section 3 of the Act cannot have any further operation. There cannot be a second vesting. This itself furnishes the intrinsic evidence that Bhogra lands, vested in the State under the Press Note read with the Board's administrative instructions, would be governed by the procedure prescribed therein and the Act would have no application. The Act becomes effective only with reference* to date it is brought into force in any particular area.

Even if no settlement has been made either under the Press Note or under the Act, claims of the parties cannot be litigated under old titles as on vesting of Bhogra lands in the State the prior titles are extinguished and fresh title would accrue only on settlement.

Settlement made under the Press Note before the Act came into force whether prior to the suit or during the pendency of the litigation would be governed

by the provisions of the Press Note. Civil Court will have no jurisdiction to set aside such settlement except in the limited manner already pointed out. (See Pt. A).

Settlement made under the provisions of the Act during the pendency of a litigation would be governed by the provisions of the Act. (Para 38)

Cases Referred: Chronological Paras

AIR 1975 SC 434 = (1975) 1 SCC 106	16
AIR 1975 Orissa 146 = (1975) 41 Cut LT 387	5
(1974) 40 Cut LT 549	4
ILR (1973) Cut 826 = 39 Cut LT 975	19
(1973) 1 Cut WR 203	4
AIR 1972 Orissa 224 = ILR (1972) Cut 469 (FB)	8
AIR 1971 SC 71 = (1970) 2 SCR 714	15
(1971) 37 Cut LT 1152 = (1971) 2 Cut WR 873	4
(1970) 36 Cut LT 519	4
(1970) O. J. C. No. 261 of 1966, D/- 11-2-1970 (Orissa)	9
AIR 1969 SC 78 = (1968) 3 SCR 662	14
(1968) 34 Cut LT 1169 = ILR (1968) Cut 1010	18
AIR 1966 SC 1438 = (1966) 3 SCR 214	10
AIR 1940 PC 105 = 67 Ind App 222	13
AIR 1935 Mad 725	18
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1911 AC 179 = 80 LJKB 796	8
(1888) 21 QBD 313 = 36 WR 776	12
(1859) 6 CBNS 336 = 141 ER 486	11

S. C. Mohapatra, for Appellants; B. K. Pal and R. K. Patro (Standing Counsel), for Respondents.

G. K. MISRA, C. J.:— The case of the plaintiff may be stated in short. Schedules A, B and C of the plaint constitute the disputed lands. A and B Schedules are Bhorga lands. They were a part of holding No. 1 of the 3rd settlement (1927) in the ex-State of Sonepur. Schedule A and B lands respectively comprise 3.21 acres and 15.52 acres. Schedule C lands were in holding No. 48 of the 3rd settlement and were raiyati lands with an area of 39.84 acres. All the three schedule lands were recorded in the name of Jaisingh Rai, father of the plaintiffs, in the 3rd settlement.

Schedule A and B lands were converted into rayati by order (Ext. N) of the Collector, Bolangir, on 16-12-1962 in Bhogra Conversion Proceedings in respect of village Siali in which the suit lands are situated. Jaisingh Rai died on 16-11-1954. Till his death he was in peaceful physical possession of the disputed lands in his own right, title and interest. After his death plaintiffs inherited the properties and were in possession thereof. At the time of harvest of the crops in 1957, defendants 1, 6 and some other defendants disturbed the possession of the plaintiffs. In a proceeding under Section 145, Criminal Procedure Code the possession of the

plaintiffs was declared in respect of A and B Schedule lands. The preliminary order in that case was passed on 23-11-1957. Thereafter plaintiffs leased out A and B Schedule lands to Bhikari Das and Udhaba Sahu for one year and cultivated the C Schedule lands themselves. Defendants again created disturbance. An order under Section 145, Criminal Procedure Code in respect of A and C Schedule lands was passed in their favour on 10-7-1963. In the current settlement of the year 1955-56 possession of A Schedule lands had been recorded in the names of defendants 1 and 2 and the Collector on the basis of such recording settled A Schedule lands in the names of defendants 1, 6, 9, 14, 17 and 19 on raiyati basis. Plaintiffs filed an appeal in 1963 against the order of the Collector before the Revenue Divisional Commissioner which was dismissed by the order (Ext. 11) on 15-3-1966. The suit was filed on 16-5-1964 during the pendency of the appeal before the Revenue Divisional Commissioner for declaration of title and recovery of possession of the disputed lands after setting aside the order of the Collector (Ext. N) dated 16-12-1962 settling A Schedule lands on the defendants on raiyati basis.

Defendants 1 to 3, 6, 7, 9 to 11, 14, 17, 19, 20 and 23 filed a joint written statement. Most of the facts are not disputed. It was averred that the ancestors of the defendants were raiyats of the disputed lands for more than sixty years. They had reclaimed the land by being brought into the suit village by the ancestors of the plaintiffs. They were in cultivating possession and as such A Schedule lands were recorded in the current settlement in 1955-56 in their names. The order of the Collector settling A Schedule lands on them is valid and legal and the Civil Court has no jurisdiction to annul the settlement.

2. The learned Munsif, Sonepur, after allowing parties to go into evidence on all disputed questions held that plaintiffs were in possession of the disputed lands all through and defendants were not in possession and that the order of the Collector settling A Schedule lands on the defendants in the Bhogra Conversion Proceedings was contrary to law and the Civil Court had jurisdiction to set it aside. He set aside the settlement on the defendants in respect of A Schedule lands and granted a decree for declaration of title and recovery of possession of the disputed lands.

The contesting defendants filed an appeal before the Subordinate Judge, Bolangir, which was dismissed. Those defendants filed the second appeal. During the pendency of the second appeal the Orissa Merged Territories (Village

Offices Abolition) Act, 1963 (Orissa Act 10 of 1963) (hereinafter to be referred to as the Act) came into force in the ex-State of Sonepur from 1-12-1972.

3. The second appeal came up before Mohanti, J., for hearing. On account of conflict of views in several Single Judge decisions of this Court he referred the matter to a Division Bench. S. K. Ray and K. B. Panda, JJ., heard the second appeal. Both the learned Judges agreed that the second appeal is to be dismissed in regard to B and C Schedule lands. They, however, differed in respect of A Schedule lands. Panda, J., concluded thus:—

"In fine, therefore, the appeal will succeed to the extent of 'A' Schedule lands as the same have been settled with some of the defendants by the Collector. The Civil Court decree, which is without jurisdiction, will not affect it. It is open to the aggrieved party, if so advised, to pursue the remedy in the revenue forum. Since the matter is not before us under Section 13 of the Act, we express no opinion on the propriety of the settlement and we wish to make it further clear that the revenue authorities are not bound by any observation made while disposing of the appeal."

S. K. Ray, J., observed as follows:—

"In my opinion, therefore, the jurisdiction of the Civil Court in the instant case is not ousted and the suit was rightly entertained, and even now taking into consideration the subsequent event of the introduction of the Act in Sonepur, the plaintiffs are entitled to recover possession of the suit lands. In my opinion, the appeal shall fail in its entirety, even in respect of the Schedule A lands."

On account of conflict of views in several Single Judge decisions and difference of opinion in the Division Bench and importance of the points in issue the case was referred to a Full Bench. This is how the matter has come before us.

4. On the contentions advanced by the learned Advocates on either side the following questions arise for determination:

(i) Did the proprietary rights in Bhogra lands vest in the State?

(ii) Had the Collector of Bolangir (defendant No. 24) authority to convert the Bhogra lands into raiyati and make settlement of the raiyati lands under the Press Note dated 2-2-1956?

(iii) Is the order of settlement of the Collector invalid and illegal in the absence of provision in the Press Note prescribing the procedure for enquiry before settlement is made?

(iv) Is any appeal provided against the order of the Collector and, if so, if it is valid?

(v) Has the Civil Court jurisdiction to annul the settlement made by the Collector? If so, what is the scope and ambit of that jurisdiction?

(vi) Is the Act which came into force in the ex-State of Sonepur from 1-12-1972 applicable to the settlement made by the Collector on 16-12-1962? Is the jurisdiction of the Civil Court barred under the Act to annul any settlement made by the Collector?

(vii) Do Pasupati Mahanto v. Damodar Mahanto, (1970) 36 Cut LT 519, Dhanu Malik v. Lal Sitanshu Sekhar Singh Deo, (1971) 37 Cut LT 1152, Kia Pateluni v. Ghasana Naikani, (1973) 1 Cut WR 203 and Chandrabhanu Naik v. Mst. Gomati Naikani, (1974) 40 Cut LT 549 lay down the correct law?

(viii) To what extent the views expressed by our learned brothers S. K. Ray and K. B. Panda, JJ., in the differing judgments are sustainable?

(ix) To what relief, if any, are the plaintiffs entitled?

5. Point No. (i):— Bhogra lands in all the former States of Orissa which had been granted to headmen differently called in different States, belonged to the State and they had been granted towards remuneration of the headman for management of the villages. In para. 12 at page 14 of the Report on Land Tenures and the Revenue System of the Orissa Chattisgarh States by R. K. Radadyhani I. C. S., Vol. I, the incidents of the Bhogra tenures have been given as follows:—

"12. Headmen without proprietary rights:— While in some Chattisgarh States, and in Gangpur State in the Orissa Agency, the gaontias have been attempting to arrogate to themselves the status of proprietors as in the adjoining areas of the Central Provinces, in no case has proprietary status been granted to the village headmen. It is categorically laid down in the patta or theka of every gaontia that he is not at liberty to alienate or partition his right in any way, and any violation of this rule results in forfeiture of the theka.

xx xx xx xx"
This general observation receives full support in paragraph 25 at page 267 in Vol. III which specifically deals with the ex-State of Sonepur. Paragraph 25 runs thus:—

"25. Villages may not be transferred by the gaontia by sale, gift etc., and the gaontia is liable to be ejected for such an act. The Ruler may however condone the act by the levy of a suitable penalty. The succession to gaontia villages is governed by personal law but only one person may succeed. The gaontias and theka-dars hold bhogra lands in the village. Co-sharers in the bhogra lands may be created by the gaontia as a private ar-

rangement and this will not be interfered with by the State usually; the gaontia cannot eject co-sharers except through a Court on the ground that management of the village is interfered with but if the gaontia's post passes to another family the co-sharers lose their rights. Bhogra lands cannot be leased out for a longer period than one year without the sanction of the Ruler but a portion may be leased out for three years. xx xx xx"

The same is the rule laid down in Section 5 (4) of the Bhumi-bidhi, (Sonepur State Code), Vol. I, Section 5 (4) runs thus:—

"Section 5 — The liabilities of all classes of village-holders, as have been described and dealt with in this chapter, to be ejected from the village, shall be for violation of any of the following conditions, namely;

General rules for ejectment of all classes of village holders:

xx xx xx xx

(4) Transferring by sale, mortgage, gift, dowry, etc., either the village or any portion thereof. It is provided, however, in this connection that if on enquiry by the Durbar or by any revenue officer authorised by the Durbar, it be found feasible that the gaontia aforesaid for his illegal act be condoned by imposing a suitable penalty, on him and the gaontia pays such suitable penalty, the possession of the village by the gaontia may be allowed to continue by the order of the Durbar.

xx xx xx xx"

Thus the Reports of Ramadhyani as well as the Bhumi-bidhi clearly indicate that the Gaontias had no proprietary rights in the Bhogra lands which they enjoyed towards remuneration for management of the villages. Their rights were wholly precarious. They had no right of transfer in any manner excepting by way of lease for a short period. They were liable to be evicted for contravention of the law unless the Durbar (Ruler) condoned the delinquencies.

We had to examine the incidents of Bhogra tenures in the ex-State of Bolangir in *Gopaleswar Dharua v. State of Orissa*, (1975) 41 Cut LT 387 = (AIR 1975 Orissa 146), with reference to the law prevailing there. In paragraph 8 of the judgment we reached the following conclusion:—

"The legal position that existed in the ex-State of Bolangir prior to the coming into force of the Act on 3-3-1950 was that the Thekadar had no right, title and interest in the Bhogra lands except that he was in possession thereof towards the remuneration for management of the village."

The view we had taken applies to the ex-State of Sonepur though the prevail-

ing laws in both the States were different.

6. Points Nos. (ii) and (iii):— The source of the Collector's authority to convert Bhogra lands into raiyati lands and to settle them on tenants is derived from a Press Note issued by the Government on 2-2-1956. So far as material, it may be extracted:

"Abolition of Gaontia system and conferring occupancy rights on Bhogra lands with fair rent to those attached to the office of the Gaontia.

It has been decided by Government that the Gaontia system now prevailing in the sub-divisions of Kalahandi Sadar, Dharmgarh and Sonepur will be abolished with effect from the 1st April, 1956. Bhogra lands attached to the office of the Gaontia will be settled with occupancy rights therein on fair and equitable rent in favour of the person in actual possession as on the 1st day of July, 1955, subject to reservation of a fraction of the Bhogra lands in favour of Grama Sabha on the following scale:—

xx xx xx xx

4. Collectors have been authorised to confer occupancy rights in respect of Bhogra lands with the exception of lands to be reserved in favour of Grama Sabhas.

xx xx xx xx

6. Persons desirous of availing themselves of this opportunity of acquiring occupancy rights in respect of Bhogra lands held by them may apply to the Collector of the district of any other Revenue Officer authorised by him in this behalf."

7. The Press Note is a piece of executive instruction. By the Press Note itself there is a declaration that the Gaontia system prevailing in the ex-State of Sonepur was abolished with effect from 1st April, 1956. The abolition of Bhogra lands was, therefore, the result of the policy decision taken by the Government. In the absence of any law to the contrary the State as the proprietor had full power and authority to abolish the Gaontia system and to issue administrative instruction to subordinate officers as to how to deal with those lands for conferment of occupancy right.

8. The question which was seriously mooted by Mr. Pal was that the Press Note does not prescribe the procedure of enquiry as to how settlement is to be made by subordinate officers. The settlement would confer civil rights and in the absence of a procedure the settlement is invalid and without jurisdiction.

In *Pramila Dei v. Secy. Board of Secondary Education, Orissa, Cuttack*, ILR (1972) Cut 469 = (AIR 1972 Orissa 224) (FB) a Full Bench of this Court examined similar contentions in connection with exami-

the Bihar provision stands in glaring contrast to similar provision in the other Acts. Even on payment of all arrears of rent it does not relieve the tenant from his liability to be evicted on the ground of non-payment of rent. I have, therefore, differing from my own judgment, to which I shall refer hereinafter, ventured to take the view—as I thought it was just and proper to do so—that the expression “arrears of rent” occurring in Section 11-A must be interpreted to mean arrears of rent falling due during the period of the suit, which expression, in certain circumstances, may mean period of appeal or appeals, on the basis of the well known principle that an appeal is a continuation of the suit. But, in my considered judgment, it will be highly unjust, unreasonable and incongruous in the context and the nature of the Bihar provision, to permit the expression to embrace within its ambit arrears of rent which had accrued due prior to the institution of the suit. A provision like Section 11-A of the Bihar Act was not brought to our notice occurring in any other State Statute.

14. In *Bholanath Tewary v. Kuer Rup Narain Singh Trust*, (1967 BLJR 397), sitting singly, I took the view, following several Madras decisions given with reference to Section 114 of the Transfer of Property Act, that—

“..... I do not think that the court is concerned with the law of limitation while making an order under Sec. 11-A of the Act. It does not fix any period for which a direction for deposit of arrears of rent can be made. Nor is the period for such a direction fixed under the Limitation Act. That being so, on the principle that the remedy to claim a decree for arrears of rent may be barred under the law of limitation, right of the landlord to get his dues is not extinguished; nothing unreasonable happens nor is any injustice done if a tenant who wants to contest the suit for ejectment is asked to pay arrears of rent for whatever period they may be due before he is allowed to contest the suit on the pain of penalty of striking out his defence in case he does not obey the direction of court under Section 11-A of the Act. A tenant may choose not to pay the arrears due for such period in respect of which the claim is barred if he wants to take shelter under the law of limitation and then very likely the landlord will not be able to realise the amount from him. But if he wants to contest the suit for his ejectment and remain in the building, the law obliges him to pay all dues due from him on account of arrears of rent—current and future rent.”

On a careful and deep study of the matter, I revise my opinion, specially on a comparison of the provisions of the Bihar Act with those of the other State Acts. If the period of arrears of rent under Section 11-A of the Bihar Act is cut down to that of the pendency of the suit, the difficulty of limitation would not arise at all. It is doubtful whether Article 137 of the Limitation Act, 1963 will govern the filing of an application under Section 11-A of the Act, more so when the section in terms permits filing of such an application at any stage of the suit. But that apart, it will not be necessary to examine whether any portion of the claim made under Section 11-A in regard to the arrears of rent was barred on the date of the suit. I respectfully agree with the distinction made by Shambhu Prasad Singh, J., in *Sashadhar Das's case AIR 1973 Pat 361* between provisions like Section 11-A of the Bihar Act and Section 114 of the Transfer of Property Act; in the latter, on payment of the barred debts the tenant is relieved of forfeiture of the lease. I may, however, add that I do not accept as correct, and again I say so with utmost respect, that a barred debt is not lawfully payable. In the *Managing Committee v. Tripurary Charan Palit (AIR 1973 Pat 60)*, sitting singly, I pointed out that an application under Section 11-A in regard to the claim of arrears of rent in respect of the period prior to the institution of the suit cannot be defeated on the ground of Order II, Rule 2 (2) of the Code, as the word in sub-rule (2) is “sue”. Shambhu Prasad Singh, J., if I may say so with respect, is not correct in opining in *Sashadhar Das's case AIR 1973 Pat 361* as also in *Akhauri Mukhteshwar Pd. Sinha v. Smt. Urmila Saran, (AIR 1973 Pat 424)*, sitting with Mukherji, J., that because of the bar of Order II, Rule 2 (2) of the Code the amount will not be lawfully payable. My two decisions aforesaid given sitting singly as also the Bench decision of Shambhu Pd. Singh and Mukherji, JJ., did not lay down the correct law and must be overruled. If the expression “arrears of rent” occurring in Section 11-A of the Bihar Act is held to mean, as I am going to do in these cases, arrears of rent accruing due during the pendency of the suit, then the question of the claim being barred under Order II, Rule 2 (2) of the Code does not arise at all. A second suit would be maintainable obviously for realisation of arrears of rent accruing due during the pendency of the first suit. Thus, on penetrating into the matter deep, I have not only discovered the reasonableness and justice of the interpretation which I have ventured to give in these cases, but also

found the difficulty of the bar of limitation and Order II, Rule 2 (2) of the Code coming to an end.

15. In Sashadhar Das's case AIR 1973 Pat 361, Shambhu Prasad Singh, J. has referred to the debate on the floor of the Bihar Legislative Assembly at the time Section 11-A was introduced in the Bihar Act and has opined—

"It appears that the intention of the legislature in inserting Section 11-A was to give some relief to the landlord in respect of the rent—arrears or current—for the period of the pendency of the litigation. It was not intended that Section 11-A should apply to arrears of rent accrued due prior to the institution of the suit, even though it is not lawfully payable. Rather it can be contended that under Section 11-A no order at all can be passed in respect of rent accrued due prior to the institution of the suit even though claimed in the suit."

But since learned counsel for the petitioner did not challenge that part of the order, on that ground the point was not decided. If I may say so with respect, the seed leading to the conclusion to which I have arrived in my judgment was wisely and rightly sown by Shambhu Pd. Singh, J. and I have endeavoured to nurture it to grow into a plant.

16. In Maxwell on the Interpretation of Statutes (12th Edition) it has been mentioned at page 86.

"For it is a canon of interpretation that all words, if they be general and not precise, are to be restricted to the fitness of the matter, that is, to be construed as particular if the intention be particular."

In Craies on Statute Law (7th Edition) at pages 85-86 there is a passage which I can justifiably press into service in support of my view. It reads thus—

"It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent and in light of the reasonableness of the consequences which follow from giving it a particular construction."

At page 87 it has been said—

"Where there are two meanings, each adequately satisfying the meaning (of a statute), and great harasshness (sic) is produced by one of them, that has a legitimate influence in inclining the mind to the other..... it is more probable that the legislature should have used the word ('evade') in that interpretation which least offends our sense of justice If the inconvenience is not only great but what I may call an absurd inconvenience; by reading an enactment in its ordinary sense, whereas if you read it in a man-

ner in which it is capable, though not in its ordinary sense, there would not be any inconvenience at all; there would be reason why you should not read it according to its ordinary grammatical meaning."

There is a catena of decisions in support of what has been said by Tek Chand, J. in First National Bank v. Sant Lal, (AIR 1959 Punj 328 at p. 330 paragraph 12) that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the rights. The learned Judge has pointed out, further, in the same paragraph—

"In all personal actions, the right subsists although the remedy is no longer available. If, therefore, a creditor, whose debt becomes statute barred, has any means of realising and enforcing his claims by any method except by a suit, the Limitation Act does not prevent him from recovering his debt by such means. After a debt becomes barred, a person is still deemed to owe. In case he pays the amount after the expiration of the period of limitation, he cannot, after having paid his debt, claim to be entitled to recover it back, on the ground that the time barred debt was not 'money due' or 'owing'." The learned Judge has further pointed out—

"It is a well established proposition that payment of a time barred debt, is a valid consideration for transfer of property. Similarly, an agreement in writing undertaking to pay a time-barred debt is lawful and binding. Again, a creditor can adjust a payment made by a debtor who owes several debts, towards a debt which had become time-barred."

If a time-barred debt is not lawfully payable, then the propositions aforesaid will militate against it. Similarly, Mahajan, J. has also quoted a passage in Rullia Ram's case (AIR 1962 Punj 256) (FB) (supra) (at page 258, paragraph 10) from Rustomji on Limitation, 6th Edition, at page 316, I may repeat the quotation:

"The Limitation Act with regard to personal actions merely bars the remedy by suit, but does not extinguish the debt or demand; and none of the Articles in the schedule, except those to which Section 28 can be applied, has an extinctive operation on primary rights. A debt does not cease to be a debt because its recovery is barred by the statute of limitation, limitation extinguishes the remedy, but except in the case covered by Section 28, does not destroy the right. Section 28 applies only to suits for possession of property and has no application to the case of a debt."

In Halsbury's Laws of England (3rd Edition), Volume 24 it is stated at page 205, Article 369—

"Except in the cases previously mentioned, the Limitation Act, 1939 only takes away the remedies by action or by set-off; it leaves the right otherwise untouched, and, if a creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set-off, the Act does not prevent him from recovering by those means."

In some cases, in India, even in regard to set-off, a departure has been made from the principle of law in England. But that apart it is clear that if the payment of a barred debt could not have been lawfully payable, Section 23 of the Contract Act could have made a contract to pay the barred debt unlawful. Section 25 (3) is an exception to the principle that an agreement without consideration is void, but not an exception to Sec. 23.

17. In Surat Borough Municipality v. Sarifa Karunnissa (AIR 1939 Bom 494), Lokur, J. sitting singly, took the view that the right of the Municipality under Section 105 of the Bombay Municipal Boroughs Act is not lost by lapse of time as it does not prescribe any period of limitation. The periods of limitation prescribed for filing a suit under the Limitation Act govern the procedure in a Court of Law and the powers of the Municipality acting under the provisions of Sections 104 and 105 of the said Act are not governed by the Limitation Act. It is because of the principles aforesaid that in my earlier decision, sitting singly, I did not curtail the application of Section 11-A on the ground of limitation. In *Curwen v. Milburn*, ((1889) 42 Ch D 424), Cotton, L. J., sitting in the Court of Appeal, has said at page 434—

"Statute-barred debts are due, though payment of them cannot be enforced by action."

The decision of Lord Hanworth, Master of the Rolls, in *Allen v. Waters & Co.*, [(1935) 1 KB 200] also changed my mind and compelled me to take a view which I have taken today. While interpreting the words of sub-section (2) of Section 16 of the Statute which was under consideration there, the learned Master of the Rolls said at pp. 210-211—

"I come, therefore, to look, as after all one must look, at the actual words of Section 16, sub-section (2). They are simple; 'Any expenses recoverable under this section shall, without prejudice to any other remedy, be recoverable' not 'recovered', but 'recoverable'— 'summarily as civil debt'. They may be recovered by suit in accordance with Section 16, sub-section (1), but they may, in addition, because that power is without prejudice to other remedies, be recovered summarily as a civil debt. There is no direction to proceed in one Court only,

and the expenses may be recovered in whatever Court is chosen, and, having regard to the decisions to which I have referred, it appears to me that, if it is sought to recover them in the county court, that can be done free of the restrictions which belong to a recovery before justices, which, after all, is a summary proceeding and in respect of which there is not the same facility for examination and discussion as is provided in the county court."

The earlier law which I had laid down was just the reverse. Recovery of arrears of rent by the summary procedure of Section 11-A in the suit was held to be not circumscribed by the period of limitation while in a regular suit it would be so. *Cave, J.*, as he then was, in *Re. Hepburn*. Ex parte Smith [(1884) 14 QBD 394] pointed out at pages 399-400—

"In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action." If restricted meaning were not to be given to the expression "arrears of rent" occurring in Section 11-A of the Bihar Act, remedy by suit may be barred, but the remedy by Section 11-A will not be barred, resulting in great injustice to tenants and depriving them of their right to contest the suit for ejectment under coercion of striking out their defence if all arrears, whether barred or not, are not paid.

18. During study and discussion of the point at issue a decision of the Privy Council in *Hansraj Gupta v. Official Liquidator of Dehra Dun etc. Company*, ILR 54 All 1067 = (AIR 1933 PC 63) came to our notice. The Company had gone into liquidation in the year 1926. In the year 1928 the Official Liquidator filed an application under Section 186 of the Indian Companies Act, 1913 for recovery of three amounts of debts due from the contributory debtor. The question was, whether the debts could be recovered under the said provision of law, if their recovery by suit was barred in the year 1928. A suit in accordance with Section 179 of the Indian Companies Act would have been barred. Rejecting all arguments advanced on behalf of the debtor, ultimately, the suc-

cess was on the ground as mentioned by Lord Russell at page 1079:

"Whether, in view of the particular terms of the Indian Limitation Act already referred to, such a case could happen in India depends upon the meaning to be attributed to the words in the section 'any money due from him or from the estate of the person whom he represents to the company'. And their Lordships are satisfied that the position in this respect is, in India, the same as in this country, for the reason that, in view of the place and context in which these words are found, they must be confined in their Lordships' judgment to money due and recoverable in a suit by the company, and they do not include any moneys which at the date of the application under the section could not have been so recovered."

Therefore, for the reason that in view of the place and context in which the expression "any money due" occurred, they were confined, in their Lordships' judgment, to money due and recoverable in a suit by the Company. Giving full expression to the words added by Lord Russell in the interpretation of the expression, I am inclined to take the view that the expression "arrears of rent", occurring in Section 11-A of the Bihar Act means arrears of rent recoverable in another suit by the landlord. It will thus be seen that if the money is already claimed in a suit, a second suit will not be maintainable. If it is not claimed, the second suit would be barred under Order II, Rule 2 (2) of the Code. The question of limitation with regard to the claim for the period prior to the institution of the first suit will not be relevant. I, however, must hasten to add that I do not mean to suggest that if the claim for arrears of rent falling due during the pendency of the suit is not recoverable by institution of a second suit on the date when the application under Section 11-A of the Bihar Act is filed, then on the analogy of Hansraj Gupta's case [LR 54 All 1067 = (AIR 1933 PC 63) (supra) the money will not be recoverable, because here the expression is that such an application can be filed at any stage of the suit. I am aware that this decision of the Privy Council was distinguished in cases where a new statutory liability was created such as in respect of call money due from a contributory. But Section 11-A of the Bihar Act does not create any new statutory liability.

19. For the reasons stated above, I hold that no arrear of rent in respect of any period prior to the institution of the suit can be directed to be deposited under Section 11-A of the Bihar Act, and

the contrary view expressed earlier in my decisions or in the Bench decision in Sashadhar Das's case AIR 1973 Pat 361 and the decision of the same Bench in Akhauri Mukhteshwar Prasad Sinha's case (AIR 1973 Pat 424) must be held to be bad law. In view of the answer aforesaid given to the first point urged on behalf of the defendant petitioner in both these cases, it is clear that no specific answer is called for to the second and third points urged on their behalf.

20. In the result, I allow Civil Revision No. 856 of 1971 and set aside the order dated the 17th June, 1971 of the court below directing the petitioner to deposit arrears of rent due from 1-4-1964 to 1-8-70. Civil Revision No. 1314 of 1970 is allowed in part and the direction given to the defendant to deposit arrears of rent in respect to any period prior to the institution of the suit, whether barred by the law of limitation or not, is knocked down. There will be no order as to costs in any of the civil revision applications.

K. B. N. SINGH, J.:— 21. I agree that no arrears in respect of any period prior to the institution of the suit can be directed to be deposited under Section 11-A of the Bihar Act. I also wish to add that filing of an application under Section 11-A of the Bihar Act is not circumscribed by any period of limitation, and all arrears of rent accruing during the pendency of the suit, which expression in certain circumstances may mean pendency of appeal or appeals, as observed by his Lordship the Chief Justice, can be ordered to be deposited. Such an application is not governed by Article 52 of the Limitation Act which applies to suits only, and an application under Section 11-A of the Bihar Act obviously is not a suit. The scope of Article 137 of the New Limitation Act (Act XXXVI of 1963) is not different from the scope of Article 181 of the Old Limitation Act (Act IX of 1908), to cover such an application, as observed by their Lordships of the Supreme Court in the cases of the Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli, (AIR 1969 SC 1335), and the Management of the S. B. I., Hyderabad v. Vasudeva Anand, (AIR 1970 SC 196). This question, however, has been left open in the case of Nityanand M. Joshi v. The Life Insurance Corporation of India, (AIR 1970 SC 209). Be that as it may, it was open to the Legislature to free an application under Section 11-A of the Bihar Act from the fetters of the law of limitation for giving relief to the landlord for whose benefit it was enacted. In my opinion, by providing for filing of an application under Section 11-A to be filed 'at any stage of

the suit', the Bihar Legislature intended such an application to be not circumscribed by way of limitation. The Bihar Buildings (Lease, Rent and Eviction) Control (Amendment) Act, 1955 (Bihar Act III of 1955), which incorporated Section 11-A in the Bihar Act (Bihar Act III of 1947), having been assented to by the President of India under Article 254 (2) of the Constitution, its provisions will prevail, even if Article 137 of the Limitation Act were to cover such application.

S. K. JHA, J.:— 22. I entirely concur in all that has been said by my Lord the Chief Justice. In this case I believe that the question is a very short one and to my mind very plain. The whole question turns, in the first instance, upon what is the meaning of the words "the arrears of rent" in Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 [Bihar Act 3 of 1947]. It is clear that the term is not free from ambiguity. Some decisions have taken the view that it means all arrears of rent lawfully payable which in its turn includes even arrears the recovery of which is barred by the statute of limitation or otherwise. The cases of *Bhola Nath Tiwary*, 1967 BLJR 397 and the *Managing Committee v. Tripurari Charan Palit*, AIR 1973 Pat 60 are of this nature. Some other decisions have taken the view that arrears of rent lawfully payable connote only such arrears as are legally recoverable and, therefore, not barred by limitation and with regard to which a claim for recovery has been made in the suit itself. In such latter type of cases it has also been held that the absence of a relief for recovery of arrears of rent in the suit itself will preclude the plaintiff-landlord from claiming such arrears under Section 11-A of the Act, being barred by the principles of Order 2, Rule 2 of the Code of Civil Procedure. The cases of *Sashadhar Das*, AIR 1973 Pat 361 and *Akhauri Mukhteshwar Prasad*, AIR 1973 Pat 424 fall under this category. Yet, another point of view has faintly been suggested in the case of *Sashadhar Das*, AIR 1973 Pat 361 (supra) by *Shambhu Prasad Sinha, J.* that the term may possibly be said to mean such arrears as accrue and fall due during the pendency of the suit. Therefore, I must overrule the contention put forward by *Mr. Guneshwar Prasad* that the term is absolutely unequivocal. That is the starting point upon which I found my observations.

23. It is true that the Court which is to construe an Act of a legislature has to determine the intention as expressed by the words used and in order to understand those words it is material to en-

quire what the subject-matter is with respect to which they are used, and the object in view. As was observed by Lord Davey in the case of *Canada Sugar Refining Company v. R.*, 1898 AC 735 and quoted with approval by *Subba Rao, J.* (as he then was) in a decision of the Supreme Court in *M. Pentiah v. Muddala Veeramallappa* (AIR 1961 SC 1107) at page 1111:

"Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

And for such a construction the object of the particular statutory provision, the mischief sought to be remedied have to be ascertained. And for this purpose it will have to be seen as to what was the law immediately before the insertion of Section 11-A in the Act by the Bihar Act 16 of 1955. As *Maxwell* says in his *Interpretation of Statutes* (12th Edition) at page 64:

"The course which legislation on a particular point has followed often provides as indication as to how the Act at present in force should be interpreted." The provisions of law engrafted in Section 11 before the aforesaid Amending Act of 1955 will also have to be taken into consideration in this context. Section 11 as it stood before the amendment of 1955 conferred a power on the Controller in very sweeping terms. It had entrusted the Controller with the jurisdiction including the jurisdiction to determine whether there was non-payment of rent or not as well as the jurisdiction to order eviction of a tenant on a finding that there was non-payment of rent. Even if the Controller had wrongly decided the question regarding the non-payment of rent, his order for eviction on the ground that there had been non-payment of rent could not be questioned in a Civil Court. (*C. F. Rai Brij Raj Krishna v. S. K. Shaw and Brothers*, 1951 SCR 145 = (AIR 1951 SC 115)). The application for eviction of tenants under Section 11 of the Act as it stood before the amendment had to be made before the Controller on any of the grounds mentioned therein and the Controller's decision was not subject to review by the Civil Courts. The whole proceeding before the Controller was more or less of a summary nature, the disposal of which ordinarily and generally was not likely to consume even a small fraction of the time taken by competent Civil Courts for disposal of suits in the ordinary way. The Legislature had not, therefore, thought it fit at that time to provide for any interim relief to the

landlord. As has already been observed by the learned Chief Justice, the Bihar Act 16 of 1955 brought about a radical change in the scheme of Section 11. After the amendment actions for eviction of tenants have to be brought in the ordinary Civil Courts and the tenant is not liable to eviction except in execution of a decree passed by the Court on one or more of the grounds mentioned in Section 11. Since such a litigation was in the very nature of things contemplated to be a rather protracted one, it would have been too harsh upon the landlord-plaintiff who sought to evict his tenant to remain deprived of his rent for all the period during which the action at law continued. Section 11-A was accordingly inserted in the statute book laying down that the tenant contesting the suit regarding claim for ejectment shall, if the Court on an application made by the landlord orders for deposit of rent at such rate as may be determined by the Court month by month and the arrears of rent. The failure to deposit such arrears or rent month by month put the tenant-defendant to the jeopardy of his defence being struck out, but not relieving him of his liability to be finally evicted either for default in payment of rent within the meaning of Section 11 (1) (d) or any of the other grounds mentioned in that section.

24. It is in my view plain that the subject-matter of Section 11-A was the right or privilege theretofore not enjoyed by the landlord except by way of a protracted litigation for recovery of damages for use and occupation. It is equally clear that the object of Section 11-A was to confer on the landlord a right to enjoy the income of his building by a summary adjudication under Section 11-A while the course of litigation took its own time. And as observed by Craies on Statutes Law (7th Edition) at page 117:

"In cases of doubt, Courts will lean to a construction that an enactment is not intended to impose a serious new obligation, but only to provide new or better means of enforcing the existing obligation."

Section 11-A imposes a new obligation on the tenant if he chooses to contest the claim for ejectment. The other construction, namely, that all arrears of rent lawfully payable for howsoever long a period and irrespective of whether accrued before the institution of the suit or not would be to place upon the tenant an absurd inconvenience and palpable injustice, for even in spite of his depositing the arrears of rent for, say ten years, the corresponding privilege that he gets under Section 11-A is merely a relief

from his defence being struck out—not making him immune from eviction even on payment of such arrears. It is for occasions arising as in the present case that it has been said by Craies on Statute Law (7th Edition) at page 87:

"If too literal adherence to the words of the enactment appears to produce an absurdity or an injustice, it will be the duty of a Court of construction to consider the state of the law at the time the Act was passed, with a view to ascertaining whether the language of the enactment is capable of any other fair interpretation, or where it may not be desirable to put upon the language used a secondary, or restricted meaning, or perhaps to adopt a construction not quite strictly grammatical."

If, therefore, we construe the term "arrears of rent" in Section 11-A as confined to the period after the institution of the suit and during the pendency of the action, which construction I think is the only proper construction, every abuse meant to be corrected can be corrected on the interpretation that we take. It is a right of the landlord which trenches upon the tenants' old freedom, and occurring as it does in a Statute providing relief to the tenant from undue harshness (sic) in the matter of his eviction, it certainly appears to me to be unreasonable in its nature as well as oppressive in its exercise, and unneeded for the legitimate prosecution of the tenant's defence to the landlord's suit for eviction.

25. As may be noticed from the provisions of the other State Statutes relating to the subject-matter which has been elaborately discussed by my Lord the Chief Justice, most of such statutes have provided a relief against forfeiture on account of non-payment of rent on the part of the tenant-defendant in the event of his paying all arrears of rent, whether recoverable or not. Such provisions analogous to Section 114 of the Transfer of Property Act which afford relief to the tenants against forfeiture is in the very nature of things bound to embrace within its sweep all arrears of rent whatever lawfully payable though not legally recoverable. For, the quintessence of relief against forfeiture is the equitable principle being enforced both by Courts of equity and common law for long times. The true foundation of the relief in equity in all these cases is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to. In reason; in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty

in case of his omission to do a particular act (the real object of the parties being the performance of the Act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said, that it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man cannot authorise gross-oppression on the other side. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as such against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground, that a party having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury. Founded upon these principles, wherever relief against forfeiture is provided for it enures to the advantage and benefit of both the parties. While the tenant enjoys the immunity from eviction for default in the payment of rent, the landlord gets the corresponding benefit of recovering even such arrears as are not legally recoverable. The harshness is commensurate with the advantage that either party obtains in such a state of affairs.

26. This equitable doctrine either on the principles of Section 114 of the Transfer of Property Act or on the analogy of such statutory provisions in other State Statutes cannot be invoked for the purpose of construing Section 11-A of the Bihar Act. And the terms "arrears of rent" in that section being confined to the period after the institution of and during the pendency of the litigation does not warrant the principles of Order III, Rule 2 of the Code of Civil Procedure standing as a bar to the grant of such interim relief in cases where no claim for recovery of arrears of rent has been made in the suit itself.

C. R. 856 of 1971 allowed;

C. R. 1314 of 1970 partly allowed.

AIR 1975 PATNA 295

**K. B. N. SINGH AND
S. SARWAR ALI, JJ.**

Mathura Prasad Singh and others,
Petitioners v. The State of Bihar and
others, Respondents.

Civil Writ Jurisdiction Cases Nos.
1605, 1604, 1640, 1667, 1668, 1671, 1672,
1673, 1676, 1678, 1692 to 1702, 1704, 1705,
1715, 1643, 1674, 1713, and 1714 of 1974,
D/- 28-4-1975.

HS/IS/D168/75/VSS

(A) Constitution of India, Article 348 — Bihar Co-operative Societies (Second Amendment) Ordinance (35 of 1975) — Ordinance promulgated in Hindi — English translation not published — Whether Ordinance is non est in the eye of law.

Under the scheme of Article 348 of the Constitution, all Ordinances made in Hindi where the Legislature has so authorised will be a valid piece of legislation even without its English translation and where an English translation has been published as laid down therein, the said translation will be also considered to be a valid piece of legislation and both can be looked into as the authorised version of the Ordinance.

The Bihar Legislature in pursuance of clause (3) of Article 348 has prescribed Hindi as the language for use in Bills, Acts, Ordinances of the State of Bihar. That being the position, the Ordinance cannot be said to be non est simply because a translation of the same in English language has not been published under the authority of the Governor. AIR 1961 SC 1534 and AIR 1957 Madh Bha 26, Rel. on: AIR 1954 All 257 and AIR 1966 Raj 142, Distinguished. (Para 8)

(B) Constitution of India, Articles 213 and 174 — Bihar Co-operative Societies (Second Amendment) Ordinance (35 of 1975) — Ordinance making power of Governor — Whether Court has power to declare Ordinance ultra vires on ground that State is ruled by successive Ordinances.

An Ordinance has to be promulgated to bring forth an emergent legislation, when the Legislature is not in session. The Governor or the Government could not by-pass the Legislature and go on governing the State by successive Ordinances instead of seizing the earliest opportunity to bring Bills on the lines of the Ordinance and getting the same passed by the Legislature. Rule by successive Ordinances was not contemplated under the Constitution. Provision in Art. 174 obviously places the control of legislature over the Ordinance making power of Governor. But the Constitution having vested the Governor with power to promulgate Ordinance when Legislature is not in session and such an Ordinance is given the same force and effect as an Act of Legislature within the limits as provided by Art. 213, it is not for the Court to declare such an Ordinance ultra vires on the score of Rule by successive Ordinances. It is for the Legislature of the State to disapprove of it, if the State is sought to be ruled by successive Ordinances, as and when it meets, or for the electorate to disapprove of the conduct of its accredited representatives at the next poll. (Para 16)

(C) Constitution of India, Article 213 — Circumstances for promulgating an

Ordinance — Question whether circumstances existed, if justiciable.

The Governor, while promulgating the Ordinance, is exercising Legislative function of the legislature. Chapter IV of the Constitution itself, which contains Article 213, deals with the legislative powers of the Governor. The question whether circumstances existed for promulgating an Ordinance involves question of legislative policy of the Government and it is not open to the Court to decide questions of policy. AIR 1974 SC 1533, Followed; AIR 1969 SC 707, Distinguished; AIR 1970 SC 564, Explained.

(Para 18)

(D) Constitution of India, Article 358 — Promulgation of emergency under — Suspension of Article 19 during emergency whether relates to "State's action" and not to a Governor's Ordinance (i) *ibid*, Articles 12, 19, 213; (ii) Interpretation of Statutes; (iii) Bihar Co-operative Societies (Second Amendment) Ordinance (35 of 1975)).

It is well-settled that an inclusive definition cannot be utilised for cutting down the definition of a term so defined. On the other hand, it is used to extend scope of the expression so defined. Thus, the definition of the expression "State" under Article 12 does not limit it to mean only the Government or the Legislature, but it extends the ambit of the definition of the expression "State" to include all local or other authorities which would not ordinarily come within the purview of the expression "State". In view of the Articles 153, 154 and in view of the fact that the executive powers of the State are co-extensive with the legislative powers of the State legislatures, the expression "State" includes the Governor. The Ordinance promulgated by the Governor under Article 213 has the same force as an Act of a Legislature assented to by the Governor. If an Act of a Legislature can be free from the fetters of Article 19 so long the emergency continues, it is idle to contend that the Governor's Ordinance will not be so. Any contrary construction would defeat the very purpose of declaration of emergency during the period when it may not be possible for Legislature to meet off and on. Therefore, so long as the emergency continues, it cannot be contended that the Bihar Co-operative Societies (Second Amendment) Ordinance is violative of Article 19.

(Para 22)

(E) Bihar Co-operative Societies (Second Amendment) Ordinance (35 of 1975) — Vires — Not violative of Article 14 of the Constitution. (Constitution of India, Article 14).

The Government being satisfied that the real power in the Co-operative Societies was being monopolised by the office-

bearers, they should not be allowed to continue in office for more than six years, the Ordinance has obviously been made with a purpose to make the Co-operative Societies broad-based and democratise the institutions rather than to allow them to be monopolised by a few persons which means the very negation of the beneficial measures contemplated by the Act. Therefore there is rational basis for making a distinction between the ordinary members and the office bearers of the managing committee of the registered societies for achieving the objects for which co-operative laws have been enacted, and the Ordinance does not suffer from the vice of discrimination so as to be violative of Article 14 of the Constitution.

(Para 27)

The areas of activities of the two societies, Multi-Purpose Society and Primary Society, being different and the two being not similarly situate, there is no question of any arbitrary discrimination between the two types of Societies in the matter of cessation of membership of the office-bearers, so as to offend against Article 14.

(Para 28)

The Registrar of the Co-operative Societies is expected to carry out the mandate of law calling for special general meeting for holding election of office-bearers within 90 days in case of multi-purpose societies and within 180 days in case of primary societies from promulgation of the Ordinance. The fact that the Registrar may flout this mandate will not be a ground for holding that an arbitrary power has been given to the Registrar in this regard. The Registrar will always be amenable to the writ jurisdiction of High Court besides remedy by way of suits in Civil Court for being compelled to discharge his statutory functions. The mere possibility of an authority misusing the powers vested in it cannot be a ground for declaring a legislation to be arbitrary.

(Para 29)

Cases Referred: Chronological Paras

AIR 1974 SC 1533 = 1974 Tax LR 2245	18
AIR 1974 SC 2192 = 1974 Lab IC 1380	17
AIR 1970 SC 564 = (1970) 3 SCR 530	17
AIR 1969 SC 707 = (1969) 3 SCR 108	17
AIR 1969 SC 903 = (1969) 1 SCR 478	18
AIR 1967 SC 295 = (1966) Supp SCR 311	20
AIR 1966 Raj 142 = 1965 Raj LW 358	9
AIR 1962 SC 316 = 1962 (1) Cri LJ 364	29
AIR 1962 All 240 = 1961 All LJ 900 (FB)	9
AIR 1961 SC 1534 = (1962) 2 SCR 1	3
AIR 1957 Madh Bha 26 = Madh Bha LR 1956 Civil 819	10
AIR 1954 All 257	8

Jagdish Swaroop, Shree Nath Singh and Kamalapati Singh (in C. W. J. C. No. 1605 of 1974), Shreenath Singh and Kamalapati Singh (in C. W. J. C. No. 1604 of 1974), Kamalapati Singh and A. B. Ozha, (in C. W. J. C. Nos. 1640, 1667, 1668, 1671, 1672, 1673, 1676, 1678, 1692, 1693 to 1702, 1704, 1705 and 1715 of 1974), M/s. B. C. Ghose and Yogendra Mishra (in C. W. J. C. No. 1643 of 1974), Yogendra Mishra (in C. W. J. C. Nos. 1674, 1713 and 1714 of 1974), for Petitioners: Balbhadra Prasad Singh, (Advocate-General), S. B. N. Singh (Govt. Pleader No. 3), G. P. Jaiswal, Nagendra Rai, Prabhu Nath Roy, Shashank Kumar Singh, Vinoy Kumar Narain Singh and Uma Shankar Singh, for Respondents.

K. B. N. SINGH, J.:— In this batch of 28 writ applications the vires of the Bihar Co-operative Societies (Second Amendment) Ordinance, 1975 (Bihar Ordinance No. 35 of 1975), which replaces the Bihar Co-operative Societies (First Amendment) Ordinance, 1974 (Bihar Ordinance No. 173 of 1974) is under challenge. As common questions of law arise in these writ applications, they have been heard together and this judgment will govern all of them.

2. These writ applications were filed in or about October, 1974, and what was challenged was the Bihar Ordinance No. 173 of 1974. When these applications came to be heard, a petition for amendment was filed in C. W. J. C. No. 1605 of 1974, stating that the Ordinance (Bihar Ordinance No. 173 of 1974) had lapsed, and it was apprehended that a fresh Ordinance on the same lines was likely to be promulgated by the Governor of Bihar. It was common ground before us that a fresh Ordinance, being Bihar Co-operative Societies (Second Amendment) Ordinance, 1975 (Bihar Ordinance No. 35 of 1975), was promulgated. It was signed by the Governor of Bihar on the 11th January, 1975, and was published in the Bihar Gazette on the 15th January, 1975. We accordingly allowed the amendment prayed for challenging the vires of the new Ordinance which will be hereinafter referred to as the Third Ordinance, being Ordinance No. 35 of 1975. The parties to the writ applications agreed that this amendment made in C. W. J. C. No. 1605 of 1974 will hold good in all the writ applications. Allegations of mala fide on the part of Shri Umesh Prasad Verma, Minister of Cooperation, Government of Bihar, have been made in the writ applications in getting the Ordinance promulgated, which will be discussed at the appropriate place in course of the judgment.

3. The arguments of Mr. Jagdish Swaroop, learned Counsel appearing on behalf of the petitioner in C. W. J. C. No.

1605 of 1974, have been adopted by learned counsel appearing in the other 23 writ applications, immediately following, namely, C. W. J. C. Nos. 1604, 1640, 1667, 1668, 1671, 1672, 1673, 1676, 1678, 1692 to 1702, 1704, 1705 and 1715 of 1974, which may be referred to as the first batch of writ applications for sake of convenience.

4. Arguments of Mr. B. C. Ghose, learned Counsel appearing on behalf of the petitioners in one of the second batch of applications, namely, C. W. J. C. No. 1643 of 1974, have been adopted on behalf of the petitioners in C. W. J. C. Nos. 1674, 1713 and 1714 of 1974. In view of the submissions made before us, it will suffice to mention the facts of C. W. J. C. No. 1605 of 1974, while dealing with the arguments of Mr. Jagdish Swaroop, and of C. W. J. C. No. 1643 of 1974, while dealing with the arguments of Mr. B. C. Ghose, in so far as they may be necessary.

5. In Sections 14 and 27 of the Bihar and Orissa Co-operative Societies Act, 1935, hereinafter referred to as 'the Act', some amendments were sought to be made by the Bihar Ordinance No. 111 of 1974, promulgated by the Governor of Bihar on the 18th of May, 1974, and it is common ground before us that it lapsed on the 27th of July, 1974, on account of the Legislature having met in the meantime. This Ordinance may be referred to as the first Ordinance. The case of petitioner No. 1, Shri Mathura Prasad, in C. W. J. C. No. 1605 of 1974 is that, after lapse of that Ordinance, on the 6th of August, 1974, he was validly elected as the Chairman of the Bihar State Co-operative Bank Limited for a term of three years, which would continue up to the next election to be held in August, 1977, under the existing law, by defeating Shri K. N. Sahay, an individual member of the Bank, Respondent No. 2, Shri Umesh Prasad Verma, Minister of Co-operation, who is a close relation of Shri Sahay, with mala fide motive influenced the Council of Ministers to approve a Second Ordinance to be passed by the Governor of Bihar Amending Sections 2, 14 and 27 of the Act, on almost the same terms as contained in the first Ordinance No. 111 of 1974, which lapsed on the 27th of July, 1974, so that the petitioner No. 1 may cease to hold his office on the date of the promulgation of the Ordinance. But the Council of Ministers in the Ordinance proposed to be promulgated by the Governor, did not approve of the clause of termination of office-bearers of Co-operative Societies who were continuous office bearers of Co-operative Societies for six years on the date of promulgation of the Ordinance, but by amendment laid down that such termination will be after 45 days of the promulgation of the Ordinance. Accordingly, the Governor of

Bihar promulgated, on the 12th September, 1974, Bihar Ordinance No. 173 of 1974, without there being existence of any circumstance justifying the Governor to promulgate the said Ordinance. This Ordinance may be referred to as the second Ordinance. The impugned provisions of this Ordinance have been fully quoted in the writ applications. The Bihar Legislature met after the promulgation of this Ordinance as well. No bill on the basis of second Ordinance was introduced in the State Legislature, with the result that six weeks thereafter the second Ordinance also lapsed. On the 15th of January, 1975, the Governor of Bihar, promulgated the third Ordinance No. 35 of 1975, without there being any justifying circumstance for its promulgation, which is under challenge by an amendment of the writ application, referred to above.

6. Mr. Swaroop has submitted the following points in support of his submissions to quash the Ordinance:—

(1) The Ordinance being in Hindi and no English translation thereof having been published, there is no authoritative text of the Ordinance which could be brought before the Court to be declared *ultra vires*. The Hindi version of the Ordinance, therefore, must be deemed to be *non est* and must be declared to be so.

(2) The Ordinance has been promulgated in mala fide exercise of powers at the instance of Shri Umesh Prasad Verma, Minister of Co-operation Bihar, respondent No. 2.

(3) It is not permissible for the State of Bihar to go on ruling the State by Ordinances. Article 213 of the Constitution does not permit this and the promulgation of Ordinances is a fraud on constitution.

(4) The amendment brought in by the Ordinance put unreasonable restrictions on the freedom of association, to form association of their own and to elect office-bearers of their choice and are violative of Article 19 (1) (c) of the Constitution and a Governor's Ordinance is not saved from attack for violation of Article 19 in spite of proclamation of emergency.

The second and third points raised by Mr. Swaroop have also been canvassed by Mr. Ghose and I shall discuss together their contentions in regard to these two points.

7. In support of his first contention, learned counsel has relied upon Article 348 of the Constitution. Relevant portion of Article 348, on which reliance has been placed, may usefully be quoted:—

"(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) shall be in the English language.

(b) the authoritative texts—

(i) shall be in the English language.

(ii) of all Acts passed by Parliament or the Legislature of a State and of all

Ordinances promulgated by the President or the Governor of a State, and

(iii) shall be in the English language.

(2) shall be in the English language.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this Article."

It is not disputed that the Bihar Legislature, in pursuance of clause (3) of the aforesaid Article, has prescribed Hindi as the language for use in Bills to be introduced and Acts passed by the State Legislature as also for the Ordinances to be promulgated by the State of Bihar, besides other matters, as provided in the first part of clause (3) of the aforesaid Article. Mr. Swaroop has laid stress on the fact that clause (3) of Article 348 of the Constitution makes it obligatory for the Governor to publish an English translation of the Bills, Acts and Ordinances in the Official Gazette of the State, which "shall be deemed to be the authoritative text thereof in the English language under this Article". This, according to learned counsel, is meant for satisfying the essential requirements of clause (1) of the Article that such Acts or Ordinances shall be in English language. No such authoritative text having been published, the Ordinance must be declared to be *non est* in the eye of law.

8. In my considered opinion, there is no substance in this submission of learned counsel that the Ordinance promulgated by the Governor of a State shall be in the English language and unless an English translation of Ordinance in Hindi is made there is no Ordinance in existence in the eye of law. The submission made on the basis of clause (1) of Article 348 overlooks the specific exceptions provided under Clause (3) of Article 348 of the Constitution, quoted above. Undisputedly, the Bihar Legislature has provided for such Ordinances being in Hindi. That being the position, the Ordinance cannot be said to be *non est* simply because a translation of the same in English language has not been published under the authority of the Governor. Clause (3) also does not lay down that, if such a translation is not published, the Ordinance will not be ef-

fective. All that it lays down is that, if such a translation is published, it will be deemed to be an authoritative text thereof in the English language, having preference over any other translation of the Ordinance in Hindi. By virtue of this Article, the English translation provided under this clause is not meant to satisfy the requirement of clause (1) that such an Ordinance shall be in the English language. Under the scheme of Article 348 of the Constitution, all Ordinances made in Hindi where the Legislature has so authorised will be a valid piece of legislation even without its English translation and where an English translation has been published as laid down therein, the said translation will be also considered to be a valid piece of legislation and both can be looked into as the authorised version of the Ordinance. The view I have taken gains support from a decision of the Supreme Court of India in the case of *Messrs. J. K. Jute Mills Co. Ltd. v. State of Uttar Pradesh*, (AIR 1961 SC 1534), wherein it has been held as follows:—

"It should further be noted that the validation Act was published both in Hindi and in English, and both of them were authorised versions."

The decision in the case of *Sagir Ahmad v. The State*, (AIR 1954 All 257), cited by Mr. Swaroop in support of his submission, does not support his extreme contention. The following observations of Mukherji, J., were relied upon by Mr. Swaroop:—

"As I have already noticed there were certain contradictions or inconsistencies between the notification which issued in English and the notification that issued in Hindi, but these contradictions or inconsistencies do not affect the substance of the matter. By Article 348 (1) (b) (iii) of the Constitution, it has been provided that 'all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State shall be in the English language'.

In view of this provision of the Constitution the notification appearing in English must prevail over the notification appearing in Hindi."

The question which is canvassed before us was not for consideration before the learned Judges of the Allahabad High Court. There the question was which of the two notifications — the English or Hindi—should prevail in case of conflict. All that is laid down is that in case of conflict between the English version and the Hindi version of the notification, the English version will prevail. We are not concerned in the instant case with any such controversy.

9. Mr. Swaroop also relied on the decision of the Rajasthan High Court in the case of *Bhikam Chand v. The State*,

(AIR 1966 Raj 142) relevant portion of which may be usefully quoted:—

"Thus, Section 4 again shows that while Hindi has been permitted to be the official language for bills and statutory orders, English has not been done away with the official language. The only requirement, when English is used, as language, is that the State Government is required to publish a translation of the notification in the Hindi language written in Devnagri script. Consequently, we have no doubt that English version of the notification alone has to be treated as the Authorised Version of the notification."

(I have underlined the portion on which emphasis has been laid). The observations of the learned Judge of the Rajasthan High Court have to be understood in the context that no authenticated or duly authorised version of the notification in Hindi was at all published. The result was that the only notification which held the field was in English (vide paragraph 33 of the report). That the learned Judges of Rajasthan High Court never meant to lay down that English version is alone to be treated as an authorised version is also manifest from the fact that they rely on *Jaswant Sugai Mill Ltd., Meerut v. Presiding Officer, Industrial Tribunal (III), U. P., Allahabad*, (AIR 1962 All 240) (FB) where such an argument has been rejected.

10. A similar contention, as raised by Mr. Swaroop in the instant case, was raised and rejected by the Madhya Bharat High Court in the case *Raichand Amichand v. Sanchalak Gramodhar*, (AIR 1957 Madh Bha 26), with which I am in respectful agreement. A passage from that decision may usefully be quoted:—

"The mandatory provisions in clause (b) of Article 348 (1) providing for the use of English language is intended only for the limited purposes of having the authoritative text. It does not forbid laws being passed in languages other than English. It only requires that the authoritative text of the law shall be in English. This also has been relaxed in respect of the State laws by authorising the State Legislatures by clause (3) of Article 348 of the Constitution to prescribe any other language in use in the State for the purposes of clause (1) (b) of the said Article. By clause (3) it is provided that if an English translation of the laws made by the Legislature or of the rules framed by the Government is published under the authority of the Rajpramukh, it shall also be recognised as an authoritative English text for the purposes of Article 348 (1) (b)."

11. Mr. Swaroop has submitted that an Ordinance is also promulgated by

the Governor on the aid and advice of the Ministers and that, if the Council of Ministers or a Minister is acting mala fide, that question can be looked into by the Court. It is the satisfaction of the Minister and not of the Governor. He has submitted that the second and third Ordinances were promulgated due to mala fide of respondent No. 2. The allegations with regard to mala fide are contained in paragraphs Nos. 4, 13, and 14 of writ application No. 1605/74. It is stated therein that, on the 18th of May, 1974, the first Ordinance (being Bihar Ordinance No. 111 of 1974) was promulgated by the Governor of Bihar, which was laid on the table of the Bihar Legislative Assembly and the Bihar Legislative Council, but not introduced as a Bill in either of the two Houses, and the same lapsed in the last week of July, 1974. Thereafter, the Council of Ministers of the respondent State forwarded a draft Ordinance to the Governor of the State of Bihar, on the same terms as contained in the lapsed Ordinance, but the Governor did not promulgate it. Thereafter, on the 6th of August, 1974, the election of the Chairman of the Bihar State Co-operative Bank Limited was held, in which the petitioner No. 1 was elected defeating Shri K. N. Sahay, who is a close relation of Shri Umesh Prasad Verma, Minister of Co-operation (respondent No. 2). It is alleged that, since petitioner No. 1 was elected, respondent No. 2, Shri Verma, caused the Bihar Council of Ministers to approve an Ordinance in the same terms as the lapsed one to be promulgated by the Governor and caused the same to be forwarded to the Governor. It is also mentioned that Shri Verma wanted an Ordinance to be promulgated of such a type that the petitioner No. 1 might cease to hold office on the date of its promulgation, but, by an amendment, the Council of Ministers allowed 45 days time for the petitioner No. 1 or other office bearers to be affected by the Ordinance to continue in office. It was in pursuance of Shri Umesh Prasad Verma's efforts that the Ordinance was promulgated in September, 1974, without there being any reason or circumstance justifying the plea or alleged satisfaction that it was necessary for the Governor to take necessary action in promulgating the impugned Ordinance. It is also alleged that Shri K. N. Sahay, who after his defeat in the election of chairman did not even dare to stand as candidate for election as one of the Directors of the Bihar State Co-operative Bank Limited, was wrongly appointed as a Director of the Bank as a Government nominee by respondent No. 2.

12. A counter-affidavit has been filed sworn by respondent No. 2 himself stating that Shri K. N. Sahay is not his close relation. He has denied the fact

that he wanted to get an Ordinance of the type so that petitioner No. 1 might cease to hold his office as Chairman of the Bank from the date of the promulgation of the Ordinance. He has denied that Shri K. N. Sahay was wrongly appointed a Director of the Bank as a Government nominee at the instance of respondent No. 2. It is also stated in the counter-affidavit that efforts were made to introduce a Bill on the lines of the first Ordinance in the session of the Bihar Legislature which commenced from the 25th June, 1974, but the programme of the business of the Legislature was so full that it could not be accommodated. It is also asserted that the ordinance could not be promulgated again in time due to certain misunderstanding, which was clarified by the State Government on the 27th July, 1974, before the election of the petitioner as Chairman of the Bank, which took place on the 6th August, 1974. Respondent No. 2 in the counter-affidavit stated that All India Co-operative Ministers' Conference was held on the 27th and 28th July, 1974, in which the desirability of having a legislation in Bihar as well on the lines recommended by the Committee of Co-operative Laws, set up by the Government of India, was emphasised, when other States had already passed laws on the lines recommended. One of the major recommendations of the Committee was that no one should be allowed to continue as President, Vice-President, etc., of a Co-operative institution for more than six years. It is stated that all States, except Bihar and Assam, have amended their Co-operative laws accordingly and the State Government thereafter tried to fall in line with other States and hence a concrete step was taken in this regard, in keeping with the national policy of removing vested interests from co-operative institutions for attaining the objects of the co-operative movement, which is to work as an instrument of up-lift of the weaker and poorer section of the society. Respondent No. 2 has also stated in the counter-affidavit that the Co-operative Department had suggested for immediate ceasing of the office bearers who held office for continuous six years, but the Council of Ministers provided in the Ordinance that the office bearers should cease office after 45 days. It is also stated that such a legislation was being actively considered by the State Government for quite some time past and it has been promulgated to eliminate monopoly of vested interests and individuals. It is denied that this recommendation of the Council of Ministers was motivated against petitioner No. 1 or any of the petitioners and that Shri K. N. Sahay was nominated by the Government in view of his long association and familiarity with co-operative move-

ment in the interest of the institution.

13. Another counter-affidavit has been filed by the Deputy Secretary to the Government of Bihar, in the Co-operative Department, substantially supporting the statements made by respondent No. 2 in his counter-affidavit and stating some more facts, which would be referred to as and when necessary.

14. Petitioner No. 1 has filed a reply to the counter-affidavit filed on behalf of respondent No. 2 asserting the statements made in the writ application and also stating that, since some 150 Members of the State Legislature were affected by the Ordinance, the State Government dared not place the Ordinance before the Legislature in the shape of a Bill and the same was allowed to lapse, in view of the stiff opposition from all quarters and the Minister was doubtful about the passage of the said Bill. With regard to the All India Co-operative Ministers' Conference, all that is said in reply, as contained in paragraphs 5 and 7 of the affidavit in reply, is that respondent No. 2 is put to strict proof to produce the proceedings of the said Conference in which the desirability of such a legislation was impressed and even if so, he should not have allowed the first Ordinance to lapse. In paragraph No. 7 of the reply it is stated that the plea of respondent No. 2 that the Ordinance was promulgated in keeping with the national policy is wrong.

15. In view of the specific denial of mala fide on the part of respondent No. 2 and in the affidavit filed on behalf of the other respondents and the Ordinance having been promulgated in view of the recommendations of the Committee on Co-operative Laws set up by the Govt. of India and the decision taken in the All India Co-operative Ministers' Conference that the State of Bihar should also fall in line with the recommendations of the Committee, as other States in the country have, which is not specifically denied on behalf of the petitioners, the allegation of mala fide cannot be accepted. The denial in reply to this counter-affidavit filed on behalf of the petitioner is evasive. The fact remains that in the first Ordinance also, which was promulgated much prior to the election of petitioner No. 1, provisions on the line suggested by the All India Co-operative Ministers' Conference were incorporated which would have disqualified the petitioner from being elected as Chairman or office bearer of the Bank. In my considered opinion, therefore, there is no substance in the assertions of the petitioners that the Ordinance was promulgated in mala fide exercise of powers at the instance of respondent No. 2. Nothing has been pointed out to us about any other Ministers of the Council of Ministers hav-

ing acted mala fide in the matter. The plea of mala fide behind promulgation of the ordinance has therefore to be rejected.

16. Mr. Swaroop has submitted that the Constitution has hedged the Ordinance making power of the Governor with several limitations, firstly, that the Legislature must not be in session at the time when the Ordinance is made; secondly the Governor must be satisfied that circumstances are existing which render it necessary to take immediate action and under certain circumstances he cannot act without obtaining prior sanction of the President. Apart from that, the control of the Legislature over such an Ordinance is obvious. It has to be laid before the Legislature when it meets and will cease to operate after six weeks from the re-assembly of the Legislature, or even before that if a resolution disapproving it is passed by the Legislature. An Ordinance has to be promulgated to bring forth an emergent legislation, when the Legislature is not in session. The Governor or the Government could not by-pass the Legislature and go on governing the State by successive Ordinances instead of seizing the earliest opportunity to bring Bills on the lines of the Ordinance and getting the same passed by the Legislature. There cannot be any doubt with regard to the intention of the founding fathers of the Constitution that rule by successive Ordinances was not contemplated under the Constitution. Provision in Article 174 of the Constitution, that more than six months shall not intervene between the last sitting in one session and the date appointed for the first sitting of the next session of the Legislature, obviously wanted to place the control of Legislature over the Ordinance making power of the Governor. But the Constitution having vested the Governor with power to promulgate Ordinance when Legislature is not in session and such an Ordinance is given the same force and effect as an Act of Legislature within the limits as provided by Article 213, it is not for the Court to declare such an Ordinance ultra vires on this score. It is for the Legislature of the State to disapprove of it, if the State is sought to be ruled by successive Ordinances, as and when it meets, or for the electorate to disapprove of the conduct of its accredited representatives for having ruled the State by means of Ordinances and reject them at the next poll. The Court's power in this regard is not co-extensive with that of the Legislature so long the Ordinance does not the limits of the State's law making power. The submission of Mr. Swaroop for declaring the Ordinance as ultra vires on this ground has to be rejected.

17. Mr. Swaroop and Mr. Ghose both have submitted that the existence of circumstances for promulgation of an Ordinance is a justiciable issue, but the necessity to take immediate action may not be justiciable issue as it may amount to encroaching on the executive powers of the Council of Ministers. It is submitted that in promulgating the Ordinance, it is not the satisfaction of the Governor, but of the Council of Ministers, as the Governor is merely a constitutional head and is required to act on the aid and advice of the Council of Ministers in such matters. There cannot be any dispute, in view of the decision of the Supreme Court in the case of *Shamsher Singh v. State of Punjab*, (AIR 1974 SC 2192); that the Governor acts on the aid and advice of the Council of Ministers, except in cases where he is required to act in his discretion under the Constitution. The question, therefore, is whether the existence of circumstances for promulgating an Ordinance can be a justiciable issue. Learned Counsel relied upon the decision of the Supreme Court in the case of *Roh-tas Industries Ltd. v. S. D. Agarwal*, (AIR 1969 SC 707) and *R. C. Cooper v. Union of India*, (AIR 1970 SC 564), and urged that, if an authority is given power to exercise it in existence of certain circumstances, it is the bounden duty of the authority to see that such circumstances exist and it is open to judicial review on the ground of mala fide. Mr. Ghose has emphasised that the fact that the first Ordinance was allowed to lapse and a Bill on the lines of the Ordinance was not brought before the Legislature, which met thrice thereafter, was a self-evident fact to show that such a circumstance did not exist which would justify the Governor to promulgate an Ordinance and it amounted to mala fide in law. The Governor's taking into consideration irrelevant matters will be open to judicial review. The Government must show that there is existence of necessity for which the impugned Ordinance was necessary.

18. I do not think there is any substance in this submission of the learned counsel as well. The Governor, while promulgating the Ordinance, is exercising Legislative function of the Legislature. Chapter IV of the Constitution itself, which contains Article 213, deals with the legislative powers of the Governor. The question whether circumstances existed for promulgating an Ordinance involves question of legislative policy of the Government and it is not open to the Court to decide questions of policy. This question stands concluded in view of the clear pronouncement of the Supreme Court in the case of *M/s. S. K. G. Sugar (P.) Ltd. v. State of Bihar*, (AIR 1974 SC 1533), the relevant portion of which may usefully be quoted:—

"It is however well-settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justifiable matter. It cannot be questioned on ground of error of judgment or otherwise in court — see *State of Punjab v. Satya Pal Dang*, (1969) 1 SCR 478 = (AIR 1969 SC 903)." Learned counsel submitted that the decision in the case of *M/s. S. K. G. Sugar (P.) Ltd.*, being a decision of five Judges, cannot have any weight against the majority decision of ten Judges in *Cooper's case*, (AIR 1970 SC 564). He relied on paragraph 22 of that decision that existence of circumstance for promulgation of an Ordinance is justiciable and open to judicial review, the relevant portion of which may be quoted:—

"The clause relating to the satisfaction is composite; the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final."

19. There does not seem to be any substance in this submission of Mr. Swaroop as well. The observation relied in paragraph 22, quoted above, has to be understood in context of what is stated in paragraphs 23 to 27. Paragraphs 23 and 24 mention the contention of learned Attorney General that the condition of satisfaction of the President in both the branches is purely subjective and the Union of India is under no obligation to disclose the existence of, or to justify, the circumstances of the necessity to take immediate action. In paragraphs 25 and 26, the rival contention of Mr. Palkhivala is mentioned. In paragraph 27 it is clearly stated that the question was not being decided; relevant portion of it may usefully be quoted:—

"The Ordinance has been repealed by Act 22 of 1969, and the question of its validity is now academic. It may assume significance only if we hold that Act. 22 of 1969 is valid. Since the Act is in our view invalid for reason hereinafter stated, we accede to the submission of the Attorney-General, that we need express no opinion in this case on the extent of the jurisdiction of the Court to examine whether the condition relating to satisfaction of the President was fulfilled." Learned Advocate General for the State seems to be right in his contention that the observation in paragraph 22 relied on by the petitioner is either part

of the submission of Mr. Palkhivala in Cooper's case and not any concluded opinion of the Court on the point, or, at any rate, a mere statement that the Constitution does not in specific terms declare it to be final and the question is one of determination by way of interpretation of different constitutional provisions in this regard.

20. The decision in the case of Rohtas Industries Ltd. v. S. D. Agarwal, (AIR 1969 SC 707), on which learned counsel laid stress, is also not on the point of promulgation of Ordinance, but relates to interpretation of Secs. 235 and 237 of the Companies Act regarding investigation into the affairs of the company. It was on a consideration of the specific provisions contained in those sections, particularly Section 237 (b) of the Companies Act, which lays down the circumstances under which investigation of company's affairs could be ordered, that the Supreme Court approved its earlier decision in the case of Barium Chemical's Ltd. v. Company Law Board, (AIR 1967 SC 295). This case is, therefore, really of no assistance to learned Counsel.

21. Mr. Swroop has then contended that the amendment brought into by the Ordinance put unreasonable restriction on the freedom of association, to form association of their own and to elect office bearers of their choice and is violative of Article 19 (1) (c) of the Constitution. Faced with the situation that there is promulgation of emergency in the country under Article 358 of the Constitution suspending the provisions of Article 19 of the Constitution during emergency, Mr. Swaroop has advanced a novel argument that the suspension of Article 19 during emergency relates to 'States action' and not to a Governor's Ordinance. Article 358 of the Constitution reads as follows:—

"While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

(I have underlined the expression emphasised by Mr. Swaroop). Learned counsel has emphasised that it is with regard to the "State" as defined in Part III that there is a suspension. Article 12 of Part III defines "State" as follows:—

"In this Part, unless the context otherwise requires, "the State" includes

the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Mr. Swaroop has submitted that the expression "State" refers to Government and Legislature of each State and not to Governor. He has submitted that the 'Government' will not include Governor nor the executive means Governor. Therefore, the expression "State" does not include the Governor exercising legislative power under Article 213 of the Constitution.

22. It is well-settled that an inclusive definition cannot be utilised for cutting down the definition of a term so defined. On the other hand, it is used to extend scope of the expression so defined. Thus, the definition of the expression 'State' under Article 12 does not limit it to mean only the Government or the Legislature, but it extends the ambit of the definition of the expression 'State' to include all local or other authorities which would not ordinarily come within the purview of the expression "State". It is inconceivable that the expression 'State' would exclude a Governor, inasmuch as Article 153 lays down that there should be a Governor for each State and Article 154 lays down that the executive powers of the State shall vest in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The executive powers of the State are co-extensive with the legislative powers of the State Legislatures. Therefore, in my considered opinion, the expression 'State' includes the Governor. The Ordinance promulgated by the Governor under Article 213 has the same force as an Act of a Legislature assented to by the Governor. If an Act of a Legislature can be free from the fetters of Article 19 so long the emergency continues, it is idle to contend that the Governor's Ordinance will not be so. Any contrary construction would defeat the very purpose of declaration of emergency during the period when it may not be possible for Legislature to meet off and on. Mr. Swaroop, therefore, cannot be permitted to urge violation of Article 19 so long as the emergency continues. It is admitted position before us that the declaration of emergency made during Indo Pakistan War in 1971 still continue.

23. Mr. B. C. Ghose, learned counsel appearing on behalf of the petitioners in C. W. J. C. No. 1643 of 1974, whose arguments have been adopted in the other three writ applications, has challenged the vires of the Ordinance on the ground of its being discriminatory in

so far as it makes an invidious distinction between the office bearers and other members of the managing committee for its treatment regarding the terms of office, although the parent Act or the rules framed thereunder do not make any such distinction between them in matters of management of the societies and vesting of powers in them. The Ordinance confers arbitrary powers on the Registrar of the Co-operative Societies to curtail the rights of the democratically elected executive without any rational basis and sensible object and, therefore, it is hit by Article 14 of the Constitution. Mr. Ghose has also urged that the Ordinance confers unbridled power on the Registrar of the Co-operative Societies to usurp the entire management of the Co-operative Societies by his inaction in exercise of powers under the Ordinance which has adversely affected the parties concerned.

24. To appreciate the submissions of Mr. Ghose it will be necessary to refer to the amendments brought in the Act by the Ordinance. In the definition clause of the Act, i.e., Section 2, four new clauses (bb), (ff), (gg) and (ggg) have been added. Clause (bb) defines 'Co-operative year' to be beginning from the 1st July and ending on the 30th June. In clause (ff) 'Multi-purpose Co-operative Society' is defined as a co-operative society formed for providing more than one type of service to its members, and includes a society registered as a Cane Growers' Co-operative Society. Clause (gg) defines 'office-bearers of a managing committee' to mean and include the Chairman, the Vice-Chairman, the Secretary, the Joint Secretary, the Treasurer or any such functionary by whatever name they may be designated. Clause (ggg) defines 'primary society' to mean a society of which no member is a registered society. In Section 14 of the Act, seven sub-sections have been added which have been numbered as sub-sections (3) to (10) and the original sub-section (3) has been re-numbered as sub-section (11). The newly added sub-section (3) fixes the life of the managing committee of a society to be three years and allows it to continue till the next election or for a period of six months from the close of the co-operative year whichever is earlier. Sub-section (4) lays down that if no election is held within a period of six months, then the managing committee will be deemed to have been superseded under Section 41 of the Act. Sub-section (5) which vitally hurts the petitioners in these writ applications, lays down that no person shall be eligible for election as an office bearer of the managing committee of a registered society if he has been an office-bearer of the committee for two consecutive terms. They may be eligible

after they have been out of office for one term. Sub-section (6) introduces a legal fiction and says that an existing office-bearer of the managing committee of a registered society shall be deemed to have been an office-bearer of the committee for two consecutive terms if he has completed a period of six years as an office-bearer. Sub-section (7) provides for cessation of office-bearers who have been office-bearers of a society for more than six years on the 45th day of the promulgation of the Ordinance. Sub-section (8) lays down that special meeting will be called within 90 days of the date of commencement of the Ordinance for electing office-bearers in place of those who have ceased to hold office or have been displaced due to operation of sub-section (7) and during the intervening period of 45 days after the office-bearers have ceased to function, the duties of the society will be carried on by such person or persons as may be appointed by the Registrar or the Assistant Registrar of the Co-operative Societies, as the case may be, and if no election is held within 90 days the managing committee will be deemed to have been superseded under Section 41 of the Act. The provisions of sub-sections (7) and (8) mentioned above in relation to multi-purpose societies have been made applicable mutatis mutandis to primary co-operative societies also, save that in their cases a larger period of 180 days has been provided for cessation of office and for holding election in place of office-bearers who will cease to hold office. In Section 27 of the Act a proviso is added that, in case of multi-purpose co-operative society, a member who has not paid membership fee will also be entitled to vote.

25. Mr. Ghose has submitted that Section 14 of the Act vests the management of a registered society in the managing committee constituted in accordance with rules with certain rights and no individual member of a managing committee has any right under the Act. Rule 22 framed by the Governor of Bihar under the powers conferred under Section 66 of the Act deals with the constitution of the managing committee and lays down as under:—

"(1) Subject to nomination by the Registrar of such number of members to the managing committee and in such manner as may be prescribed by him, the managing committee of a registered society including its office bearers shall be elected by vote from among the members of the society at the annual general meeting held in accordance with the bye-laws.

(2) The members of the managing committee and the office-bearers shall be deemed to have taken over charge immediately after their election and shall hold office till the next election.

(3) When the bye-laws of a registered society so provide, the Registrar may nominate all the members of the managing committee on such terms and conditions as may have been prescribed in the bye-laws."

Mr. Ghose has submitted that the Act and the Rule do not confer any special power on any of the office-bearers but vest power in the managing committee alone and the Registrar of Co-operative Societies has maximum control over the societies apart from powers under Section 48 in case of dispute and power of revision under Section 56 of the Act. He has submitted that in the Ordinance there is no justification for making invidious distinction between the office-bearers and other members of the managing committee; the office-bearers of the managing committee who have been in office for six years have been made to retire 45 days after the promulgation of the Ordinance, while it does not touch the other members of the managing committee although every member of the managing committee is equally treated under the Act. There is nothing in the Ordinance justifying separate treatment among the members of the managing committee who constitute one class. There is no substance in this submission of Mr. Ghose. In the Act itself, Section 2 (gg) defines 'office-bearers' as follows:—

"'Office-bearers of a managing committee' means and includes the Chairman, the Vice-Chairman, the Secretary, the Joint Secretary, the Treasurer or any such functionary by whatever name he may be designated."

26. In the counter-affidavit filed on behalf of the State by the Secretary to the Government of Bihar in the Dept. of Co-operation on 31st January, 1975 (C. W. J. C. No. 1643 of 1974) in paragraphs 3, 4, 5, 6, 7 and 8, it is stated on behalf of the State that in actual experience of the functioning of the societies it has been noticed that the office-bearers of the societies are not merely figurative heads, but the members of the managing committee of the societies for all intents and purposes delegate their powers and functions to the office-bearers and actually the office-bearers are active participants in the co-operative movement and look after the enrolment of the members and influence the election at the annual general meeting of the society. It is the office bearers who handle the funds of the societies under the authority they obtain from the members of the managing committee of the societies who are installed at their instance. It is also stated that, following the guidelines given at the All India Conference of Registrars of the Co-operative Societies held on the 24th and 27th of July, 1974 at New Delhi

quoted in paragraph 3, that no person should be allowed to be elected as President, Vice-President etc., for more than six years and this disqualification should not apply to the ordinary Directors of the Societies, it was considered expedient to provide remedy for the basic malady which infest the societies and reduce them as puppets in the hands of the office-bearers of the societies. It is also asserted that beyond making provisions to meet the exigency of situation and to make the co-operative society broad-based there was no malice and collusion in making the impugned provisions of the Ordinance. In Annexure B to that counter-affidavit, which is a copy of the counter-affidavit filed in C. W. J. C. 1605 of 1974 on behalf of the Secretary to the State Government in the Co-operative Department, it is mentioned that the question of introducing a bar against membership of the managing committee for more than two terms or four years consecutively and for four terms or 8 years whichever is less in all, was broached and steps were initiated to introduce the amendments in the Bihar and Orissa Co-operative Societies Rules, 1959 and a draft was published on the 11th March, 1970, a copy of which has been filed as Annexure 'D'. Reference has also been made to the fact that steps in this direction were sought to be taken earlier than the Ordinance to remove the aforesaid malady by Annexures 'A' to 'C'. These documents have also been filed along with the counter-affidavit in C. W. J. C. No. 1605 of 1974. It is also asserted that elections have been held in some of the societies in pursuance of the Ordinance where there is no stay as mentioned in Annexure 'A'.

27. A rejoinder has been filed denying the above allegations. I do not find any reason to discard the affidavits filed on behalf of the State in this regard based as they are on the recommendations of the All India Co-operative Registrars' Conference and the Committee set up by the Government of India on the Co-operative Societies and on the basis of the recommendations of the All India Conference of the Registrars of Co-operative Societies held on the 24th and 27th July, 1974, the agenda of which has been quoted in paragraph 3 of the counter-affidavit. The Government being satisfied that the real power in the Co-operative Societies was being monopolised by the office-bearers they should not be allowed to continue in office for more than six years, the Ordinance has obviously been made with a purpose to make the Co-operative Societies broad based and democratise the institutions rather than to allow them to be monopolised by a few persons which means the very negation of the beneficial measures contemplated by the Act. I am,

therefore, satisfied that there is rational basis for making a distinction between the ordinary members and the office-bearers of the managing committee of the registered societies for achieving the objects for which Co-operative laws have been enacted, and the Ordinance does not suffer from the vice of discrimination so as to be violative of Article 14 of the Constitution. It may be relevant to mention that almost all the petitioners in these writ applications have been office-bearers of societies continuously for more than six years which lends support to the assertions made on behalf of the State in the counter-affidavit.

28. There is also no substance in the submission of Mr. Ghose that an arbitrary distinction has been made between a multi-purpose society and a primary society. The very definition of the two societies given in the Ordinance makes them two kinds of Co-operative Societies. Multipurpose Co-operative Society has been defined as a primary society formed for providing more than one type of service to its members and includes a society registered as a cane-grower's co-operative society, while a primary society has been defined in clause (ggg) as a society of which no member is a registered society. A longer period of 180 days has been allowed in sub-section (8) of Section 14 for cessation of membership of the office-bearers of the primary societies and within same period to elect new office-bearers in their place under sub-sections (9) and (10) of Section 14 of the Ordinance. The areas of activities of the two societies being different and the two being not similarly situate, there is no question of any discrimination between the two types of societies on this score, so as to offend against Article 14.

29. The second submission of Mr. Ghose that unbridled power has been conferred upon the Registrar of the Co-operative Societies to usurp the entire management of the societies inasmuch as, if elections are not held of the office-bearers within 90 days of the commencement of the Ordinance, in the case of multi-purpose societies, and within 180 days in the case of primary societies, the managing committees of the societies will be deemed to have been superseded under Section 41 of the Act, is two fold: Firstly that by his own inaction in holding the election in time, as it is, the Registrar, who has to call special general meeting, has been given arbitrary power to usurp the management of Co-operative Societies not intended by the provisions of the Act and, secondly, provision for supersession is contrary to the spirit of Section 41 of the Act which never contemplated supersession for inactivity or

lapses of Registrar. It is true that the Ordinance provides that, in case election is not held, the entire managing committee will be deemed to have been superseded under Section 41 of the Act. The Registrar of the Co-operative Societies is expected to carry out the mandate of law calling for special general meeting for holding election of office-bearers within 90 days in case of multi-purpose societies and within 180 days in case of primary societies from promulgation of the Ordinance. The fact that the Registrar may flout this mandate will not be a ground for holding that an arbitrary power has been given to the Registrar in this regard. The Registrar will always be amenable to the writ jurisdiction of this Court besides remedy by way of suits in Civil Court for being compelled to discharge his statutory functions within a specified time and can be pulled up for his inaction in the matter. The provision for supersession in case such meetings are not held is only meant to be applied in exceptional cases where it is impossible for the Registrar to call special general meeting within the specified time as a measure of safety in such cases, for example, where there is an injunction order restraining the holding of election or the like. The mere possibility of an authority misusing the powers vested in it cannot be a ground for declaring a legislation to be arbitrary (vide AIR 1962 SC 316). The second contention of Mr. Ghose that the Ordinance makes provisions for supersession of a managing committee of a registered society not on account of its own laches but on account of inactivity or slackness on the part of the Registrar and is foreign to the scope of Section 41 is based on misconception of the provisions of the Ordinance. To avoid stalemate in the functioning of the Society, where no election of office-bearers could be held for unavoidable reasons, provision for its management during the interim period till the fresh election of the managing committee has been provided for in the Ordinance by taking aid of legal fiction that where no election could be held within the stipulated period, the managing committee will be deemed to have been superseded. Clauses (2) and (3) of Section 41 provide for management, when managing committee of a society is superseded, and they are meant to be applied by the Ordinance. The aforesaid clauses of Section 41 provide for appointment by Registrar of a person or persons to carry on the business of the society and also to take steps to call general meeting for holding the election of a fresh managing committee. This is an enabling provision and does not provide for supersession for inactivity of the Registrar. The submission of Mr. Ghose, is, therefore, without substance.

30. Mr. Ghose has also urged that the proviso added by the amendment in Sec. 27 of the Act that, in case of multi-purpose co-operative society, a member may exercise his membership fee for the society will weaken the society (sic). It is difficult to appreciate this submission of Mr. Ghose. There being provisions in the Act and the Rules and bye-law for realisation of membership fee from the members of the societies, the right to vote without payment of membership fee will not affect or cripple the co-operative societies as urged by Mr. Ghose.

31. These writ applications were admitted in October, 1974, and there has been stay of the provisions of the impugned Ordinance in relation to the petitioners in each of the writ applications. Stay orders were passed on 11-10-1974 in the first two writ applications; on 14-10-1974, in C.W.J.C.No. 1643/74, on 15-10-1974 in the next nine; and on 16-10-1974 in the remaining writ applications. The period of 45 days, at the end of which the office-bearers were to cease functioning, and 90 days, within which the Registrar was to call a special general meeting for the election of office-bearers of the co-operative societies, mentioned in the Ordinance expired during the pendency of these writ applications. For meeting this eventuality, so that the provisions of the Ordinance may be given effect to and election be held in place of such office-bearers who would cease to hold office in pursuance of the Ordinance, the period during which the operation of the Ordinance against the writ applications remained (pending is) period of 45 days or 90 days or 180 days, as the case may be. It is expected that the respondents will take appropriate steps for holding elections in place of the office-bearers who would cease to hold office in pursuance of the provisions of the Ordinance.

32. With the above observations, all these writ applications are dismissed, but, in the circumstances of the case, I shall make no order as to costs.

SARWAR ALI, J.:— I agree.

Applications dismissed.

AIR 1975 PATNA 307

MADAN MOHAN PRASAD, J.

Subhas Kumar Singh and others,
Petitioners v. Sheo Balak Singh and
others, Opposite Party.

Civil Revn. No. 957 of 1974, D/- 16-4-1975.*

*(Against order of S. K. Chaudhry, 2nd
Munsif, Chapra, D/- 24-6-1974).

HS/HS/D163/75/AGT

(A) Civil Procedure Code (1908), Order 21, Rule 29 — Grant of stay — Rule not mandatory — Court not obliged to grant stay where requirements of the rule are fulfilled — Word 'may' in the rule cannot be read as 'shall' — (Words and Phrases — May — Meaning). AIR 1936 Mad 102 and AIR 1962 Raj 223 and AIR 1973 SC 528, Considered and Applied. AIR 1957 Raj 219 and AIR 1975 Pat 110, Dist. (Paras 4, 5)

(B) Civil Procedure Code (1908), Order 21, Rule 29 and Order 39, Rule 1 — 'Stay order' and Injunction — Distinction — Consideration of convenience not extraneous to question of stay.

The difference between an order of injunction and order of stay are well known. In one case, it is an order against the person restraining him from executing a decree; in the other case, it is a direction to the Court to stay the proceeding.

The consideration of convenience is not a matter extraneous to the question of stay of a proceeding.

The principles which govern stay of execution in general ought to be the principles which would govern the stay of execution under Order XXI, Rule 29 of the Code. The legislature cannot be deemed to have in mind any different principles to be adopted in respect of Rule 29 of the Code. Though words such as 'sufficient cause being shown' have not been mentioned in Rule 29, still it cannot be said in view of the power being discretionary that the court was bound to stay the execution even without sufficient cause being there. (1867) 8 Suth WR 392 and AIR 1969 Orissa 233, Considered and Applied. (Paras 5, 6, 7, 8)

(C) Civil Procedure Code (1908), Order 21, Rule 29 — Rule applies to restitution proceedings under Section 144 as well.

The provision of Rule 29 of the Code applies as much to an application for execution as to an application for restitution. The mere fact that an application under Section 144 of the Code is no more in the Chapter on execution does not change the nature of the application itself. It still remains an application in execution. In fact, it is now well settled that an application for restitution is an application in execution. AIR 1934 Pat 246 (2) (FB), Approved in AIR 1965 SC 1477, Followed. (Para 9)

(D) Civil Procedure Code (1908), Order 21, Rule 29; Section 37 — Decree sought to be stayed — Need not necessarily be that of trial Court.

Section 37 of the Code lays down that the expression 'Court which passed a decree', shall in relation to the execution of decree, be deemed to include, where the decree to be executed has been passed in the exercise of appellate jurisdiction,

the court of first instance. Section 38 of the Code next provides that a decree may be executed either by the "court which passed" it or by the 'court to which it is sent for execution'. The term, 'the court which passed a decree' thus in the case of an appellate decree would include the court of first instance for the purpose of execution. It is, therefore, immaterial that the decree in the present case was that of the appellate court in respect of which the application for execution for costs and restitution by delivery of possession had been filed. AIR 1956 Madh Bha 229, Applied. (Para 10)

Cases Referred: Chronological Paras

AIR 1975 Pat 110 = 1974 BBCJ 710	4
AIR 1973 SC 76 = 1973 Lab IC 407	11
AIR 1973 SC 528 = (1973) 1 SCR 1022	5
AIR 1971 SC 2324 = (1970) 2 SCR 368	11
AIR 1969 Orissa 233 = ILR (1970) Cut 320	8
AIR 1965 SC 1477 = (1965) 2 SCR 436	9
AIR 1962 Raj 223 = 1962 Raj LW 542	5, 7
AIR 1957 Raj 219 = 1956 Raj LW 473	4
AIR 1956 Madh Bha 229 = Madh Bha LR 1955 Civil 641	10
AIR 1936 Mad 102 = 70 Mad LJ 120	5
AIR 1934 Pat 246 (2) = 15 Pat LT 173 (FB)	9
(1867) 8 Suth WR 392	7

Jaleshwar Prasad and Parmanand Sharma, for Petitioners; Prabha Shankar Mishra and Ganesh Prasad Singh, for Opposite Party.

ORDER:— This application in revision is directed against an order refusing to stay execution under O. XXI, R. 29 of the Code of Civil Procedure (hereinafter to be referred to as 'the Code').

2. It appears that the opposite party second set and the father of petitioners 1 and 2 filed a title suit (Title Suit No. 136 of 1960) in the court of the 2nd Munsif, Chapra, against the opposite party first set for a declaration of their title to some lands alleged to have been taken in settlement from the landlord and recovery of possession thereof. The Opposite Party first set defendants contested the suit and claimed to have taken settlement of the lands from the other defendants, who are said to have taken settlement of those lands from the zerpeshgidars of the landlord. The suit was decreed by the trial Court. As against that there was an appeal (Title Appeal No. 2/28 of 1964) which was allowed and the decree passed by the trial Court was set aside. The Opposite Party thereafter levied execution of the decree of the appellate court for costs and filed a petition under Section 144 of the Code for restitution by delivery of possession of the lands in question. This was treated as a miscellaneous case (Misc. Case No. 28 of

1972). In this proceeding, the petitioners filed an application for stay of the restitution proceeding under Order XXI, R. 29 of the Code till the disposal of the title suit (Title Suit No. 7 of 1974) which they had filed for a declaration that the decree passed in Title Appeal No. 2/28 of 1964 was null and void on the ground that the petitioners were not properly represented before the court. It was said that after the decree of the trial court, the petitioners had attained the age of majority but the appellants had not so impleaded them as parties to the appeal, but as minors under the guardianship of their mother. The mother did not properly represent the petitioners in the appeal aforesaid and the decree was tainted with fraud, collusion and gross negligence. The learned Munsif rejected the prayer. Hence, this application.

3. Mr. Jaleshwar Prasad appearing for the petitioners has raised two points; firstly, that in view of the provisions of Order XXI, Rule 29 of the Code, it must be deemed to be a mandatory duty of the Court to stay execution provided the requirements of the rule are fulfilled and secondly, that in the present case the learned Munsif has erred in law in applying the principle of injunction under Order XXXIX of the Code to this case and his order, therefore, is fit to be set aside. I must straightway say that there is no merit in either of these contentions.

4. The argument of the learned counsel to the effect that the provision of Rule 29 of Order XXI of the Code is mandatory cannot be accepted at all. He has not cited any authority in support of his proposition. The provision of Rule 29 of Order XXI of the Code is as follows:—

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

It has been urged that the word 'may' used herein should be read as 'shall' and it is urged that the learned Munsif had no option but to stay the execution. According to Mr. Prasad there were just two conditions which had to be fulfilled in order to make it obligatory on the part of the court to stay the execution. They were, firstly, that the suit should be pending in the court which had passed the decree under execution and secondly that the suit should have been filed by the person against whom the earlier decree was passed. Once these two requirements are fulfilled; it is said, the Court had no option but to grant stay. In support of his argument, learned Counsel has placed reliance on two decisions one

in the case of *Hansraj v. Satnarain*, (AIR 1957 Raj 219) and the other in the case of *Smt. Ram Kumari Devi v. Tarkeshwar Nath Pandey*, decided by a learned single Judge of this Court (1974 Bihar Bar Council Journal 710) = (AIR 1975 Pat 110). Neither of these two decisions supports the argument of the learned counsel viz., that once these two requirements are fulfilled, it becomes obligatory on the part of the court to grant stay. It appears that the decision in the case of *Hansraj* (Supra) was relied upon by S. P. Sinha, J., in the latter case of *Smt. Ram Kumari Devi v. Tarkeshwar Nath Pandey*. The observation in *Hansraj's* case upon which reliance has been placed by learned Counsel for the petitioners is as follows and it was also quoted in the case of *Smt. Ram Kumari Devi* (Supra):—

"All that is required for the application of Order XXI, Rule 29 is, (1) that the suit should be pending in any court against the holder of a decree of that very court, (2) and that the suit should have been filed by the person against whom the earlier decree was passed. In such a case, it is open to the court to stay execution of the decree until the pending suit has been decided on such terms as to security or otherwise as it thinks fit."

4-A. It is obvious from the latter sentence in the passage cited above that once these requirements are fulfilled, the provision of Rule 29 of the Code is attracted and thereafter it is open to the court to stay the execution. It will appear that in both the cases aforesaid, the learned Judges were not called upon to decide as to whether once the two requirements are fulfilled, it becomes obligatory on the part of the court to stay the execution. In the case of *Hansraj*, the argument was that an order under Rule 29 of the Code could be passed only in execution proceeding and could not be passed by the court, before whom the subsequent suit was filed, in the proceeding of that suit. This contention was not accepted. In the case of *Srimati Ram Kumari Devi* also, the argument was that the order under Order XXI, Rule 29 of the Code could be passed only in the suit and not in the execution case. The learned Judges were, therefore, considering as to what were the requirements to be fulfilled before an order under Rule 29 of the Code could be passed. These decisions are thus of no avail to the petitioners.

5. In my view, and it is well settled, the power of the Court under rule 29 of the Code is discretionary. I have already referred to the observation of Wanchoo, C. J., in the case of *Hansraj* where the learned Chief Justice said that in such a case "it is open to" the court to stay the execution. In the case of *Kan-*

nammal v. Muthukumaraswami Chetty, (AIR 1936 Mad 102), it has clearly been stated by Beasley, C. J., "the rule is not an imperative one; and the Court has a discretion either to grant the relief asked for, namely, stay of execution of the decree, or to refuse it". In the case of *Anop Chand v. Hirachand*, (AIR 1962 Raj 223), a Division Bench of that Court also said: "it is clear from the wordings of Rule 29 of Order 21 that the power given to the court is discretionary."

In my view, the word 'may' occurring in Rule 29 of the Code cannot be read as 'shall' and clearly indicates that the power of the court is discretionary. In the case of *Shaukat Husain v. Smt. Bhuneshwari Devi*, (AIR 1973 SC 528), their Lordships were considering the provision of Rule 29 of the Code and after quoting the rule said as follows:—

"It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the Court in which the suit is pending may stay the execution before it."

Their Lordships say that once these conditions are fulfilled, the Court 'may', and do not say that it 'shall' stay the execution. The argument of the learned counsel to the contrary cannot therefore, be accepted.

6. The second grievance of the learned counsel is that the court below has adopted wrong principles in deciding the matter, namely, principles of injunction which do not apply to a case of stay of execution. The differences between an order of injunction and order of stay are well known to need repetition. In one case, it is an order against the person restraining him from executing a decree; in the other case, it is a direction to the court to stay the proceeding. The argument of the learned counsel is based on the statement by the court below to the following effect:—

"Considering all the facts and circumstances in this case I find and hold that the balance of convenience is not in favour of the O. Ps. in T. S. No. 7/74."

On this basis, the argument, advanced firstly is that the court below has considered only the "balance of convenience" and nothing else. I am afraid, the argument is not well founded on facts. The court below has in another part of the order referred to the statement in the petition to the effect that the petitioners were not represented in the previous title suit and title appeal and the judgments of the those courts were tainted

with fraud, collusion and gross negligence. It has also noted the argument that the petitioners claimed to have attained the age of majority when the title suit was going on in the trial court and that their mother-guardian was very much shocked by the premature death of her husband and hence she could not represent the petitioners. The learned Munsif said that even on these statements, at best, the decree would be voidable and it is a good decree till it is set aside. He has also stated that nothing regarding fraud and collusion had been argued before him and hence he was convinced that the petitioners had not made out a case for stay. It is thus obvious that the court below has considered questions other than "balance of convenience" as well. It seems to have considered whether there was any proof *prima facie* of the case made out by the petitioners in Title Suit No. 7 of 1974.

7. Learned counsel has not been able to cite any authority for the proposition urged next that the consideration of convenience is a matter extraneous to the question of stay of a proceeding. What are the principles which a court should keep in mind in deciding a matter of stay under Order XXI, Rule 29 is a question which has not been exhaustively answered in any decided case to which my attention has been drawn or which I have come across. There are number of cases, however, which have well settled the guideline in respect of stay of execution under other provisions of the Code. It is well known that a mere filing of an appeal against a decree is by itself not a good ground for stay of execution under Order 41, Rule 5 of the Code. The petitioner there has to make out "sufficient cause". Such a cause is said to have been established if the party is able to prove that he would incur substantial loss, that there are fairly arguable questions and thus a substantial case to be considered and that the petitioner has come without unreasonable delay. There are some cases which I have come across to which I will refer hereinafter which give some indication in respect of the guideline. The earliest case is that of *Mittun Bibee v. Buzloor Khan*, (1867) 8 Suth WR 392. In that case the application was not supported by any affidavit nor was there any matter except the allegations of the petitioner in the plaint. The Principal Sudder Ameen came to the conclusion that it did not appear probable that the plaintiff would succeed in the suit. Their Lordships said that the application was not one which could be granted or entertained without an affidavit or satisfactory proof of the complaints alleged. It was observed that it was for the petitioner to support the allegations by evidence upon which the court could act. In

the case of *Anup Chand v. Hirachand*, (AIR 1962 Raj 223) (Supra), their Lordships said the following with regard to the provision of Rule 29 of the Code:—

"This rule is based on the principle that a judgment-debtor may not be harassed if he has a substantial claim against the decree-holder which is pending for decision of the court executing the decree. If the court is of the view that there is some substance in the claim, it may order for the stay of the execution."

It will be noticed that the aforesaid points which are said to be matters for consideration are none other than those which apply to stay of executions in general. I venture, therefore, to think that the principles which govern stay of execution in general ought to be the principles which would govern the stay of execution under Order XXI, Rule 29 of the Code. I base my conclusion not merely on what has been stated before but also on the fact that Rule 29 of Order XXI is one of the rules in the part dealing with stay of execution beginning with Rule 26 and ending with Rule 29. The legislature cannot be deemed to have in mind any different principles to be adopted in respect of Rule 29 of the Code. It will be noticed that in Rule 26 of the Code also it is laid down that the Court to which the decree has been sent for execution shall, upon "sufficient cause" being shown, stay the execution. There is no doubt that no such words as 'sufficient cause being shown' have been mentioned in Rule 29. Still it cannot be said in view of the power being discretionary that the court was bound to stay the execution even without sufficient cause being there.

8. Learned counsel for the opposite party has drawn my attention to a decision in the case of *Judhistir Jena v. Surendra Mohanty*, (AIR 1969 Ori 233). In that case the learned single Judge of the Court said:—

"The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit to set aside the decree might succeed. Such suits are also of a very precarious nature. The allegations therein ordinarily would be that the previous decree was obtained by fraud or collusion or that the decree was not binding on the present plaintiff as the transaction entered into by the judgment-debtor was tainted with immorality. These are all suits of uncertain and speculative character. Most of these cases are likely to fail the onus being very heavy on the

plaintiff to establish fraud and similar charges. That being the position, a person should not be deprived of the fruits of his decree merely because suits of frivolous character are instituted and litigants are out after further series of litigations. The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay should be granted. Even if stay is granted, it must be on suitable terms so that the earlier decree is not stifled.

No hard and fast rule can be laid down in what cases stay would be granted or refused. But as has already been stated, a rigorous test is to be applied and in most of the cases prayer for stay is bound to be refused."

[I respectfully concur in the view that the fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits thereof, and, in my view, unless there is "sufficient cause". I need not, however, go as far as to say that in most of the cases it should be refused and a very rigorous test ought to be applied for deciding as to whether stay should be granted or refused. In my view, as I have said above the question as to whether sufficient cause has been made out should be the guiding principle in deciding the question.

9. Learned counsel for the opposite party raised another important question which is one of first impression. It was urged that Order XXI, Rule 29 of the Code relates to stay of execution and not to stay of a proceeding for restitution. It is stated at the bar that there is no decided case which answers one way or the other the question whether Rule 29 has any application to an application for restitution under Section 144 of the Code. I have also not been able to lay my hand on any direct decision on the point. I have, however, after careful consideration come to the conclusion that the provision of Rule 29 of the Code applies as much to an application for execution as to an application for restitution. My grounds are the following:—

It will appear that in the Code of Civil Procedure, 1882, there was a provision under Section 583 of that Code to the following effect:—

"When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the court which passed the decree against which the appeal was preferred and such court shall proceed to execute the decree passed in appeal, according to the rules here-

inbefore prescribed for execution of decrees in suits."

The question of restitution was one dealt with in that provision by way of execution. That is now with suitable amendment the subject-matter of Section 144 of the Code which provides for an application for restitution and this section is under Part 11 dealing with "miscellaneous". The mere fact that an application under Section 144 of the Code is no more in the Chapter on execution does not change the nature of the application itself. It still remains an application in execution. In fact, it is now well settled that an application for restitution is an application in execution. In the case of Bhaunath Singh v. Kedar Nath Singh, (AIR 1934 Pat 246 (2)) (FB) a Full Bench of this Court held that an application for restitution and for mesne profits is an application in execution and is therefore governed by Article 182 of the Limitation Act. The law laid down in this case was approved by the Supreme Court in the case of Mahijibhai v. Manibhai (AIR 1965 SC 1477). The majority of the learned Judges deciding this case held that:—

"When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie, therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree." It thus stands well established that an application for restitution is an application for execution. There is thus no reason why provision of R. 29 of Order XXI of the Code should not apply to an application for restitution as much as it does to an application for execution. Execution can be stayed and so can a proceeding for restitution under Rule 29 aforesaid.

10. The only other point raised by learned Counsel for the opposite party in the present case is that the decree which was under execution in the present case was that of the appellate court and not of the learned Munsif and, therefore, the learned Munsif had no jurisdiction at all to entertain the application under Order XXI, Rule 29 of the Code. There is no

substance in this contention. Section 37 of the Code lays down that the expression 'Court which passed a decree', shall in relation to the execution of decrees, be deemed to include, where the decree to be executed has been passed in the exercise of appellate jurisdiction the court of first instance. Section 38 of the Code next provides that a decree may be executed either by the "court which passed" it or by the court to which it is sent for execution. The term 'the court which passed a decree' thus in the case of an appellate decree would include the court of first instance for the purpose of execution. It is, therefore, immaterial that the decree in the present case was that of the appellate court in respect of which the application for execution for costs and restitution by delivery of possession had been filed. No authority is needed for the proposition the point being so clear. I may however mention a decision in the case of *S. M. Nagori v. Baburao*, AIR 1956 Madh Bha 229. In that case the High Court had awarded costs in second appeal and remanded the case to the trial court for fresh decision. The defendant had made an application for execution of the decree for costs. The question was whether the execution for costs awarded by the High Court could be stayed under Order XXI, Rule 29 of the Code. The learned Judge took the same view as I have done in this case and held that it could. There is thus no substance in this objection raised by the learned counsel.

11. Lastly, learned counsel for the opposite party urged that assuming that the court below had committed an error of law in not considering other matters, matter other than balance of convenience pertaining to the question of stay, an error of law would not enable this Court to interfere with the order of the court below unless the error was of jurisdictional nature. He has relied on the decision in the case of *M/s. D. L. F. Housing and Construction Co. (P.) Ltd. v. Sarup Singh*, (AIR 1971 SC 2324) which was reiterated in the subsequent case of *The Managing Director (MIG) Hindustan Aeronautics Ltd. v. Ajit Prasad*, (AIR 1973 SC 76). In view of what I have said earlier on the point of the consideration of the matter by the learned Munsif, the question does not arise. But even if it be held that the learned Munsif had omitted to consider other relevant materials, it would still be an error of law not relating to the question of jurisdiction. The learned Munsif had the jurisdiction which is not disputed and even if he had decided the case without considering other relevant matters, the decision would be one wrong in law and yet not without jurisdiction.

12. For all the reasons mentioned above, I do not find any substance in this application, it is accordingly dismissed with costs.

Petition dismissed.

AIR 1975 PATNA 312

MADAN MOHAN PRASAD AND
S. K. CHOUDHURI, JJ.

Rajendra Prasad, Appellant v. Gaya Prasad Sah, Respondent.

A. F. O. D. No. 447 of 1965, D/- 24-3-1975.*

(A) Limitation Act (1963), Section 18 — Acknowledgment — Chitha implying a promise to pay furnishes fresh cause of action for suit.

Chitha in the instant suit shows that certain amount has been found due after the accounting in respect of the previous transaction which was embodied in the previous chitha. There is acknowledgment of this debt. Obviously in view of the law laid down in *Maniram's case* (1906) 33 Ind App 165 (PC) the acknowledgment implies a promise to pay. Chitha also shows that a payment was made towards the aforesaid amount by the defendant and an entry to that effect was made in the chitha itself. This clearly indicates the promise to pay and a partial fulfilment of that promise. The suit is thus one on the basis of a chitha implying a promise to pay. It is not said that a suit would not lie on its basis if it be held to imply a promise to pay. In that view of the matter, therefore, the suit was maintainable. AIR 1953 SC 225 and (1906) 33 Ind App 165 (PC) and AIR 1968 Pat 203 and AIR 1969 Raj 192 (FB), Followed; AIR 1961 SC 1236, Distinguished.

(Para 11)

(B) Evidence Act (1872), Section 92, Proviso 2 — Applicability — Hathchitha is informal document — Contemporaneous oral agreement to pay interest — Can be proved.

It is well settled that where the document is a formal one no oral evidence relating to any contemporaneous agreement inconsistent with the terms of the document would be permitted. The same cannot however be said in respect of an informal document. If a hathchitha is one, as in the present case, which contains only an acceptance of a liability and promise to pay a previous debt there is no escape from the conclusion that it is an informal document which need not contain all that had been agreed to be-

*(From decision of R. P. Tandan, Sub-J., Motihari, D/- 31-8-1965).

tween the parties. Therefore it was open to the plaintiff in the present case to lead evidence to show a contemporaneous agreement between the parties in respect of payment of interest. AIR 1917 Cal 210 and (1882) 9 Cal LR 301, Followed; AIR 1916 Pat 406 (1) and AIR 1923 Cal 402, Distinguished. (Paras 16, 17)

(C) Civil P. C. (1908), Section 34 — Interest prior to suit — Interest is payable either under contract or mercantile usage or provision of law.

Admittedly the chitha does not contain any stipulation to pay interest. The evidence regarding a contemporaneous agreement is worthless. Interest can be allowed only under a provision of law or under a contract or in accordance with a mercantile usage, if proved. In respect of the present transaction which is based on an informal document there is no question of allowing interest under any provision of law i.e., Section 80 of the Negotiable Instruments Act does not apply. No evidence has been led about any mercantile usage. The result is that there is no case to award any interest to the plaintiff for the period up to the date of the suit.

(Para 19)

Cases Referred: Chronological Paras

AIR 1969 Raj 192 = ILR (1968) 18 Raj 1137 (FB)	10
AIR 1968 Pat 203 = 1968 BLJR 619	10
1967 BLJR 763	10
AIR 1961 SC 1236 = (1962) 1 SCR 140	10
AIR 1953 SC 225 = 1953 SCR 758	10
AIR 1952 Raj 7 = 1951 Raj LW 295 (FB)	10
AIR 1942 Lah 50 = 44 Pun LR 10 (FB)	10
AIR 1935 All 129 = 1934 All LJ 1185	10
AIR 1929 Lah 263 = 30 Pun LR 240	11
AIR 1929 Lah 264 = 30 Pun LR 226	11
AIR 1929 Pat 258 (2) = 10 Pat LT 169	10
AIR 1923 Cal 402 = 70 Ind Cas 790	15
AIR 1920 Pat 161 = 1 Pat LT 190	10
AIR 1917 Cal 210 = 36 Ind Cas 612	17
AIR 1916 Pat 406 (1) = 1 Pat LJ 71	15
AIR 1915 Cal 37 = 26 Ind Cas 736	15
AIR 1915 Cal 321 (1) = 26 Ind Cas 935	15

(1906) 33 Ind App 165 = ILR 33 Cal 1047 (PC)	10
(1882) 9 Cal LR 301	17

Gupteshwar Prasad, for Appellant;
Mangal Pd. Misra, for Respondent.

MADAN MOHAN PRASAD, J.:

This appeal by the defendant is directed against a decree for money passed by the Second Additional Subordinate Judge of Motihari.

2. The plaintiff-respondent filed a suit for recovery of Rs. 10,871/- being the principal and interest due on the basis of a Chitha dated Asarh Sudhi 1366 F. S. corresponding to the 18th. of July, 1959. The plaintiff alleges that he was a regis-

tered money lender and had transactions with the defendant who used to borrow money, for his business, as the head of a joint Hindu family, and the account used to be entered in his Bahi Khata kept in regular course of business. In the year 1366 accounting was done and the balance of Rs. 19,059/8/- was found due with the defendant and in respect of this amount due he had executed a Chitha on the 18th July, 1959. It is further said that there was, at the time of the execution of the Chitha, an oral agreement with the defendant to pay interest at the rate of 1 per cent. per mensem. This account was also entered into the Bahi Khata of the plaintiff. It is said that the aforesaid loan was taken for the benefit of the joint family. The plaintiff then states that a sum of Rs. 14,242/- was paid by the defendant through his brother and the said amount was also entered in the Bahi Khata and in the Chitha. In that view of the matter a sum of Rs. 10,064/- was found due towards the principal and a sum of Rs. 807/- towards interest was payable by the defendant. The cause of action for the suit, it is said, had arisen on the 18th July, 1959, the date on which the Chitha was executed after adjustment of accounts and on the 9th November, 1961, the date on which the aforesaid amount of Rs. 14,242/- was paid off.

3. The defendant's case on the other hand is that it is true that the father of this defendant used to take loans from the plaintiff in course of his business but the aforesaid Chitha was executed by him without taking any accounts, on the assurance of the plaintiff that he would help the defendant by lending money, in times of need, for running of his business. It is said that there was no consideration paid for the Chitha aforesaid, that not a single pie remained due from this defendant, that there was no stipulation for payment of any interest over the amount mentioned therein, that the Chitha amounted to, mere acknowledgment and could not form the basis of the suit and the suit is bad for non-joinder of parties, that the suit comes within Section 7 of the Money Lenders Act, that it is a case where accounts should be reopened under Section 8 of the said Act, that the Bahi Khatas of the plaintiff were not kept in regular course of business, that no payment was made by the defendant through Bhupendra Prasad, that the plaintiff is not a registered money-lender and that the suit is bad on account of Section 4 of the said Act. On these grounds, it is stated that the suit is fit to be dismissed.

4. The following issues were framed:—

1. Is the suit as framed maintainable?

2. Has the plaintiff got any cause of action?

3. Whether the suit is bad for defect of parties?

4. Is the Chitha dated Asadh Sudi 13, 1366 F. S. corresponding to 18-7-1959, valid, genuine and for consideration?

5. Whether the accounts can be re-opened under Section 7 of the Bihar Money-Lenders Act?

6. Whether the suit is barred by law of limitation?

7. Was there any contract for payment of any interest, if so, at what rate?

8. Is the suit hit by Section 4 of the Bihar Money Lenders Act?

9. Is the plaintiff entitled to any decree, if so, for what amount?

5. The learned Subordinate Judge answered Issues Nos. 1 and 2 in the affirmative and Issues Nos. 3, 5, 6 and 8 in the negative. Regarding Issue No. 4 he found that there was no consideration for the chitha aforesaid but held that upon the plaint it was a case based on an earlier original transaction of the year 1956 and at that point of time Rs. 18,551/- had been advanced to the defendant in cash. According to him the chitha of 1959 was an acknowledgment of that past debt and therefore the suit could lie on the basis of the original advance. Accordingly he decreed the suit taking the advance of Rs. 18,551/- as initial loan. Regarding Issue No. 7 he allowed interest thereon at the rate of 11 annas per cent. per month as appeared from the past transaction and disallowed the claim of the plaintiff for interest at the rate of Re. 1/- per cent. per month. Of course, he allowed a set off of the payments made since the date of the original transaction.

6. Learned counsel for the appellant has not challenged the findings of the court below except in relation to the following points. Firstly it is said that the court below has erred in not treating the chitha (Ext. 1 (a)) as a mere acknowledgment on the basis of which a suit could not lie; secondly, that the trial court has erred in going back to the past transaction of 1956 and thereby substituting a case not pleaded by the plaintiff, thirdly, that in absence of any stipulation in the chitha to pay interest, the court below has erred in allowing interest at the rate found in the past transaction and fourthly, that the transaction should have been reopened and examined in the light of Sections 7 and 8 of the Bihar Money Lender's Act.

7. I have gone through the pleadings of the parties and the evidence on the record with great care and I find that the trial court has rightly come to the conclusions that neither the suit is hit by

Section 4 nor does Section 7 or Section 8 of the Money Lender's Act apply. Its finding that the suit was within time is also not open to any criticism. I do not find any defect of parties either in this case.

8. In respect of the question of application of Sections 7 and 8 of the Money Lender's Act, the counsel for the appellant tried to canvass before us that even the past loan of Rs. 18,551/- said to have been paid in cash was really not so paid and the amount itself represented a past debt. It was pointed out in this connection that it is supported by the evidence of D. W. Lakshman Prasad that actually there was a debt of Rs. 37,010/-, which was found due to Sarju Prasad Lachman Prasad the firm of a joint family of which the defendant, his brother and his father formed a branch. According to his evidence this total amount of Rs. 37,010/- was divided between the two branches of the same family, one consisting of Sarju Prasad and his sons Lachman Prasad, Bidyasagar and Daya and the second of Jamuna Prasad, the father of this appellant and his brothers. The amount thus came to be Rs. 18,505/- for each, as appears from the Rokar Bahi and Khatabahi, Ext. 3 and 4 series. This amount of Rs. 18,505/- which is falsely said to have been paid in cash but which was really past dues, it is urged, and another amount of Rs. 46/- which is also alleged to have been paid in cash both taken together make Rs. 18,551/-. It is said that even this sum of Rs. 46/- was not really paid in cash and it was a fictitious entry made. There is no satisfactory evidence on these points. The defendant has not produced the khata bahi of his father or ancestor's firm to show that the said amount of Rupees 18,551/- had not been received by him in cash on the 18th of July, 1956, the date of Ext. 1 the previous chitha. Further although the khata bahi for some of the relevant years of the plaintiff were produced the defendant could not show even therefrom that this amount of Rs. 18,551/- was not paid in cash. In the absence of evidence to that effect therefore the question of application of Section 7 or Section 8 of the Bihar Money Lender's Act does not arise.

9. The most important question which arises in this case is whether the suit is maintainable. According to the appellant it is based merely on the Chitha Ext. 1/A whereas according to the respondent it is a suit based on the original transaction of which reference has been made in Ext. 1/A and which was the subject-matter of a previous chitha dated the 18th July, 1956, (Ext. 1). Much will turn

upon the answer to this question. Having carefully examined the plaint I am unable to come to the conclusion that it is a suit based on the original consideration. All that we find in the plaint is a statement giving the historical background in which adjustment of amount took place on the relevant date namely the 18th of July, 1959. There is no pleading regarding any previous chitha or about any transaction by way of any particular advance made previously. In other words it has not been pleaded as to when the loans which formed the original consideration were advanced. All that is said is, as I have said, by way of antecedent relationship viz., that there used to be transactions "karbar wo lendeni" between the parties. This is said in paragraph 2 of the plaint. It is said further that there used to be accounting between the parties and the same used to be entered in the bahikhata. In para. 3 of the plaint it is said that after accounting of the previous transactions a sum of Rs. 19,059/- was found due from the defendant and a chitha (Ext. 1/A) was executed therefor. The next relevant paragraph is the one which recites that the cause of action arose on the date of the execution of the chitha. Reading the plaint as a whole there is no room for any argument in this case that the suit was based on the original consideration. Undoubtedly the plaintiff has filed his suit on the basis of the Chitha Ext. 1 (a) itself.

10. The question which comes next is whether the suit as framed is maintainable. Learned Counsel for the appellant has contended that the chitha is merely an acknowledgment of a debt and in absence of any promise to pay the debt, it does not create any liability or a cause of action. In this respect he has placed reliance on a Bench decision of this court in the case of Baidya Nath Pd. Sah v. Jamuna Pd. Sah, (1967 BLJR 763) and on an observation of the Supreme Court in the case of Shapoor Fredoom Mazda v. Durga Prasad, (AIR 1961 SC 1236). I am afraid that these decisions are of no avail to the appellant. In the case of Shapoor Mazda (supra) the suit was for recovery of mortgage dues and there was a letter which was said to be an acknowledgment within the meaning of Section 19 of the Limitation Act and the question was whether the claim was barred. While dealing with this question Gajendragadkar, J., speaking for the court said:—

"..... Acknowledgment as prescribed by Section 19 merely renews the debt, it does not create a new right of action. It is a mere acknowledgment of liability in respect of the right in question; it need not be accompanied by promise to pay either expressly or even by implication".

Learned counsel has placed great reliance on the first sentence aforesaid and urged that this must be taken to mean that in no case can an acknowledgment create a new right of action. In my view that would amount to reading into the observation of their Lordships what they have not said. It is obvious that the question was whether the letter in that case amounted to an acknowledgment and the learned Judge was merely explaining what an acknowledgment is. The case before their Lordships was one of acknowledgment of subsisting liability and the observations have to be read in the light of the facts of that particular case. The present case before us is not really one of acknowledgments pure and simple, of a subsisting debt but it is a suit based on the Chitha. The decision in the aforesaid case has therefore no application to the case before us. Turning to the other case of Baidya Prasad Sah, (supra) again, I find that the decision is of no avail to the appellant. That was a suit where the defendant used to take loans and there used to be adjustments of account and for the last time such an adjustment was made on a particular date and in respect of the amount found due a chitha was executed which contained a promise to pay interest at one per cent. R. K. Chaudhuri, J., with whom K. B. N. Singh, J., agreed held in that case that there the chitha was a mere acknowledgment of liability and it could not form the basis of the suit. This was held on the authority of the decisions in Shiv Ram Punnun Ram v. Faiz, (AIR 1942 Lah 50) (FB) and Hastimal v. Shanker Dan, (AIR 1952 Raj 7) (FB). Their Lordships however found that the suit in that case was not based merely on the chitha but also on the loan advanced. Learned counsel has placed reliance on the observation in respect of the chitha being a mere acknowledgment of liability and thus being incompetent to be the basis of a suit. With very great respect, in view of the decisions of the Privy Council and the Supreme Court, it is difficult to accept the proposition of law laid down in that case on the basis of the two decisions of the Lahore and Rajasthan High Courts. It appears that the attention of the learned Judges was not drawn to the case of Hira Lal v. Badkulal, (AIR 1953 SC 225) nor was their attention drawn to an earlier case of Maniram v. Seth Rupchand, ((1906) 33 Ind App 165) (PC). In the case of Hira Lal their Lordships of the Supreme Court said in paragraph 11 as follows:—

"Mr. Bindra next urged that the plaintiffs' suit should have been dismissed because it could not be maintained merely on the basis of an acknowledgment of liability, that such an acknowledgment could only save limitation but

could not furnish a cause of action on which a suit could be maintained. The Judicial Commissioner took the view that an unqualified acknowledgment like the one in the suit, and the statement of the account under which the entry had been made were sufficient to furnish a cause of action to the plaintiffs for maintaining the present suit. We are satisfied that no exception can be taken to this conclusion. It was held by the Privy Council in *Maniram v. Seth Rupchand*, (1906) 33 Ind App 165 (PC) that an unconditional acknowledgment implies a promise to pay because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. In *Fateh Mahomad v. Ganga Singh*, AIR 1929 Lah 264, the same view was taken. It was held that a suit on the basis of a balance was competent. In *Kahan Chand Dularam v. Dayaram Amritlal*, AIR 1929 Lah 263 the same view was expressed and it was observed that the three expressions "balance due", "account adjusted" and "balance struck" must mean that the parties had been through the account. The defendant there accepted the statement of account contained in the plaintiff's account book, and made it his own by signing it and it thus amounted to an "accounts stated between them" in the language of Article 64 of the Limitation Act. The same happened in the present case. The acknowledgment which forms the basis of the suit was made in the ledger of the plaintiffs in which earlier mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable."

It is obvious from the aforesaid that the Supreme Court laid down the law that an unqualified acknowledgment could form the basis of the suit if it implies a promise to pay and that is the natural inference unless there is anything to show to the contrary. They overruled the view of the Allahabad High Court in *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*, (AIR 1935 All 129) as will appear from paragraph 12:—

"Mr. Bindra drew our attention to a decision of the Allahabad High Court in *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*, (AIR 1935 All 129) wherein it was held that even if an acknowledgment implies a promise to pay it cannot be made the basis of suit and treated as giving rise to a fresh cause of action. We have examined the decision and we are satisfied that it does not lay down good law." This decision of the Supreme Court has been followed by another Bench of this Court in *Brijbihari Pd. v. Birbahadur Rai*, (AIR 1968 Pat 203). I may as well

mention that the case of *Baidya Nath Pd. Sah* was also considered in the case of *Brijbehari Pd.* (supra). In this case *G. N. Prasad, J.*, sitting with *R. K. Chaudhuri, J.*, did not follow the decision in the case of *Baidya Nath Pd.* and said that the attention of their Lordships in that case was not drawn to any authority for the proposition that a chitha containing acknowledgment of liability could not form the basis of a suit and particularly the attention of their Lordships was not drawn to the decision in the case of *Mani Ram*, (33 Ind App 135) (PC) or to the decision of the Supreme Court in *Hira Lal's* case (supra). Their Lordships referred to a decision of this Court in *Deoraj v. Indrasan*, (AIR 1929 Pat 258 (2)) which followed an earlier decision of this Court in the case of *Suraj Pd. Pandey v. W. W. Boucke*, (AIR 1920 Pat 161) and distinguished the same. It will appear that the view of Rajasthan High Court also has changed after the decision of the Supreme Court in *Hiralal's* case. It appears that in the case of *Jeev Rai v. Lalchand*, (AIR 1969 Raj 192) (FB) a Full Bench consisting of the learned Chief Justice and two other Judges considered the previous decision in AIR 1952 Raj 7 (FB) (supra). The learned Chief Justice took one view but the two other learned Judges took a contrary view and held that in the case of *Hiralal* (supra) the Supreme Court had laid down the law under Article 141 of the Constitution which is that the proposition that an acknowledgment cannot form the basis of a suit is not good law. I respectfully concur in this view of Rajasthan High Court. I may mention here that the majority judgment placed reliance also on the decision of this Court in the case of *Brijbihari Pd.* (supra). I have not the slightest doubt that what their Lordships of the Supreme Court have said in *Hira Lal's* case is meant to be the law. Had it not been so, it was not necessary for their Lordships to approve of the decision in the case of *Mani Ram* (supra) and to notice the decision in the case of *Ghulam Murtaza* (supra) and to say that it did not lay down good law. In that view of the matter the suit could lie on the basis of the chitha and it is not open to the appellant in this case to say that the chitha amounted to a mere acknowledgment and since it contained no promise to pay the suit could not be based thereon.

11. In the present case it will be relevant to read the chitha Exts. 1/a and 2 which is as follows:—

"Chitta bana dia Rajendra Pd. Kalwar Sahkim Kesaria se sahi bakalam khas.
Hs. Rajendra Prasad.

Lekha Gaya Pd. Sah, Sakim Kesaria Ka Jamakharcha San 1366 Sha. Isbi San 1959 Tarikh 18-7-1959.

Rs. 19059/8/- Mi Asarh Sudi 13 Ke Jama-
hisab karke purane chitha
ka banki lei Unis Hajar
Unsath athana.

M. S. 106/62. Ext. 1 (a)

Sd.....

2nd. Addl. Sub-Judge

19-7-65.

14242/- Miti Kartick sudi sk baste Bhupendra
Pd dey gai choudon hajar dosou
bialis rupeya kebal

M. S. 106/62.

Wosuli Rs. 14242/- daraj kiya

Sd.....

M. S. 106/62 Ext. 2.

Sd.....

2nd. Addl. Sub-judge 19-7-65".

Looking at Ext. 1/a what do we find? We find that certain amount has been found due after the accounting in respect of the previous transaction which was embodied in the previous chitha. There is acknowledgment of this debt. Obviously in view of the law laid down in Maniram's case the acknowledgment implies a promise to pay. We also find that a payment was made towards the aforesaid amount by the defendant and an entry to that effect was made in the chitha itself. This clearly indicates the promise to pay and a partial fulfilment of that promise. The suit is thus one on the basis of a chitha implying a promise to pay. It is not said that a suit would not lie on its basis if it be held to imply a promise to pay. In that view of the matter, therefore, the suit was maintainable. The argument of the learned counsel to the contrary must be rejected.

12. It must however be held that the trial court has erred in decreeing the suit for the reason given by it and in the manner it has been done. As I have said earlier, it was a suit not based on any original consideration and therefore it was not permissible for the subordinate Judge to go back to any earlier transaction. The view that he took was that there was a previous chitha (Ext. 1) which showed that cash amount of Rs. 18,551/- had been advanced to the defendant. Taking that as the basis and as the principal loan advanced he decreed the suit for that amount along with interest at a rate at which it was found to have been paid thereon. It was not at all a case based on the original transaction. The chitha in question Ext. 1/a does not speak of any particular previous loan advanced in token of which the chitha was executed. It merely makes a reference to the previous chitha. It was thus not permissible for the trial court to substitute a new case and a new cause of action for the one alleged by the plaintiff in respect of a debt the cause of action for which could have arisen three years earlier. The decree passed by the learned Subordinate Judge has got to be modified in the light of the findings on the point and I find that the suit being based on the transaction stated in Ext. 1/a it should be decreed for the sum of Rs. 19,059/8/- after deducting Rs. 14,242/- the payment already made i.e., for the balance of Rs. 4,817/8/-.

13. That brings us to the next question as to whether the plaintiff is entitled to any interest on the aforesaid amount of Rs. 19,459/8/-. It has been urged on behalf of the appellant that the chitha Ext. 1/a does not show any stipulation of any interest and therefore it is not permissible in the present case. On the other side it has been contended firstly that there is oral evidence adduced on behalf of the plaintiff to prove a contemporaneous agreement to pay interest at the rate of one per cent. per month. Alternatively, it has been urged that assuming that this evidence is not accepted in view of the reference in Ext. 1/a to the earlier chitha (Ext. 1) of 1956, it is open to the court to look into the earlier transactions and if it be so it would appear that interest at the rate of (11 annas per cent.) per month was payable and was paid at that rate and in any event therefore interest at the rate of 11 annas per cent. per month awarded by the court below must be sustained. I am afraid it is not possible to accept this contention of learned counsel for the respondent. I must straightway say, as I have done earlier, that the suit being based on the chitha, Ext. 1/a alone, it is not open to us to go into the previous transactions and take the amount thereof as the original consideration. The present chitha is only an acknowledgment to pay a particular amount. To import into it anything which was the subject-matter of previous transaction would amount to importing extraneous evidence into the acknowledgment itself. It is a case where only a certain amount found due on a particular date has been made the subject-matter of the chitha with a promise to pay. If we were to import into it the rate of the interest paid in respect of the prior sum it would amount to importing into Ext. 1, a further promise to pay interest at the rate at which it was previously paid. The acknowledgment here is merely to pay a certain ascertained amount of debt without any stipulation with regard to payment of interest. It is therefore not open to us to insert into this acknowledgment the liability to pay interest at any rate whatsoever. That meets the argument in this behalf.

14. Coming now to other argument in respect of the evidence adduced to prove contemporaneous agreement be-

tween the parties to pay interest an objection has been taken on behalf of the appellant that to allow such evidence would be a violation of Section 92 of the Evidence Act. Section 91 of the said Act lays down that when the terms of contract or of a grant or of any other disposition of the property has been reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or other disposition of property except the document itself. Section 92 next lays down that when the terms of such contract, grant or disposition have been proved according to Section 91 no evidence of any oral agreement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its term. There are however several provisos to this section and the one relevant to the present case is proviso 2 which is as follows:—

"The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved. In considering whether or not this proviso applies the court shall have regard to the degree of formality of the document."

It is therefore obvious that where the document is silent the existence of any separate oral agreement in respect thereof, if not inconsistent with its term, may be given. It must be noted that in considering the question of application of this proviso, the court has to keep regard to the degree of formality of the document itself. It is well settled that where the document is formal and if the matter in respect of which the evidence is sought to be adduced was a matter which necessarily would have been mentioned in the document, evidence in that regard shall not be allowed. If however the document is not formal and it need not have contained all the matters relating thereto and when the document is silent, in such cases it is open to the party to lead evidence in respect of the matter on which it is silent.

15. Learned counsel for the appellant has cited some cases before us but in my view they are of no avail. He has placed reliance on the decisions in *Banwari Lal v. Jagar Nath Pd.*, 1 Pat LJ 71 = (AIR 1916 Pat 406 (1)), *Lachmi Chand Jhowar v. Hamendra Pd. Ghose*, 26 Ind Cas 736 = (AIR 1915 Cal 37) and *Moti Biswas v. Haripada Pal*, (AIR 1923 Cal 402). In the case of *Banwari Lal* (supra) there was a suit based on a Hundi and it was said that it was a negotiable instrument and relying on a decision of the Calcutta High Court in *Lachmi Chand Jhowar v. Hamendra Pd. Ghose*, 18 Cal WN 1260 = (AIR 1915 Cal 37) which was a case on the basis of a

promissory note, the learned Judge held that Section 92 was a bar to the reception of oral evidence in support of a contract for payment of interest which was not mentioned in the Hundi. The case of *Lachmi Chand Jhowar* itself had gone up in Letters Patent Appeal before the Division Bench of the Calcutta High Court and the view of the learned Judge was upheld (see 26 Ind Cas 935 = (AIR 1915 Cal 321 (1))). In *Moti Biswas's* case (AIR 1923 Cal 402) (Supra) the suit was based on a promissory note. It is obvious that these were cases of negotiable instruments like promissory notes which were formal documents and since there were omissions in such formal documents of any agreement to pay interest, oral evidence proving the existence of such agreement could not be accepted. The same principles cannot however be applied to a document which is not a formal one.

16. The principle underlying the law is that when a transaction has been reduced to writing that must be regarded as the appropriate and the only evidence of the terms of agreement. The question therefore as to what is the nature of the document becomes a very important one because upon its nature will depend the answer to the question as to whether the document can be treated to be one which is supposed to incorporate all the terms of agreement. If the document is a formal one, obviously the presumption is that it incorporates the entire agreement between the parties. That is the reason why oral evidence is excluded. If the document is of an informal nature it need not contain within itself all the terms agreed to between the parties because by its very nature it is not supposed to be a document complete in all respect. It is therefore well settled that where the document is a formal one no oral evidence relating to any contemporaneous agreement inconsistent with the terms of the document would be permitted. The same cannot however be said in respect of an informal document. In the present case the chitha being an informal document the law laid down in the cases aforesaid has no application.

17. The question whether a Chitha is a formal document has been considered in two cases which I have come across. Firstly, in the case of *Nabin Chandra v. Devendra Mohan*, (36 Ind Cas 612 = (AIR 1917 Cal 210)), there was a hatchchitha in respect of a sum of Rupees 6,001/-. It did not contain any stipulation for payment of interest. It was held as follows:—

"The hatchchitha in dispute in this case is an extremely informal document. It is virtually a mere memorandum of

loan. Evidence was therefore rightly admitted to show the rate of interest under Section 92, sub-section (2) of the Evidence Act."

In another case of Umesh Chunder Baneya v. Mohini Mohun Das, ((1882) 9 Cal LR 301) there was also no mention of interest in the hatchitha which was held to be a document of informal nature and on that account oral evidence of contemporaneous agreement to pay interest was held to be admissible. It is thus obvious that if the document is informal, oral evidence of a contemporaneous agreement can be permitted in view of the proviso 2 of Section 92 of the Evidence Act. I need not however be understood to say that in every case of a document which is called a hatchitha, oral evidence would be permissible. In my view the court has to determine upon the basis of the document as to whether it is formal or informal irrespective of the name given to it by the parties. If a hatchitha is one as in the present case, which contains only an acceptance of a liability and promise to pay a previous debt there is no escape from the conclusion that it is an informal document which need not contain all that had been agreed to between the parties. Where however a hatchitha amounts to a promissory note and thus is of a formal character proviso 2 of the Section 92 may not be of any avail. In my view therefore it was open to the plaintiff in the present case to lead evidence to show a contemporaneous agreement between the parties in respect of payment of interest.

18. The plaintiff has adduced evidence to the effect that there was an agreement with the defendant that he would pay interest at the rate of one per cent. per month over the amount mentioned in Ext. 1/a. The evidence is so worthless that I cannot act upon it. P. W. 1 is a chance witness who speaks only in respect of the transaction previous to the one evidenced by Ext. 1/a. P. Ws. 2, 3, 4 and 5 speak about the agreement relating to the present transaction. According to P. W. 2 who is no one else but the plaintiff, although there was a stipulation to pay interest only at the rate of 11 annas per cent. per mensem on the previous loan at the time of execution of the present chitha, Ext. 1/a there was an agreement between the parties that the defendant would pay interest at the higher rate of one per cent. per month. He admits however that this agreed rate of interest was not recorded in the chitha. According to him, his witness in respect of the agreed rate of interest is one Jagarnath Singh. This person is no other than P. W. 1. He does not however say a word as to what was the rate of interest agreed to between the parties at the

time of execution of Ext. 1/a. In fact this witness has also not given any good reason for his likely presence at the shop of the plaintiff and he does not mention his presence at all at the time of execution of the chitha. Ext. 1/a. Therefore the person whom the plaintiff claims to be his witness on the point is not at all his witness on that point. P. W. 3 is another chance witness. He claims to have gone to the shop of the plaintiff for purchase of wheat. According to him also at the relevant time of execution of Ext. 1/a there was a contract of novation between the parties that is in lieu of 11 annas per cent. interest was agreed to be paid at the rate of one per cent. The witness says that he does not remember whether the plaintiff had asked the defendant to enter the rate of interest also in the chitha. According to the witness the only other person who was present then was Kodai Ram P. W. 4. He therefore contradicts the evidence of the plaintiff to the effect that the only witness on the point was Jagarnath P. W. 1. P. W. 4 also speaks about the same novation of contract. He also does not know whether the rate of interest was inserted in the chitha itself. He does not remember what was the principal amount of the previous debts and how much was the interest. This person is also a chance witness who claims to have gone to the shop of the plaintiff for purchase of Tisi. P. W. 5 is another witness who in his examination-in-chief states the same thing. He is also a witness in respect of novation of contract. He also like others is a chance witness who claims to have gone to the shop of the plaintiff for purchasing two logs of wood. There is no evidence to show that the plaintiff held shop of wheat, Tisi or timber. He also does not know whether the rate of interest was embodied in the chitha. It is thus obvious that one witness on whom the plaintiff relied in his evidence does not support him and the evidence of other witnesses can hardly be treated as convincing. The plaintiff himself is too interested in the matter to be relied upon in absence of any corroboration. Further it is difficult to believe that the rate of interest agreed to between the parties could have been at the rate of one per cent. in the circumstances of the present case. Admittedly there have been transactions between the parties for a long period. Admittedly Ext. 1/a did not evidence a cash payment of money. Admittedly the rate at which the defendant paid interest on the prior debt was 11 annas per month i.e., nearly 8 per cent. It is difficult to believe in this circumstance that the debtor would be willing to pay more and the creditor would expect much more than the previous amount for the simple reason that the debtor had paid a considerable amount

of interest and would ask for a remission rather than agree to pay interest at an enhanced rate. The evidence of the defendant (D. W. 8) is that he had told the plaintiff that he would not be able to pay any further interest and he had executed the chitha for the amount he was asked to do. It is obvious that the plaintiffs' evidence on the point is worthless and no contract has been proved.

19. The question then is whether the plaintiff is entitled to any interest from the date of the execution of the chitha to the date of the suit. Admittedly the chitha does not contain any stipulation to pay interest. The evidence regarding a contemporaneous agreement is worthless. The court below allowed interest treating the suit to be based on the original advance made in the year 1956 which I found to be wrong. The result is that there was no stipulation to pay interest on the amount of the chitha. Interest can be allowed only under a provision of law or under a contract or in accordance with a mercantile usage, if proved. In respect of the present transaction which is based on an informal document there is no question of allowing interest under any provision of law i.e., S. 80 of the Negotiable Instruments Act does not apply. No evidence has been led about any mercantile usage. The result is that I am unable to award any interest to the plaintiff for the period up to the date of the suit. The claim in this respect must be disallowed.

20. In the result, I set aside the decree passed by the court below and decree the plaintiff's suit for a sum of Rs. 4,817.50 paise, the balance due from him as stated earlier with proportionate cost. On this amount the defendant would be liable to pay interest at the rate of 6 per cent. per annum from the date of the suit until the realisation of that amount from the defendant. The appeal is thus allowed in part. In the circumstances of the case I direct the parties to bear their own costs so far as this appeal is concerned.

S. K. CHOUDHURI, J.:— I agree.

Appeal partly allowed.

AIR 1975 PATNA 320

**SHAMBHU PRASAD SINGH AND
LALIT MOHAN SHARMA, JJ.**

M/s. Gyan Das Shaw and others,
Petitioners v. The State of Bihar and another, Respondents.

Civil Writ Jurisdiction Case No. 230
of 1974, D/- 20-1-1975.

GS/IS/C599/75/SGK

(A) Land Acquisition Act (1894), Section 17 (1), Explanation (as inserted by Bihar Amendment Act (2 of 1961)) — Lands having forest, orchard or trees are either waste or arable — Simply because mango orchard is standing on the plot in question it cannot be said that no directions under Section 17 (4) can be issued in respect thereof. (Para 3)

(B) Land Acquisition Act (1894), Section 17 (1) and (4) and Section 4 — Notification under Section 4 amended by specifying which of the lands under acquisition are arable and which are waste — Petitioner not alleging that area of arable and waste land is not correct — Lands in question belonging to petitioner either arable or waste within the meaning of terms under the Act as amended by Bihar Act (2 of 1961) — Petitioner cannot claim that no direction under Section 17 (4) could be issued. 1965 BLJR 272 and 1972 BLJR 537, Distinguished. (Para 4)
Cases Referred: Chronological Paras
1972 BLJR 537 = 1972 Pat LJR 325 4
AIR 1967 SC 1081 = (1967) 1 SCR 373 3
1965 BLJR 272 4

K. D. Chatterji and Chunni Lal, for Petitioners; Md. Khaleel (Govt. Pleader 4) and Prabhu Nath Ray (J. C. to G. P. 1), for Respondents.

ORDER:— By this application under Article 226 of the Constitution of India the petitioners pray for quashing of Annexures 1 and 3, a notification under Section 4 and a declaration under Section 6 of the Land Acquisition Act (hereinafter referred to as 'the Act'). Annexure '1', the notification under Section 4 of the Act also gives a direction under Section 17 (4) of the Act that acquisition of the land was urgently needed and, therefore, the provisions of Section 5-A of the Act were not to apply in the case.

2. Plots Nos. 215, 218, 219 and 228 of village Jasidih which belong to the petitioners are subject-matter of the acquisition. According to them Plot No. 215 measures 22.3 acres and is second class Bari land, Plot No. 218 measures 9.8 acres and is "mango garden etc.," Plot No. 209 measures .74 acre and is rasta, and Plot No. 228 measures .79 acre and is a third class Dhani land. The petitioners claim that as the notification and the declaration do not specify which of these lands are waste lands and which of these are arable, they are bad in law. It is further claimed that some of these lands such as Plot No. 218, which is a mango orchard is neither waste nor arable and, therefore, no direction under Section 17 (4) of the Act could be given in respect thereof.

3. Reliance has been placed on behalf of the petitioners on the decision in Raja Anand Brahma Shah v. State of Uttar Pradesh, (AIR 1967 SC 1081) wherein it has been held that directions under

the price of the fruit trees. The learned Additional District Judge based this value on the report of a fruit specialist which has not been shown to be erroneous. We, accordingly, affirm the decision of the learned Additional District Judge on the point and hold that there is no scope either for enhancement or reduction.

8. A sum of Rs. 15,000/- was claimed on account of the price of a tubewell in the claim filed before the Land Acquisition Collector but he found that there was no tubewell on the spot and none was acquired by the State Government. In his application under Section 18 of the Act the claimant claimed a sum of Rs. 8,000/- on account of the price of the tubewell. The learned Additional District Judge has observed that the entries in the Khasra Girdawaris support the statement of Shri Preet Mohinder Singh, the father of the claimant, about the existence of a tubewell on the land but there was no evidence as to the value of the tubewell and, therefore, its price could not be determined. He allowed Rs. 2,000/- on account of compensation for a well and in view of what has been stated by the learned Additional District Judge, there is no scope either for enhancement or reduction in the amount.

9. The only other claim relates to a building on the acquired land. The claimant demanded Rs. 3,000/- for the same but the Collector awarded a sum of Rs. 700/- only. Shri Raj Kumar Goel Draftsman, prepared plan, Exhibit P-5, and estimated the cost of construction of the building as Rs. 1,850/- in his report, Exhibit P-6. He appeared as P. W. 4 to support his report. That report was accepted in the absence of any rebuttal on behalf of the State of Punjab. There is, therefore, no scope either for enhancement or reduction in the amount of compensation for the building.

10. As a result of the above discussion, we find no merit in these appeals which are dismissed but the parties are left to bear their own costs.

Appeals dismissed.

AIR 1975 PUNJAB AND HARYANA 321
MUNI LAL VERMA, J.

The Controller of Stores and another, Appellants v. M/s. Kapoor Textile Agencies, Respondents.

F. A. F. O. No. 197 of 1973, D/- 24-1-1975.*

*(From order of Dhian Singh, Sub. J., 3rd Class, Patiala, D/- 25-4-1973).

DS/ES/B/305/75/MBR

1975 P. & H./21 XI G-31

(A) Arbitration Act (1940), S. 39 (1) (iv) — "Filing or refusing to file an arbitration agreement" — Order appointing arbitrator other than named arbitrator — Order is appealable.

When a person is named in the arbitration agreement, his appointment as such would be included in the words of 'filing of the arbitration agreement.' Non-appointment of such a person (the one who is named in the arbitration agreement) or appointment of a person other than him would be tantamount to refusing to file arbitration agreement and, therefore, appeal is competent against such order under Section 39 (1) (iv). (AIR 1968 Cal 333, Rel. on). (Para 3)

(B) Suits Valuation Act (1887), S. 11 — Objection as to jurisdiction, when to be taken.

Where there is no dispute as to valuation but the contention is that on valuation given by the plaintiff or the applicant, the lower Court had no jurisdiction. Section 11 does not apply and the objection as to jurisdiction can be taken at any time. (Para 4)

(C) Civil P. C. (1908), O. 3, R. 4 — Power to refer to arbitration — Pleadar has no authority to revoke the appointment of an Arbitrator (made by his party) without instructions from him and to appoint a new Arbitrator in substitution. (AIR 1922 Nag 39, Rel. on). (Para 4)

Cases Referred: Chronological Paras
AIR 1968 Cal 333 3
AIR 1922 Nag 39 = 5 Nag LJ 229 4

J. S. Wasu, Advocate General (Punjab), for Appellants; J. V. Gupta, for Respondents.

JUDGMENT:— The respondents entered into a contract for the supply of uniform cloth (Khaki Drill) for the year 1970-71 to the appellants. An agreement was executed in that respect on September 7, 1970. Besides other terms and conditions, it contained an arbitration clause, to the effect, that if on any question, difference or objection whatsoever would arise in any way connected with or arising out of the aforesaid agreement, it would be referred for arbitration to any officer appointed by the Government of Punjab and the decision given by the Arbitrator would be final and binding upon the parties. In terms of the agreement, the respondents supplied Khaki Drill to the Controller of Stores on the contract rate. The delivery of the said Khaki Drill, costing Rs. 15,456/-, had been accepted by the General Manager, Punjab Roadways, Ludhiana. Some of the Khaki Drill, on inspection, was rejected by the Director, State Transport, Punjab. Thereafter, the respondents were required to supply further Khaki Drill. They notified

their willingness to do so subject to payment of the dues outstanding against the appellants. Therefore, the differences arose between the parties about the dues which were outstanding against the appellants. As such, the respondents approached the appellants to refer the matter for arbitration and when they did not pay heed to their request they made application under S. 20 of the Arbitration Act (hereinafter called the Act) to the Court for filing of the arbitration agreement and appointment of the Arbitrator. The said application was heard by the Subordinate Judge III Class, Patiala. The appellants did not dispute the broad facts of the case and indicated that they had no objection if the differences relating to the matters in dispute were referred for arbitration to Shri Bhagwant Kishore or Shri L. R. Khosla, Deputy Director of Industries, Punjab, Chandigarh. The respondents did not accept Shri Bhagwant Kishore or Shri L. R. Khosla as Arbitrator and pleaded that some independent person be appointed as Arbitrator. Hence, the following issues were settled:—

1. Whether the applicant has sufficient cause for the appointment of an Arbitrator, if so, who should be appointed Arbitrator? O. P. Parties.

2. Relief.

Despite obtaining two adjournments, the parties did not produce any evidence. On April 25, 1973, when the arguments were being heard, the learned counsel appearing for the respondents and the learned Assistant District Attorney appearing for the appellants agreed that the matters in dispute might be referred for arbitration to Shri Kuldip Singh, P. C. S., Executive Magistrate, Patiala. It was in that situation that the learned subordinate Judge appointed him (Shri Kuldip Singh) as Arbitrator and the parties were directed to appear before him. Aggrieved by the said order, the appellants have come to this Court in Appeal.

2. Shri J. V. Gupta, learned Counsel for the respondents, raised a preliminary objection that the appeal was incompetent, on two grounds, (1) that the Arbitrator had been appointed with the consent of the parties and, therefore, the appeal was barred vide Section 96 (3), Civil Procedure Code, and (2) that the impugned order was not appealable. In my opinion, the said objection is not well-founded. Section 96 (3) bars an appeal from a decree which has been passed with the consent of parties. Firstly, the impugned order cannot be said to be 'decree'. It is clear from clause (iv) of Section 39 (1) of the Act that it provides appeals against orders and not against decrees. Secondly, as would be seen hereinafter, the consent given by the learned Assistant District Attorney to the appoint-

ment of the Arbitrator cannot be taken as valid so as to bind the appellants. Therefore, when it is an appeal against an order and not against a decree and the impugned order cannot be said to have been passed with the consent of the appellants, the first ground taken for raising the preliminary objection is not tenable.

3. Clause (iv) of sub-section (1) of Section 39 of the Act provides appeal against filing or refusing to file an arbitration agreement. Mr. J. V. Gupta has been of the view that the appeal could be maintainable against an order of filing or refusing to file an arbitration agreement only, but no appeal lies against the order appointing an Arbitrator. The respondents averred in the application under Section 20 of the Act that there was arbitration agreement. The appellants did not dispute that fact and had no objection against referring the dispute for arbitration. So, the parties were not at issue with regard to existence or validity of the arbitration clause or respecting the dispute between them being referred for arbitration. As such, argues Mr. Gupta, that the Court was justified in referring the dispute between the parties for arbitration vide Order XV, Rule 1, Civil Procedure Code, and that part of the order is unassailable because the appellants did not oppose the reference of the dispute for arbitration. However, according to Mr. Gupta, though the order respecting the filing of the arbitration agreement, which, as indicated above, was unopposed, was appealable yet the appointment of Shri Kuldip Singh, Executive Magistrate, Patiala, as Arbitrator had nothing to do with the filing of the award and, as such, no appeal was competent against that part of the impugned order. I have not been able to agree with him. True sub-section (4) of Section 20 of the Act consists of two parts; firstly, filing of the arbitration agreement, and, secondly, the making of order of reference to the Arbitrator appointed by the parties, whether in agreement or otherwise, or where the parties cannot agree upon an Arbitrator, to an Arbitrator appointed by the Court. It is, therefore, essential to consider as to what is the extent and scope of the words 'filing of arbitration agreement'. Besides that, existence and validity of arbitration agreement and the question as to whether the dispute or difference, which has arisen between the parties, is covered by it (arbitration agreement) are within the scope of the said words, the appointment of Arbitrator may or may not be within the scope of the words. When a person is named in the arbitration agreement, his appointment as such would be included in the words of 'filing of the arbitration agreement'. Non-appointment of such a

person (the one who is named in the arbitration agreement) or appointment of a person other than him would be tantamount to refusing to file arbitration agreement and, therefore, appeal is competent against such order under cl. (iv) of subsec. (1) of Section 39 of the Act. So was observed in *Union of India v. M. S. Grewal and Co.*, AIR 1968 Cal 333. If none is named in the arbitration agreement, the appointment of an Arbitrator would not be tantamount to filing or refusing to file arbitration agreement and in such a case appeal against the appointment of such an Arbitrator may not be competent. The arbitration agreement, in the case in hand, provided that in the event of dispute or difference arising between the parties, the same was to be referred for arbitration to any officer appointed by the Punjab Government. The State of Punjab in reply to the application under S. 20 of the Act, stated that the dispute might be referred for arbitration to Shri Bhagwant Kishore or Shri L. R. Khosla, Deputy Director Industries, Punjab, Chandigarh. Thus, when the arbitration agreement and the reply put in by the State of Punjab are read together, it would be clear that the Arbitrator named by the Punjab Government according to the arbitration agreement was Shri Bhagwant Kishore or Shri L. R. Khosla. The Court did not appoint either of them and instead it (the Court) appointed Shri Kuldip Singh, Executive Magistrate, Patiala, as Arbitrator. That would certainly amount to refusing to file the award and, as such, the appeal lay against the said part of the judgment, i.e., with regard to the appointment of Shri Kuldip Singh as Arbitrator, under clause (iv) of Section 39 (1) of the Act and the second ground of the preliminary objection is again without any substance. It follows that there is no force in the preliminary objection and the same is overruled.

4. Shri J. S. Wasu, Advocate-General, Punjab, challenged the impugned order on two grounds; firstly, that the subject-matter of the impugned order was beyond the pecuniary jurisdiction of the Court which passed it, and, secondly, it (the Court) could not appoint any person other than Shri Bhagwant Kishore or Shri L. R. Khosla, Deputy Director Industries, Punjab, Chandigarh, as Arbitrator and the learned Assistant District Attorney had no authority to agree to the appointment of Shri Kuldip Singh as Arbitrator. It was not disputed that the jurisdictional value of the subject-matter of the application under Section 20 of the Act was Rs. 15,456/-, and it was admittedly beyond the pecuniary jurisdiction of the Court, the same being of Subordinate Judge III Class. Relying on Section 11 of the Suits Valuation Act,

Mr. J. V. Gupta, argued that the objection respecting the lack of pecuniary jurisdiction of the Court that passed the impugned order could not be raised, because such an objection had not been taken in the Court below. On a careful reading of Section 11 of the Suits Valuation Act, I feel that it (Section 11) is limited to cases of undervaluation and over-valuation and is not applicable to cases where the suit or the subject-matter has been properly valued but the same has been heard and decided by a Court, which on the face of it has no jurisdiction to proceed with it. To put it differently, where there is no dispute as to valuation but the contention is that on valuation given by the plaintiff or the applicant the lower Court had no jurisdiction, Section 11 of the Suits Valuation Act does not apply and the objection can be taken at any time. Besides that, I feel that the learned Subordinate Judge being of Class III, having no pecuniary jurisdiction to proceed with the matter, did not approach it from the right angle and it had prejudicially affected the disposal of the case on merits. As observed in *Kashi Ram v. Mt. Guddoo*, AIR 1922 Nag 39, power to make an appointment of an Arbitrator in the first instance in the absence of any instructions to the contrary is one thing and power to undo the appointment made by a party is another thing. Therefore, a pleader has no authority to revoke the appointment of an Arbitrator or Arbitrators made by his party without instructions from him and to appoint a new Arbitrator in substitution. As indicated above, the arbitration clause contains specifically that the Arbitrator was to be appointed by the Punjab Government, and in the reply to the application under Section 20 of the Act the State of Punjab indicated that Shri Bhagwat Kishore or Shri L. R. Khosla, Deputy Director of Industries, Punjab, Chandigarh, might be appointed as the Arbitrator to whom the disputes could be referred for decision. The impugned order reveals that it was during the course of arguments that the learned Assistant District Attorney appearing for the appellants had agreed that the dispute could be referred for arbitration to Shri Kuldip Singh, Executive Magistrate, Patiala. So, it cannot be maintained that during the course of arguments he could possibly have any instructions from the appellants to agree to the appointment of Shri Kuldip Singh, Executive Magistrate, Patiala, as Arbitrator in place of Shri Bhagwant Singh or Shri L. R. Khosla, who had been named by the State of Punjab as Arbitrators. That would show that the consent given by the Assistant District Attorney to the appointment of Shri Kuldip Singh as Arbitrator was unwarranted and was invalid.

5. It, thus, follows that there is merit in the attack of Shri J. S. Wasu directed against the validity and correctness of the impugned order. So, I find that the impugned order is erroneous and cannot be upheld.

Consequently, I allow this appeal, set aside the impugned order and send the case to the Senior Subordinate Judge, Patiala, with the direction that he would either himself proceed to decide the case or he may entrust the same to any Subordinate Judge competent to deal with it. The costs of the appeal will abide the result. The parties have been advised, through their counsel, to appear in the Court of the Senior Subordinate Judge, Patiala, on February 21, 1975.

Appeal allowed.

AIR 1975 PUNJAB AND HARYANA 324

S. S. SANDHAWALIA AND
K. S. TIWANA, JJ.

Partap Singh Kadian, Petitioner v. The State of Punjab and others, Respondents.

Civil Writ No. 6278 of 1974, D/- 23-1-1975.

(A) Constitution of India, Article 358 — Scope of.

The provisions of Article 358 are applicable to both legislative and executive actions and identical considerations apply to delegated legislation and executive action. (Para 23)

(B) Constitution of India, Article 358 — Article 358 is prospective — It applies to new Legislation enacted during emergency — It does not apply to pre-emergency legislation — Such legislation can be challenged under Article 19 during emergency.

Article 358 is prospective and applies to fresh legislation or new law enacted by the State during the continuance of emergency and makes it immune from attack under Article 19 during the continuation of the emergency and is not intended to protect or validate any pre-emergency legislative provision which would be invalid because of the constitutional inhibitions before the proclamation of emergency and does not empower the State on declaration of emergency to exercise arbitrary, unreasonable and unguided powers in violation of Article 19 under the whole gamut of pre-emergency legislation which would be existing on the Statute Book. AIR 1964 SC 381 and 1942 AC 206 and AIR 1966 SC 657, Rel. on. (Paras 23, 24)

(C) Constitution of India, Article 358 — Essential Commodities Act (1955), Sec-

tion 3 — Punjab Wheat (Restriction on Stock by Producers) Order 1974, Clause 3 — 1974 Order issued under Section 3 during emergency — It becomes part of 1955 Act and can be challenged under Article 19 during emergency.

The 1974 Punjab Order issued under powers conferred by S. 3 Essential Commodities Act must in the eye of law be deemed as an integral part of that Act and since that Act being a pre-emergency legislation is subject to Article 19 even during the emergency, the 1974 Punjab Order emanating from that Act and being in continuation of its policies can be challenged as being violative of Article 19 (1) (f) and (g) during the emergency. AIR 1961 SC 751 and AIR 1967 SC 1170 and AIR 1973 SC 106 and AIR 1974 SC 366, Relied on. (Paras 25, 29)

(D) Constitution of India, Article 19 (1) (f) and (g) — Essential Commodities Act (1955), Section 3 — Punjab Wheat (Restriction on Stock by Producers) Order 1974, Clauses 3 to 6 — Validity of — Punjab Order being violative of Article 19 (1) (f) and (g) and Section 3 is void.

Under Article 19 (1) (f) and (g), the farmer has guaranteed rights to hold and possess and dispose of the produce which he directly grows by his lawful profession from the land owned by him but the Punjab Wheat Order issued under Section 3, Essential Commodities Act, by its provisions contained in Clauses 3 to 6 fixes an arbitrary limit to the maximum quantity of wheat which can be possessed by the producer himself and compels him on pain of criminal prosecution and confiscation under Section 7, Essential Commodities Act, to sell within a fortnight all surplus stocks without casting any obligation on any person to take over the stocks at a remunerative price and thus, far from merely imposing reasonable restrictions on the guaranteed rights of the farmer virtually negates them by arbitrary, irrational and oppressive provisions and therefore the Punjab order is void being violative of Article 19 (1) (f) and (g) and of Section 3, Essential Commodities Act which does not authorise legislation in violation of Article 19. AIR 1954 SC 224 and AIR 1970 SC 1070 and AIR 1969 SC 168, Rel. on. (Para 52)

(E) Constitution of India, Article 19 and Article 358 — Essential Commodities Act (1955), Section 3 — Punjab Wheat (Restriction on Stock by Producers) Order 1974, Clause 3 — Section 3 does not authorise promulgation of orders violative of Article 19 — Section 3 not challenged as being ultra vires Constitution — Punjab Order issued under Section 3 can still be assailed as being violative of Article 19.

Section 3, Essential Commodities Act which is a pre-emergency legislation does not authorise the promulgation of orders

thereunder which would be violative of fundamental rights guaranteed under Article 19 or any other provision of the Constitution and therefore any delegated legislation under Section 3 whether made before or during the emergency, which does not conform to the provisions of the Constitution would be beyond the scope of the power conferred by Section 3 and void and hence even if Section 3 was not challenged as being ultra vires the Constitution, the Punjab Order issued under Section 3 can still be assailed as being violative of Article 19. AIR 1960 SC 430 and 1942 AC 206, Rel. on; AIR 1965 Punj 74, Expl. and Rel. on. (Paras 50, 51, 52)

Cases Referred: Chronological Paras

AIR 1974 SC 366	28, 39, 54
AIR 1973 SC 106 = (1973) 2 SCR 757	27, 28, 54
AIR 1970 SC 1070 = 1969 SCD 1069	48
AIR 1969 SC 168 = (1969) 1 SCR 42	49
AIR 1967 SC 1170 = (1967) 2 SCR 454	27, 54
AIR 1966 SC 657 = 1966 Cri LJ 586	24
AIR 1965 Punj 74 = 66 Pun LR 724	52, 54
AIR 1964 SC 381 = (1964) 1 Cri LJ 269	24
AIR 1961 SC 751 = (1961) 1 Cri LJ 773	25
AIR 1960 SC 430 = (1960) 2 SCR 375	52
AIR 1954 SC 224 = 1954 SCR 803	47
1942 AC 206 = 110 LJKB 724	24, 52

Kuldip Singh with R. S. Mongia, for Petitioner; K. P. Bhandari with I. B. Bhandari and Jagdish Singh, for Respondents.

SANDHAWALIA, J.:— A multipronged attack against the validity and the constitutionality of the Punjab Wheat (Restriction of Stock by Producers) Order 1974 has been forcefully levelled in this writ petition. It arises from facts which are not in serious dispute but to which detailed reference is nevertheless necessary.

2. Partap Singh Kadian, petitioner, claims to be what may compendiously be termed as a progressive farmer of the State of Punjab. He is a Graduate in Agriculture and has adopted farming as his profession and carries on mechanical cultivation of an area of 27 acres of land situated in village Kadian, Tahsil and district Ludhiana. He has been a former member of the Punjab Legislative Assembly and is now the General Secretary of the Punjab Khetibari Zamindari Union which claims to have a membership of more than seventy-five thousand farmers. The writ petition is therefore, claimed to be more or less of a representative character on behalf of the producers.

3. The petitioner claims to have a complete know-how of the modern me-

chanised agriculture and has given full details of an investment of Rs. 97,500/- regarding the machinery and other equipment necessary for the operations on his farm. In para. 4 of the petition further details regarding the expenditure for harvesting, hoeing, seeds, repair of machinery, fuel, fertilizers, rent of land, labour and management, depreciation and interest etc., are specified wherefrom originally a rather tall claim of the cost of the production of one quintal of wheat has been ultimately reduced to Rs. 300/- per quintal (as stated in the replication). It is averred that if a meaningful survey or assessment of the current cost of production of wheat within this area were to be made by the Punjab Government then it would be more than manifest that a price of Rs. 139/- per quintal is ridiculously low and indeed ruinous to the producers. A strong apprehension is expressed that if this policy is pursued and continued then the cultivation and production of wheat within the State is likely to suffer a serious set back.

4. The admitted background of the impugned statutory order is that in early 1973 in pursuance of a policy decision the Central Government decided to take over completely the trading in wheat. To give effect to that policy this State promulgated the Punjab Wheat Dealers' Licensing and Price Control Order on the 3rd of April, 1973. However, in the actual execution of that policy within the State of Punjab and also at the All India level serious difficulties were experienced and in certain areas a total failure of the procurement of wheat resulted therefrom. As a result thereof in the ensuing year, 1974, a reversal or substantial modification of the wheat trade take over was made by the Central Government and as a result of the larger policy decision the State of Punjab on the 18th of April, 1974, promulgated the Punjab Wheat Dealers Licensing and Price Control (First Amendment) Order, 1974, and simultaneously therewith the Wheat Procurement (Levy) Order, 1974, was also enforced. Thereby very substantial changes in the procurement policy were envisaged and in particular wholesale dealers in wheat were again brought back into the field of procurement primarily on the condition that 50 per cent of the wheat purchased by them would be surrendered to the State Government in the form of a levy at the rate of Rupees 105/- per quintal and the remaining 50 per cent would be allowed to be disposed of in the open market or by the issue of export permits from the State.

5. The Government of Punjab, however, in the six months that followed appears to have had second thoughts on the procurement policy and on the 22nd

of October, 1974, the Punjab Wheat Dealers' Licensing and Price Control (Fourth Amendment) Order, 1974 (hereinafter referred to as the Fourth Amendment Order), was promulgated whereby action in substantial reversal of the preceding policy was sought to be incorporated in the statute book. Clause (12) of this order prescribed that the maximum price at which fair average quality of wheat (other than wheat products) could be sold, would be Rs. 139/- per quintal and further the quantum of stock allowed to be possessed by each wholesaler was substantially slashed from 2500 quintals to a mere 100 quintals.

6. The petitioner highlights the facts that so far as wheat production is concerned the State of Punjab is the premier surplus State in India. During the year 1972 there was a surplus of 34 lakh tonnes of wheat and in the following year the surplus stocks were as much as 27 lakhs tonnes whilst during the current year the quantum of surplus hovers around 20 lakh tonnes of wheat. It is further pointed out that 82 per cent of the population of Punjab is rural who are either themselves producers of wheat or get their wages in kind which includes wheat and other grains and a mere 18 per cent. of urban population primarily consumes wheat flour ground by the flour-mills and chakkiwalas etc. The State of Punjab is a single Food Zone out of which the export of wheat is prohibited except by the sanction and permission of the State Government. The sale of wheat by the producers is mainly done in the licenced market yards under the Agricultural Produce Markets Act and what is sought to be high-lighted is the fact that a situation exists wherein the State or its agencies are virtually the monopoly purchasers of the marketable surplus of wheat within the State of Punjab.

7. The petitioner now claims to have in stock 180 quintals of wheat raised entirely from his own farm. He alleges that the combined effect of the levy order and the Fourth Amendment Order 1974, to which reference has been made in the earlier paragraph results in the deprival of a producer to get even a reasonable price for his labour far from making any profits therefrom. Nevertheless the State of Punjab on the 6th of November, 1974, in exercise of the powers conferred by Section 3 of the Essential Commodities Act promulgated the Punjab Wheat (Restriction on Stock by Producers) Order, 1974 (hereinafter referred to as the Stock Order) which is Annexure P-2 to the petition. This inter alia provides that a producer cannot hold in stock beyond 100 quintals of wheat within a period of 15 days from the commencement of the

order and a violation of the same would under the relevant provisions of the Essential Commodities Act be a criminal offence. The petitioner is thus obliged on pain of criminal prosecution to dispose of at least 80 quintals of the produce of his own land held by him by the 21st of November, 1974. On the other hand the Fourth Amendment Order apart from fixing a remunerative price had also directed that no licenced dealer can store wheat beyond 100 quintals and the excess thereof already in stock was to be acquired by the State Government at a fixed price of Rs. 139/- per quintal. It is highlighted that earlier these wholesalers and dealers were respectively allowed to hold, up to 2500 and 1000 quintals and in view of the new statutory orders they were thus obliged to dispose of their surplus stock forthwith rather than purchase or acquire any further quantities of wheat. It is, therefore, the petitioner's case that a situation has been created in which he is unable to sell his produce in the market yards as no dealer is prepared to purchase the same at any reasonable price whilst on the other hand his failure to dispose of the excess stock would expose him to criminal prosecution apart from an equally serious penalty of the confiscation of such stocks. The petitioner alleges that by a colourable exercise of power the State of Punjab has promulgated orders in order to create a situation where neither the licenced dealer can sell his stock nor the producer can dispose of the same with the result that in particular the producers are being forced to part with their wheat at throw away prices. It is averred that in fact the State Government wishes by these methods to seize the whole of the stocks of the producers as well as the dealers at an unremunerative and ridiculously low price. It is further the case that the provisions of the Essential Commodities Act, 1955 cannot be deemed to confer an arbitrary, unguided and uncanalised powers on the State Government to fix the price of an essential commodity unrelated to the cost of its production and without giving a reasonable margin of profit to the producer thereof.

8. A scathing attack has also been levelled against the Agricultural Prices Commission and it is alleged that the report issued by it is based on mere theoretical hypothesis without any factual data worth the name. It is the case that the recommendations of the Agricultural Prices Commission are not based on any study in depth of the cost of production etc., but entirely on political considerations in order to counter the inflationary pressure by providing wheat at a low cost to the vulnerable strata of the community. It is alleged that the Commission ignored entirely the interest of the pro-

ducer and the cost of production in favour of the general economic conditions of the country and in fact the producer of wheat has been made the scapegoat for countering the rising spectre of inflation. In support of the above averment it is pointed out that the procurement price of wheat was kept static at Rs. 76/- per quintal for well-high seven years from 1966 onwards despite a steep rise in the cost of production thereof. It is highlighted that the Commission in the year 1972-73 in fact recommended that the price of wheat be reduced from Rs. 76/- per quintal to Rupees 72/- per quintal in view of the general inflation even though it was more than manifest that the cost of agricultural inputs had escalated considerably and consequently the cost of production had substantially risen. It is thus pointed out that the Commission has never considered the issue of agricultural prices from the standpoint of the cost of production and the interest of producers.

9. It is also alleged that the State of Punjab has made no survey or assessment whatsoever in order to find out as to what is the actual cost of production of wheat per quintal within this area and that no Tariff Commission in respect of the wheat prices was ever constituted by the State to study the issue in detail. It is averred that such like Tariff Commissions were appointed by the Central Government in respect of Sugar and Cotton prices and also in regard to determining even the price of Motor-cars. It is hence averred that without collecting any relevant data and information an attempt is being made to fix a wholly arbitrary and unremunerative price for the wheat produce within this State. It is, therefore, the case that the fixing of the price of the wheat below its cost of production would be ultra vires the relevant provisions of the Essential Commodities Act and in any case it is alleged that the fixation of such a price has not been based on the relevant and reasonable considerations of the cost of production, return on the capital and investment etc., and has been motivated by wholly extraneous and irrelevant considerations.

10. According to the petitioner in the peculiar context and the situation created by the orders referred to above which have been promulgated under the Essential Commodities Act all channels for purposes of the sale of wheat have been arbitrarily controlled so as to force the petitioner to part with his stocks at a price far below the cost of production. The Stock Order is, therefore, challenged as wholly arbitrary and violative of Articles 14, 19 and 31 of the Constitution of India and further being beyond the scope of Section 3 of the Essential Commodities Act. It is also alleged that the fixation of the limit of 100 quintals for producers

is arbitrary on its very face because a farmer-family owning a farm of 50 acres and producing wheat therefrom is placed at par with one owning merely 10 acres. It is pointed out that in view of the restrictions imposed by the Food Zone the petitioner cannot take the wheat out of the State of Punjab whilst within the captive market of a surplus State he is obliged to off-load his stock on pain of criminal prosecution at wholly unremunerative prices and without any corresponding obligation on the part of the State to buy the wheat at a remunerative price therefor. By way of comparison it is pointed out that in the adjoining States and other States of India the price of wheat is at a much higher level than what has now been arbitrarily prescribed here despite the fact that the cost of production is indeed lower in those States.

11. The respondent-State's stand is set out in the affidavit of Shri S. P. Singal, Under-Secretary, Department of Food and Supplies, Punjab. Therein the calculation of the cost of production by the petitioner has been labelled as exaggerated and unrealistic whilst on the other hand it is averred that procurement price of Rs. 105/- per quintal has been fixed on the basis of the recommendation of the Agricultural Prices Commission and relevant extracts from its report have been annexed to the return as Annexure R-1. It is averred that this Commission deals with all aspects of the production of foodgrains in the country and producers have also been given representation thereon. The procurement price fixed on the Commission's recommendation is stated to leave a sufficient margin for incentive to the farmers besides adequately covering their cost of production. The higher control price of Rs. 139/- is explained to be inclusive of market charges and other incidentals as well as the difference of cost incurred by a dealer on the sale of 50 per cent of wheat delivered by way of levy to the Government at Rs. 105/- per quintal. In short, this rate is for the levy paid wheat of the dealer. It is then denied that the effect of the levy order and the Price Control Order would be to deprive the farmer of a remunerative price for his produce because other agencies like the Punjab State Civil Supplies Corporation and the Punjab State Co-operative Supply and Marketing Federation have been authorised to make purchases of wheat at a price of Rs. 116/- per quintal under instructions of the Punjab Government. It is reiterated that the abovesaid prices provide adequate and remunerative compensation to the producers of wheat. It is admitted that by the Stock Order the producer is obliged to dispose of all stocks in excess of 100 quintals within a period of 15 days.

12. It is then averred that the producers are free to dispose of their wheat in the market at any price they can get in the open bidding. Apart from this traders including the Roller Flour Mills, Chakkiwalas and bulk consumers to whom relaxations in the storage limit of 100 quintals have been given are entitled to make purchases from the producers. It has been alleged that the harvesting of wheat was done in April, 1974, and the petitioner was deliberately holding his stock with a view of getting unreasonably higher prices and profiteering during the period of scarcity. It is claimed that the restriction sought to be placed on the storage limits of dealers and on the stocks of the producers is with the object of securing equitable distribution of wheat at fair prices in the country and it is denied that the Punjab Government is forcing the dealers as well as producers to part with their stocks at a throw away price.

13. The legality of the Price Control Order as also the Levy Order has been reiterated and it is repeated that these do not violate any of the fundamental rights guaranteed under Articles 14, 19 (1) (f) and (g), 31 and 301 of the Constitution. The Stock Order is stated to have placed reasonable restrictions on the producers in order to ensure availability and equitable distribution of wheat at fair prices within the country and it is averred that it leaves the producer free to sell his produce in the open market at any price. The stock limit for the producer is averred to have been fixed with due regard for domestic consumption and for seed purposes and for that reason a graded scale has been fixed in order to enable the producer with larger holding to keep a larger stock subject to the maximum of 100 quintals. It is then averred that under the law no producer can possess more than seven hectares of land and it is, therefore, incorrect to say that a farmer can own 50 acres for growing wheat. It is then reiterated that the Stock Order also does not violate any provision of the Constitution.

14. Lastly it is admitted that the petitioner cannot legally take away wheat outside the State of Punjab as such a movement is restricted under the Interzonal Wheat and Wheat Products (Movement) Control Order, 1973, issued by the Government of India. Without denying that high prices prevail in the adjoining States, it is stated that it is so because of the withholding, and consequential artificial scarcity of the wheat caused by persons like the petitioner who have been waiting for the time to exploit the situation to their utmost personal advantage and at the cost of the consumers in general.

15. Inevitably a strong challenge has been levelled against the specific clauses of the Stock Order and it, therefore, becomes necessary to first set down its provisions:—

"In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (Parliament Act 10 of 1955), read with Government of India, Ministry of Agriculture (Department of Food) Orders No. G.S.R.-316(E), dated the 20th June, 1972, G.S.R. No. 452(E), D/- the 25th October, 1972 and G.S.R. No. 168(E), dated the 13th March, 1973, and all other powers enabling him in this behalf and with the prior concurrence of the Central Government, the Governor of Punjab hereby makes the following Order, namely:—

1. Short Title, Extent and Commencement:— (1) This Order may be called the Punjab Wheat (Restriction on Stock by Producers) Order, 1974.

(2) It extends to the whole of the State of Punjab.

(3) It shall come into force at once.

2. Definitions:— In this Order, unless there is anything repugnant in the subject or context,—

(a) "Director" means the Director, Food and Supplies, Punjab or Joint Director, Food and Supplies, Punjab or Deputy Director, Food and Supplies, Punjab or any other officer appointed by the Government to administer this Order;

(b) 'Government' means the Government of the State of Punjab;

(c) 'Producer' means a person—

(i) who grows or produces wheat personally, through tenants or otherwise, but does not include a person who works as a dealer or a broker or who is a partner of a firm of dealers or brokers; and

(ii) who is not engaged in the business of purchase and sale of wheat;

(d) 'wheat' includes all products of wheat excluding bran.

3. Power to fix maximum quantity of Wheat which may be held by a Producer:— (1) The Government may, by notification in the Official Gazette fix the maximum quantity of wheat which may, at any time, be possessed by a producer.

(2) The quantity of wheat fixed under sub-clause (1) may be different for different localities or for different classes of producers.

4. Maximum quantity of wheat which may be held by a producer:— Till any other limit is fixed under Clause 3, no producer shall, after the expiry of a period of fifteen days of the commencement of this Order, have in his possession or custody, whether by way of bailment or otherwise at any time a quantity of wheat exceeding ten quintals per acre of the

area of land held by him in the State of Punjab as land-owner or tenant or mortgagee in possession, subject to a maximum of one hundred quintals.

Explanation — Part of an acre shall be treated as one acre for the purpose of this clause.

5. Disposal of excess stock:— Any producer who, on the date of commencement of this Order, has in his possession any quantity of wheat in excess of the maximum permitted under Clause 4 shall dispose of the excess quantity within a period of fifteen days of such commencement.

6. Power of entry, search, seizure, etc.:— (1) The Director may with such assistance, if any, as he thinks

(a) enter, inspect or break open and search any place, premises, vehicle or vessel in which he has reasons to believe that any contravention of the provisions of this Order has been, is being, or is about to be committed;

(b) Search, seize and remove stocks of wheat kept in contravention of the provisions of this Order and thereafter take or authorise the taking of all measures necessary for securing the production of stocks of wheat so seized in a court and for their safe custody pending such production.

(2) The provisions of Sections 100 and 102 of the Code of Criminal Procedure, 1973 (II of 1974), relating to search and seizure shall, so far as may be, apply to searches and seizures under this clause.

Provided that in exercising the powers of entry and search under this clause, due regard shall be paid by the authorised officer to the social and religious customs of the occupants of premises so entered and searched.

7. Savings:— Nothing contained in this Order shall apply to the storage of wheat by any Department or institution of the State Government or Central Government or by any Corporation owned or controlled by the State Government or Central Government."

16. On behalf of the petitioner, an incisive two-fold attack had been levelled against Clauses 3, 4, 5 and 6 abovesaid. Firstly they have been challenged as unconstitutional and the contention has been sought to be rested squarely on the provisions of Article 19 (1) (f) and (g). This at the very outset raises the issue whether during the continuation of the emergency such an attack is open to the petitioner in view of Article 358 of the Constitution.

17. In passing it may, however, be mentioned that though the petitioner in terms assailed the Stock Order on the basis of its unreasonableness and its flagrant violation of Article 19, yet the respondent-State in its pleadings did not plead the bar of Article 358 thereto.

Nevertheless in the course of arguments Mr. Bhandari on behalf of the State took up the stand that though the constitutionality of the Essential Commodities Act could be assailed on the ground of Article 19 despite the continuation of the emergency, yet the Stock Order issued under Section 3 thereof could only be challenged on the ground of being violative of or beyond the scope of the aforesaid Section. Despite the absence of the pleading noticed above, this matter does seem to go to the root of the case and it hence becomes necessary to examine the same in some depth.

18. To be candid, the point does raise some difficulties and complexities and to appreciate the same it is best to clear the factual ground first. It is the common case that the president proclaimed an emergency under Art. 352 of the Constitution in the wake of the Indo-Pakistan War on the 3rd of Dec. 1971, which has been continuing ever since and about the lifting of which as yet there is neither any prospect nor any indication. Equally it is not in dispute that the Essential Commodities Act, 1955 is a pre-emergency legislation enacted long before the proclamation of December, 1971. It is specifically under the powers conferred by Section 3 of the Act that the impugned Stock Order has been promulgated by the State Government. During the course of the two decades that have followed the enforcement of the Act, various changes and amendments therein have been made. In particular the relevant Section 3 thereof has been the subject-matter of a continuous amendatory process. Substantial changes, substitutions, amendments etc., had been introduced in this very section by the amending Act 28 of 1957; Act 17 of 1961; Act 25 of 1966; Act 66 of 1971 and the Amending Act 1974 enforced from 22nd of June, 1974. It is manifest therefrom that in continuance of a legislative policy, changes have been made in this section to meet the exigencies of the particular situation.

19. Now a plain reference to the language of Section 3 (1) of the Act would show that it empowers the Central Government to issue orders for regulating or prohibiting the production, the supply and distribution of an essential commodity and trade and commerce therein upon its being satisfied about the necessity or expediency of doing so. Section 5 of the Act provides further for the delegation of the power to make orders or issue notifications under Section 3 thereof either by an officer or authority subordinate to the Central Government or by a State Government or such officer or authority subordinate thereto as may be duly specified. It is not in dispute that such powers have been delegated also to the State of Punjab and it is under such a delegation

that the present Stock Order has been issued and promulgated.

20. In pursuance of the powers conferred by Sections 3 and 5 of the Act both the Central and the State Governments have issued innumerable Control Orders under the Act to further the course of the governmental policies to regulate, control and govern the production, supply and distribution of essential commodities thereunder. In particular for more than a decade at least the essential commodity of wheat has been the subject-matter of regulation and control through the means of the delegated legislation under Section 3 of the Act in continuation of the Government policies in regard thereto. This is not even denied by the respondent-State and on behalf of the petitioner a plethora of such orders issued under the Act have been cited to forcefully maintain the contention that the present Stock Order is indeed not more than a step in the continuous course of Government policy to regulate the production, supply and distribution of wheat within the country. For this purpose it suffices to refer to only a few of such Orders issued both by the Central and the State Governments and in the order of chronology these are the Wheat Roller Flour Mills (Licensing and Control) Order, 1957; the Wheat (Regulation of use in Roller Mills) Order, 1958; the Punjab Foodgrains (Procurement) Order, 1959; the Punjab Distribution of Foodgrains (Collection of Statistics) Order, 1959; the Punjab Commodities Price Marking and Display Order, 1962; the Punjab Hoarding and Profiteering Prevention Order, 1963; the Punjab Foodgrains Dealers Licensing Order, 1964; the Roller Mills Wheat Products (Price Control) Order, 1964; the Inter-Zonal Wheat and Wheat Products (Movement) Control Order, 1964; the Essential Commodities (Regulation of Production and Distribution for Purposes of Export) Order, 1966; Foodgrains (Prohibition of use in Manufacture of Starch) Order, 1966; Foodgrain Movement Restrictions (Exemption of Food Corporation of India) Order, 1966; the Foodgrains Movement Restrictions (Exemption of Certified Seeds) Order, 1966; Roller Mills Wheat Products (Ex Mills) Price Control Order, 1969; Inter Zonal Wheat and Wheat Products (Movement Control) Order, 1969; Foodgrains Movement Restriction (Exemption of Seeds) Order, 1971; Imported Foodgrains (Prohibition of unauthorized sale) Order, 1971; Roller Mills Wheat Products (Ex Mills) Price Control Order, 1971; and Foodgrains (Prohibition of use in Manufacture of Starch Control) Order, 1971.

21. Coming nearer in point of time to the present Stock Order it may be noticed that in pursuance of the policy decision of the Central Government to

take over the wheat trade and to give effect thereto within this State, the Punjab Wheat Dealers Licensing and Price Control Order, 1973 was promulgated on the 3rd of April, 1973. This was followed by the Punjab Wheat Dealers Licensing and Price Control (First Amendment) Order dated the 18th of April, 1974, and simultaneously therewith the Wheat Procurement (Levy), Order 1974 was also enforced. In immediate retrospect it was on the 22nd of October, 1974, that the Punjab Wheat Dealers' Licensing and Price Control (Fourth Amendment) Order 1974, was issued making substantial reduction in the authorised stocks of the wholesalers and dealers and some consequential changes in the Levy Order. Complementary to the aforesaid pieces of legislation is the present impugned Stock Order applicable to the stocks held by the producers issued as it is on the 6th of November, 1974.

22. The aforesaid background and the legislative history would, therefore, make it manifest that the impugned Stock Order is merely a step in continuation of the previous legislation on the point, and being an emanation of the previous law promulgated for the extension amendment and continuation of the earlier Government policies in regard to the control, regulation, production, and supply of wheat. It appears to me to be no more than merely one of a series of provisions in continuance of the previous legislative action. To conclude, therefore, it is admitted that the Essential Commodities Act was enacted in 1955 and there seems hardly any doubt that the impugned Stock Order issued under Section 3 thereof must either be deemed to be a part and parcel of the same Statute or is an emanation of the same law in the purported exercise of powers conferred by that pre-emergency legislation.

23. In the light of the aforesaid finding I may now proceed to examine whether the impugned Stock Order is impervious to a challenge under Article 19 (1) (f) and (g) by virtue of Article 358 of the Constitution. This is in the following terms:—

"While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

As is evident the aforesaid provision is applicable to both legislative and execu-

tive action. However, because we are here concerned with delegated legislation it is unnecessary to travel into the field of executive action, though the Article applies the identical considerations to either kind. The way I construe the abovesaid provision is that it does and was intended to empower the State to enact fresh legislation or if I may put it in other words to promulgate any new law during the continuance of the emergency in order to meet the peculiar exigencies of the situation that may arise or be anticipated in the course of the emergency and such fresh legislation or new law was made immune to an attack under Article 19 of the Constitution during the limited period of the continuation of the emergency. Patent examples of such legislation have been the promulgation of the Defence of India Act and the Defence of India Rules enforced thereunder in the two emergencies which have arisen since the promulgation of the constitution. That such legislation is impervious to a challenge under Article 19 has now been authoritatively settled by various pronouncements of the Supreme Court, to which it is unnecessary to refer. To put it in other words, Article 358 of the Constitution is in terms prospective and is not intended either to protect or to validate any legislative provision which would be invalid because of the constitutional inhibitions before the proclamation of the emergency.

24. To my mind it is not warranted on the language of Article 358 of the Constitution to hold that the moment the emergency is declared the State would thereby be empowered (apart from enacting fresh legislation) to exercise arbitrary, unreasonable and unguided powers in violation of Article 19 under the whole gamut of the pre-emergency legislation which would be existing on the Statute Book. It can hardly be that the proclamation could be intended to give such a blanket, uncanalised power to the State emanating from the pre-emergency laws which in letter and spirit were bound to conform to the provisions of the Constitution and in particular to the freedoms enshrined in Article 19 thereof. I am of the view that Article 358 is not open to any such construction. However, even assuming at the highest that two constructions could possibly be placed thereon then the one which would even give delegated legislation and orders issued under pre-emergency legislation, the status of being above the test of reasonableness underlying the spirit of the Constitution must necessarily be avoided. The correct approach to the construction of a similar provision under Article 359 of the Constitution was indicated by their Lordships in *Makhan Singh Tarsikka v. The State of Punjab*, AIR 1964 SC 381. It

was noticed therein that there existed no legal remedy against the inordinate continuance of a proclamation of emergency or against the restrictions which could be imposed on the fundamental rights of the citizens by the executive during the same. However, they noticed with approval the lone and celebrated dissent of Lord Atkin in the *Liversidge v. Sir John Anderson*, 1942 AC 206, which was rendered at a time when the British realm itself stood in mortal danger during the Second World War:—

" * * * In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I."

In a later decision their Lordships of the Supreme Court in *I. K. Ananda Nambiar v. Chief Secretary to Government of Madras*, AIR 1966 SC 657 have authoritatively indicated that the correct approach in construing the emergency provisions is that of a liberal one in favour of the citizen rather than against him, in the following words:—

"We are not impressed by this argument. In construing the effect of the Presidential Order, it is necessary to bear in mind the general rule of construction that where an Order purports to suspend the fundamental rights guaranteed to the citizens by the Constitution, the said Order must be strictly construed in favour of the citizens' fundamental rights."

25. In this very context the position taken up on behalf of the State by Mr. Bhandari deserves pointed notice. It is fairly conceded that the constitutionality of the Essential Commodities Act could certainly be challenged even on the basis of Article 19 despite the continuation of the emergency. This was admittedly so on the ground that all pre-emergency legislations can always be subjected to such an attack. However, learned counsel for the State then proceeded to contend that the delegated legislation under the powers conferred by Section 3 of the abovesaid Act could nevertheless be not subjected to such an attack on the basis of its violation of Article 19 during the continuation of the emergency. This corollary appears to me as patently fallacious. It misconceives the nature and the scope of the delegated legislation war-

ranted by the powers conferred under the parent statute. Admittedly the Stock Order has been issued under clause 3 (1) of the Essential Commodities Act. Once it is so it becomes a part and parcel of the same statute and has the same effect as if it was contained in the Act itself. It has not been contended on behalf of the respondent that there is any legal difference between statutory rules framed under the relevant enabling power of an Act and the statutory orders warranted by a provision like Section 3 (1) of the Essential Commodities Act. Once that is so there comes into the field the authoritative pronouncement of their Lordships in *State of Uttar Pradesh v. Babu Ram Upadhyaya*, AIR 1961 SC 751. It was held therein:—

"Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation; see Maxwell 'On the interpretation of statute' 10th edition pages 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal," and after referring to some decisions of the Privy Council it was again observed:—

" * * * These decisions and the observations made therein could not be understood to mark a radical departure from the fundamental principle of construction that rules made under a statute must be treated as exactly as if they were in the Act and are of the same effect as if contained in the Act. There is another principle equally fundamental to the rules of construction, namely, that the rules shall be consistent with the provisions of the Act."

In view of the abovesaid pronouncement it appears clear to me that the Stock Order must in the eye of law be deemed as an integral part of the Essential Commodities Act. If the parent Act is subject to Article 19 even during the emergency (as has been fairly conceded) it would be patently untenable to say that delegated legislation emanating from the said Act and in continuation of its policies would be immune to such an attack.

26. As regards precedent, whatever may have been the position earlier, so far as the limited issue of the pre-emergency legislation and delegated legislation emanating therefrom by virtue of the powers conferred thereby is concerned the matter seems now to have been conclusively set at rest in favour of

the petitioner by some recent pronouncements of their Lordships of the Supreme Court.

27. The first judgment which deserves notice in this context is *State of Madhya Pradesh v. Thakur Bharat Singh*, AIR 1967 SC 1170. Therein, the impugned action was taken on 24th April, 1963, during the course of emergency under Section 3 (1) (b) of the Madhya Pradesh Public Security Act of 1959. The impugned action was assailed primarily on the ground of unreasonableness by virtue of Art. 19 (1) (f) and (g) of the Constitution and objection was taken on behalf of the State to the applicability of those provisions during the course of the Emergency. Repelling such an objection, Shah, J., speaking for the Constitution Bench observed:—

"Counsel for the State urged that in any event so long as the State of emergency declared on October 20, 1962, by the President under Article 352 was not withdrawn or revoked, the respondent could not move the High Court by a petition under Article 226 of the Constitution on the plea that by the impugned order his fundamental right guaranteed under Article 19 (1) (d) of the Constitution was infringed. But the Act was brought into force before the declaration of the emergency by the President. If the power conferred by Section 3 (1) (b) authorised the imposition of unreasonable restrictions, the clause must be deemed to be void, for Article 13 (2) of the Constitution prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and laws made in contravention of Article 13 (2) are to the extent of the contravention void. Section 3 (1) (b) was, therefore, void when enacted and was not revived when the proclamation of emergency was made by the President. Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective; after the proclamation of emergency nothing in Article 19 restricts the power of the State to make laws or to take any executive action which the State but for the provisions contained in Part III was competent to make or take. Article 358, however, does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency."

Even more directly on the point is the celebrated decision in the *Bennett Coleman and Co. Ltd. v. Union of India*, AIR 1973 SC 106. Therein the Newsprint Policy 1972-73 of the Government of India, which was promulgated admittedly during the continuance of the present emergency, was assailed on the ground of

the violation of Article 19 of the Constitution. This was an emanation from the Newsprint Control Order 1962 which in turn was made in exercise of the powers conferred by Section 3 of the Essential Commodities Act and of the Import Control Order 1955 made in exercise of the powers conferred by Sections 3 and 4 (a) of the Imports and Exports Act of 1947. The abovesaid pieces of legislation were admittedly pre-emergency legislation though the impugned Newsprint Policy 1972-73 was undoubtedly enforced under the abovesaid legal provisions during the continuation of the emergency. Ray, J., (as the learned Chief Justice then was) speaking for the majority struck down the Newsprint Policy 1972-73 primarily on the ground of its violation of Article 19 (1) (a) of the Constitution. Rejecting the respondent-Union of India's objection that Article 19 of the Constitution could not be invoked by the petitioners, it was observed, after expressly confirming the ratio of Thakur Bharat Singh's case (supra), as follows:—

"The Madhya Pradesh case (supra) is an authority for the proposition that Article 358 does not operate to validate any legislative provision which is invalid because of the constitutional prohibition. In the present case, the impugned newsprint policy is continuation of prior executive action and of previous law. Therefore, in our judgment there is no merit in this preliminary objection."

28. In the very recent case of Shree Meenakshi Mills Ltd. v. Union of India, AIR 1974 SC 366, the impugned notifications were issued under the Cotton Textiles (Control) Order, 1948, (which obviously was a pre-emergency piece of legislation) on the 13th March, 1973, admittedly during the continuation of the emergency. The challenge was primarily levelled under Article 19 (1) (f) and (g) of the Constitution and was fully entertained and considered by their Lordships. Rejecting the objections regarding the maintainability of the petition on the ground of the existing emergency, Chief Justice Ray speaking for the Court reaffirmed the ratio in Bennett Coleman's case AIR 1973 SC 106 (supra), and tersely observed:—

"It was said on behalf of the State that the petitions were not maintainable because of the proclamation of emergency. During the proclamation of emergency Article 358 does not apply to executive action taken during the emergency if the same is a continuance of a prior executive action or an emanation of the previous law which is otherwise unconstitutional. The petitioners challenged the action or previous law to be violative of fundamental rights. * * * *

Therefore, if it can be shown that the executive action taken during the

emergency has no authority as a valid law its constitutionality can be challenged. The Cotton Textiles Order 1948 was continued by Essential Commodities Act, 1955. The impugned orders are made under pre-emergency Cotton Textiles Control Order. The validity of the impugned order is challenged under Article 19 (1) (f) and (g) of the Constitution on the ground that it is a pre-emergency executive order which could have been challenged under Article 19 (1) (f) and (g) before the proclamation of emergency. From that point of view the petitions are competent though the challenge is insupportable on all grounds."

29. I therefore hold that on the language of Article 358 itself, on principle, and in view of the three authoritative precedents referred to above, the petitioner in this case is clearly entitled to challenge the impugned Stock Order on the basis of the same being violative of Article 19 (1) (f) and (g) of the Constitution.

30. Once the constitutional attack under Article 19 is open, Mr. Kuldip Singh, the learned Counsel for the petitioner, has forcefully assailed the Stock Order, for what he calls to be its patent irrationality. Counsel contended that clause (f) of Article 19 (1) guaranteed to the petitioner the right to hold and dispose of his property whilst the Stock Order renders him a criminal for the mere act of possessing his own produce which he may create by the dint of his own labour. Similarly, it was claimed that clause (g) guaranteed the right to carry on the profession or occupation of farming and this must carry within its sweep the elementary right to possess and hold the fruits of his profession or occupation. It was argued that the provisions of the Stock Order taken collectively make a frontal and direct inroad into the abovesaid fundamental rights of the petitioner and thus cannot be supported on any rationale or logic.

31. Specifically, clause 3 of the Stock Order has been assailed on the ground that it gives arbitrary and uncanalised powers to the Government to fix at any time the quantity of wheat which can be possessed by the producer himself. It is highlighted that no guidelines or policy is indicated which governs the exercise of this naked power. As a logical extension of the argument, it is pointed out that the clause would empower the Government to reduce the quantum of wheat to be lawfully possessed by the producer to any limit even to a single quintal and in the garb of regulation take action which in fact may be confiscatory.

32. The fixation of the maximum limit of possession at 10 quintals per acre

of area owned by the producer subject to a maximum of 100 quintals under clause (4) has been attacked as being devoid of any rational basis and equally without any nexus to the object sought to be achieved. It is highlighted that it is neither a fact nor the case of the State that an industrious producer cannot produce more than 10 quintals of wheat from an acre of land. The absolute limit of 100 quintals irrespective of the area of land owned by the producer is again challenged to be blatantly unreasonable and an illogical attempt to treat unequals as equals.

33. Clause (5) of the Stock Order is challenged on the ground that it is in terms a direction to off-load and dispose of all surplus stocks in a captive market from which all substantial and potential buyers have been virtually excluded. The core of the attack here is that no obligation is cast on any person or body of persons to take over the stocks nor any indication of a fixed and remunerative price to be paid therefor is remotely suggested.

34. Lastly, the provisions of cl. (6) have been highlighted as being patently harsh and oppressive, and empowering the authorities to forcibly enter and seize the lawful produce of the farmer in his custody. Particular reference is made to Section 7 of the Essential Commodities Act which renders the violation of any order under Section 3 to be a criminal offence for which an imprisonment up to one year is provided along with the forfeiture of the stocks in respect of which any such offence is committed even in the case of a first offender. It is hence argued that an industrious producer or grower of wheat may ultimately be rewarded with imprisonment and confiscation for having produced out of the soil wheat beyond an arbitrary quantum of 10 quintals per acre.

35. In this largely rural country where nearly three decades after the attainment of independence we are still dependant upon foreign sources to even barely feed our teeming millions, the vocation of farming must necessarily have the pride of place. The petitioner herein claims to belong to the class which undoubtedly is the corner stone upon which the edifice of what has been called the green revolution has been built within this country. This hardy and industrious class did in fact bring the country to the verge of self-sufficiency in foodgrains. That achievement is now perhaps being eroded again by the endemic shortages of electric power, of diesel, of fuel, of chemical fertilizers, and other agricultural inputs, and equally the soaring prices of agricultural machinery. The farmer un-

doubtedly stands out as a class by himself. He truly creates out of the soil valuable property and produce by the dint of his own labour. The farmer or the agricultural producer is thus distinctly on a different footing from the trader, dealer or a manufacturer who may acquire or purchase produce from other sources. In their case it may perhaps be reasonable in a specific situation to require that they shall not purchase, acquire or hold beyond a specific stock or limit. But, can it possibly stand to reason to prescribe that the producer shall not produce or grow beyond a certain arbitrary limit from the land what he can well do by the dint of his labour, energy or intelligence? To my mind, Article 19 of the Constitution guarantees to the citizen the fundamental right to hold and possess the lawful produce of a lawful occupation or profession. Similarly, the right to carry on an occupation or a profession necessarily implies to hold and dispose of the necessary fruits or results of such an occupation. It follows, therefore, that the farmer has a guaranteed right to possess and dispose of at least that property which he directly grows from the land owned by him, by virtue of Article 19 (1) (f) and (g) of the Constitution. The solitary issue that, therefore, requires examination is whether the impugned Stock Order has placed reasonable restrictions on the exercise of these rights in the interest of the general public.

36. Much lip service has been paid on behalf of the respondent-State to the producer both in the pleadings and during the course of the argument. It has been reiterated that one of the patent objectives of the Government is to enhance wheat production within the State and to provide adequate incentives therefor to the farmer. Now it is not even remotely the case of the respondent that within the State of Punjab, a progressive farmer employing the latest know-how of modern agriculture cannot produce more than 10 quintals of wheat from an acre of fertile land. Indeed, it is well known that the maximum produce from the newly introduced seeds in ideal conditions may well rise up to 30 quintals per acre. That may present the maximum or the ideal figure but an optimum produce of 15 to 20 quintals of wheat per acre is not difficult to attain by a progressive farmer like the one the petitioner claims to be. The learned Counsel for the State, Mr. Bhandari, even when pressed is unable to give any criteria or the data or the considerations which have motivated the respondent-State to fix the limit per acre prescribed in the Stock Order. This by itself smacks of unreasonableness and arbitrariness. No clue was given to this Court either in the pleadings or in the course

of argument which could suggest a reasonable foundation for the fixation of this limit. It certainly is neither the maximum nor the optimum limit of produce per acre within the State of Punjab given even the average or ideal conditions. Therefore, it follows that a producer may well raise wheat up to the level of 20 quintals per acre and the moment he comes to have and hold the same he would be violating the provisions of the Stock Order. I have said earlier that the producer is at least entitled in terms to possess and hold what he actually grows out of the soil itself by his labour. One can understand a limitation directing that beyond a certain limit of stock he would be liable to deliver the same to the State, its agencies or its nominees at a remunerative price. That might perhaps fall within the ambit of reasonable restrictions (though we are not called upon to pronounce upon the same herein) on the fundamental right to hold and dispose of property acquired through a lawful occupation. But by a blanket direction to prescribe that the producer shall not be entitled even to possess the whole of his produce and the moment it exceeds an arbitrary limit he would forthwith be branded a criminal liable to prosecution and conviction under Section 7 of the Essential Commodities Act is not, to my mind, what can possibly be a reasonable restriction on the right above-mentioned. The requirement of the Stock Order, therefore, in terms becomes an irrational fiat either directing that the producer shall not be industrious and productive enough to grow wheat beyond this arbitrary limit of 10 quintals per acre and in case he does so he would either be at once within the mischief of a violation of the Stock Order or forthwith bound to off-load and rid himself of his lawful produce on pain of criminality irrespective of the fact whether or not there is a purchaser for the same or a remunerative price therefor is forthcoming.

37. Equally arbitrary, to my mind, is the requirement of the maximum limit of 100 quintals for the producer. This is irrespective of the quantum of land owned by him. The result is that the same limit would apply to a farmer holding either 10 acres of land or another holding 30 acres of the same. Taking the concrete case of the petitioner who claims to own and grow wheat on 27 acres of land, the limit in his case is equally put at the figure of 100 quintals. This would bring it to the queer and the ridiculously low figure of a limit of about 3 1/2 quintals of wheat per acre of land held by him. Here again the learned counsel for the respondent-State is unable to enlighten us as to the rationale for treating patent unequals as equals for

the upper limit of the holding of stocks. Even assuming the arbitrary limit of 10 quintals of produce per acre a producer like the petitioner could grow 270 quintals of wheat on his land. It is well known that during the relevant season land is primarily diverted to wheat growing within the State. The moment the petitioner thus harvests a crop exceeding 100 quintals which he necessarily would do, then he at once comes within the infraction of the Stock Order. The learned Counsel for the State has been unable to give us any rationale why a person like the petitioner should be deprived of his right to possess and even to harvest what he has grown in his fields within even the arbitrary limit of about 10 quintals of wheat per acre. It also equally deserves notice in this context that the limitations of stock are not related to the area of wheat grown on the land but to the area owned or held by the producer. The result may well be that a producer who diverts his entire holding to the growing of cash crops (other than wheat) would be entitled, nevertheless, to hold up to the maximum of 100 quintals of wheat even though he may not have grown a grain of it. On the other hand a producer who grows wheat on the whole of its holding would not be entitled to hold even his own produce if it exceeds the arbitrary limit of either 10 quintals per acre or 100 quintals at the maximum. I am, therefore, unable to hold that the abovesaid prescriptions are reasonable restrictions on the fundamental right of the petitioner.

38. The Achilles heel and the most glaring irrationality of the Stock Order, however, lies in the fact that whilst it obliges the producer to dispose of all stocks in excess of the arbitrary limit which he may actually have in his possession or which he may grow from his own land, without creating any corresponding obligation whatsoever on the part of anyone else to either take over this excess stock and what is perhaps more it casts no liability on anyone to offer any reasonable or remunerative price for such produce. The admitted position is that prior to the promulgation of the impugned Stock Order no limitation existed on the right of the producer to hold his produce. Growers were, therefore, lawfully in possession of stocks above the overall maximum limit of 100 quintals now prescribed or the pro rata limit of 10 quintals per acre of the land held. The petitioner in terms claims in para. 8 of his petition that he himself has a stock of 180 quintals of wheat raised by him entirely from his own farm. As has already been shown earlier it is and would be possible in future for progressive farmers to exceed the arbitrary limit

even upon an optimum yield of wheat per acre from the land. Both as regards present stocks and the future ones the producer is, therefore, obliged on pain of criminality to divest himself of the same. Mr. K. P. Bhandari on behalf of the respondents candidly states that neither the State nor any of its agencies or wholesalers or dealers are under any obligation to buy the wheat of which the petitioner and others, like him, must forthwith divest themselves within a period of 15 days or to face confiscation of the same and the prosecution for the infraction of the order. The learned counsel for the petitioner is, therefore, on strong ground in contending that the petitioner and those like him are being driven to the wall to dispose of their lawful produce irrespective of the fact whether or not any purchaser worth the name is forthcoming to take it over or any remuneration therefor is available. Counsel is correct in saying that the necessary concomitant of a reasonable power in such a situation must necessarily provide that the surplus stock will either be taken over by the State, its Corporations or bodies controlled by it or cast some similar obligation on the wholesalers, dealers or purchasers who would be willing to accept what the petitioner must divest himself of. In the absence, therefore, in the Stock Order of any indication as to who is to purchase the excess stocks and what is more without specifying any price therefor whether remunerative or otherwise it smacks sky-high of unreasonableness and an exercise of arbitrary power. To repeat a liability to off-load and dispose of stocks must necessarily be matched with a corresponding obligation in someone to take over and buy the same at a precisely specified price. Merely by a fiat to require the producer that he shall not even possess the produce grown from his field irrespective of the fact whether he can reasonably part therewith appears to me as a provision so harsh that it cannot possibly come within the ambit of what the Constitution calls a reasonable restriction.

39. What I have said above appears to be well borne out by the weighty observations of Chief Justice Ray in the *Shree Meenakshi Mills' Case* AIR 1974 SC 366 (supra). The impugned notifications therein even though they affected textile manufacturers (and not a primary producer like the farmer) were forcefully assailed on the ground that they obliged the producer of yarn to sell to persons named, without there being a corresponding obligation on those persons to buy. The challenge was duly entertained as an unreasonable restriction but on the specific facts, to which reference was made, the learned Chief Justice held that in fact positive obligations were cast on the

purchaser and the impugned notifications provided that no non-lifting of yarn or denial of the obligation to purchase can happen thereunder (at para. 97 of the report). As I have already noticed the State has here taken up the candid position that indeed there is no obligation on the part of anyone to take over the surplus stocks nor is there any suggestion of the price which would necessarily be paid therefor. On the admitted position, therefore, the relevant provision must be held to be a provision which is patently unreasonable.

40. A statutory provision like the Stock Order has necessarily to be tested on the anvil of all the reasonable possibilities and eventualities arising or likely to arise thereunder and not merely on the fluctuating situation existing at a particular time. It is the admitted case that the State of Punjab is a surplus State which is the bread basket of the country and at least over the last three years it has been exporting more than 20 lakh tonnes of wheat per year to the other deficit States of India. It is again not in dispute that the State of Punjab by itself is a single Food Zone and no producer and even dealer or wholesaler is entitled to take his produce outside the State for marketing the same without the permit and sanction of the State Government. Indeed any unauthorised export of wheat would be a criminal offence. It is also the common case that recently the export permits granted to wholesalers have been withdrawn and it is only the State or its agencies who are now entitled to export wheat beyond the State's Food Zone. Counsel for the petitioner hence forcefully contends that with a surplus of 20 lakh tonnes of wheat within the captive area of the Punjab State Food Zone it is always in the power of the State to drive the producer to off-load his stock and in case exports are not allowed, a situation can easily be created where there would be huge surpluses without necessarily a purchaser therefor within the isolated Food Zone. Now on the State's own showing in the previous year there was what has been called the State take over of the grain trade which virtually made the State and its sponsored agencies as the sole and monopolistic buyer of wheat at least within the State of Punjab. During the present harvesting year a change was made and wholesalers were brought in on the condition that 50 per cent. of the wheat purchased by them was to be delivered over to the State in the form of a levy at a fixed rate of Rs. 105/- per quintal whilst the remaining 50 per cent. would be allowed to be disposed of in the open market or by the issue of Export permits beyond the Food Zone. Each wholesaler thus introduced was entitled to hold stocks up to 2500 quintals whilst

each dealer under the said order was allowed to keep in stock up to 1000 quintals of wheat. Even that policy has not been adhered to and in mid-season by the relevant amending orders it is again being reversed with the effect that wholesalers are again virtually sought to be ousted from the market. It is not in dispute that by the promulgation of the Punjab Wheat Dealers Licensing and Price Control (Fourth Amendment) Order 1974 issued on the 22nd of October, 1974, the stocks of each wholesaler which were earlier fixed at 2500 quintals had been slashed to the minimum figure of 100 quintals and the balance thereof is sought to be acquired compulsorily by the State. Similarly by virtue of the said order the upper limit of the stock of dealers has again been brought down from 1000 quintals to a mere 100 quintals each. There is thus substantial force in the argument on behalf of the petitioner that the two potential classes of buyers, namely, the wholesalers and the dealers are now far from being willing purchasers in the market, and are in fact themselves under pressure to off-load the excess of their stock and thus primary sellers in the market. In effect there was no potential buyer of large stocks in the market in a surplus State from where the export is blocked and 82 per cent. of whose population is itself rural being either growers or receiving their wages etc., in terms of produce.

41. There is thus substance in the petitioner's contention that in actual fact a situation has been created where the producers are being directed to off-load the stock without any indication of the price in a market where there are no potential buyers except the virtually monopolistic State agencies. Indeed it is the case that the objective is to drive the producers to off-load their wheat at unremunerative prices. There is force in the contention of the learned counsel for the petitioner that in fact a situation of the kind above mentioned has been created or in the alternative it can always be so created at the sweet-will of the respondent. It is pointed out that the State has the absolute power to exclude all other potential purchasers of wheat from the Food Zone and had earlier exercised that power to do so during the grain trade take over. The Fourth Amendment Order leaves no manner of doubt that the State agencies are having second thought about the policy of having introduced wholesalers and dealers in the market who are either being completely ousted or being limited to proportions where they would be insignificant factors in a surplus market. This would lead to the glaring unreasonable situation of the producer being obliged by law to off-load his stock on pain of confiscation and prosecution and

in the absence of any matching obligation on anyone to take over the stocks or to pay a remunerative price thereof. Any monopolistic buyer would be thus wholly in a position to exploit such a contingency and the producer obliged to dispose of the wheat at a throw away price. It appears patent to my mind that a unilateral obligation and liability imposed upon the producer denying him his fundamental right to hold the fruits of his labour in his own hand cannot possibly stand the test of reasonableness or be within the ambit of Article 19 (5) and (6) of the Constitution of India.

42. A feeble and half-hearted attempt was made on behalf of the respondent-State to meet the glaring inequity of the above noticed situation. It was stated that two State Agencies, the Punjab Co-operative Supply and Marketing Federation and the Punjab States Civil Supplies Corporation had been given some vague instructions to purchase in the market at a price of Rs. 116/- per quintal. No rationale, however, was given as to how this price has been arrived at in face of the State's claim that the controlled price has been fixed at Rs. 139/- per quintal absolutely. I would be adverting to the price factor separately hereafter but it deserves notice that Mr. Bhandari fairly concedes that neither the State itself nor the above-mentioned organisations are under any legal obligation to buy the wheat which the producer is bound to off-load. Mr. Kuldip Singh, has argued cogently that the abovesaid Organisations are themselves independent Corporations and it has not been shown that the Government as such has any legal right even to issue the suggested instructions or that there is any liability on the part of the said Organisations to comply therewith. Indeed the position as regards the Punjab Co-operative Supply and Marketing Federation Ltd., is not in dispute that the same is an independent Corporation registered under the Co-operative Societies Act and functioning independently under its relevant Board and its executive officials. No copy of the alleged instruction has been placed on the record nor even the suggested procedure for the take over of surplus stocks is remotely brought to light on behalf of the respondent-State. A vague general instruction of doubtful validity can, therefore, hardly be a corresponding equivalent of a legal liability imposed upon the petitioner and other producers. It is perfectly open to the abovesaid statutory Corporations to take over or not to take over the stocks offered to them generally and in particular by the petitioner and equally so they may or may not pay even the suggested price therefor. There is no compulsion imposed upon them under the instructions to do either of the two

things. Again there are financial limitations within which these Corporations operate and which inhibit them from buying beyond a certain limit at a certain time. In the result, therefore, when either of these Corporations are unwilling or unable to buy the large stocks of the producers which they must dispose of within the short span of 15 days they are necessarily left at sea with no option but to dispose of at a throw away price in order to escape the criminal and confiscatory liabilities which are imposed upon them by the Stock Order. Apart from the strict letter of the law the learned counsel for the petitioner contends that as a matter of practical working the result that ensues is that it becomes the sweet-will of the individual members of the staff of the Corporations to buy or not to buy stock of a particular producer or to declare and determine arbitrarily the quality of his produce and on tenuous ground to make serious inroads into the price that he would be fairly entitled to receive. In actual practice, therefore, whenever there is monopolistic buying by the State or its controlled agencies (without any legal obligation to do so) then the producer is invariably thrown to the tender and sometimes wolfish mercies of the petty ministerial staff of the Corporation who have in them the power to purchase or not to purchase the fruits of his labour and to give or not to give adequate remuneration for the same. Times out of number it is not without resort to devious methods that these ministerial officials can be persuaded to take over the stock or to pay a remunerative price therefor. With the Democles sword of clauses (5) and (6) hanging over the heads of the producers requiring them to offload their produce within a period of 15 days the result that ensues is that a whip hand is given to the State to mercilessly drive the producers with their wheat stock to the market where there may be no buyer at all, or at best a monopolistic one and no reasonable guarantee of securing a remunerative price which would cover his cost of production with a reasonable margin of profit for his labour. In fact he is left obliged by the law to part with his produce within a fortnight at any price without any obligation being cast correspondingly on anyone to receive the excess stocks or to ensure a reasonable remuneration, therefore. That in one way as the essence of unreasonableness in the impugned Stock Order.

43. As I have said earlier, the Stock Order has to be tested on the envil of all reasonable eventualities and its irrationality, arbitrariness and even oppressiveness becomes more than manifest when it is tested against the background

of the impending harvest season of wheat within the State which would approach in less than 2 1/2 months from now. The Stock Order is, to all intents and purposes, a regular and permanent addition to the statute book and, as Mr. Bhandari concedes, the first piece of legislation in this State imposing limits on the stock of primary producers like the farmers. By virtue of clauses (4) and (5) thereof after the 21st November, 1974, every producer either having or coming to acquire wheat beyond the arbitrary quantum of 10 quintals of wheat per acre of land held is directly within the mischief of the Stock Order. Not travelling into the realm of conjecture but taking the concrete case of the petitioner, one may visualize the situation if he has now planted wheat on his 27 acres of land. As mentioned earlier, within this State the arbitrary quantum of 10 quintals of wheat per acre is easily likely to be exceeded and even optimum returns of upto 20 quintals may well be achieved by a progressive farmer. Wheat harvesting within the State has taken advantage of the technological advances and there are now a plethora of big harvest combines which operate in the wheat fields during the harvesting season and which are capable of harvesting up to 2 acres of wheat per hour. It is thus possible for a producer like the petitioner to have the whole acreage of his wheat harvested with one of these combines in a day. The result would be that almost automatically the petitioner would cross the arbitrary limit of hundred quintals of wheat and thus violate the stringent provisions of the Stock Order bringing in its wake the penalties of both confiscation and prosecution. Does it stand to reason that a producer carrying on his lawful profession should be denied the right even temporarily to hold the produce which he creates out of the soil and weigh every grain above the arbitrary limit, and be compelled to dispose the same within and during the mid-harvest operations in order to escape the stringent provisions of the Stock Order? I am unable to see that a provision which will lead to such anomalies and oppressive results can stand the test of reasonableness.

44. Equally, the learned counsel for the petitioner highlights the general situation apart from the individual hardship the Stock Order will entail. To repeat, the use of mechanical aids within the State enables the producer now to complete the harvesting operations of wheat within a month and half from the ripening of the grain in the fields. If the Stock Order is to be complied with, the necessary result would be that 20 to 30 lakh tons of the surplus wheat within the State, and may be more, must at once be disgorged and thrown in a sur-

plus market for disposal by the producers if they are to comply with the limits of stock laid down in the Order. Is there the wherewithal and the financial capability in the respondent or its agencies to take over all this surplus and to forthwith pay a remunerative price therefor? In fact, it is not disputed that even under ordinary conditions the State agencies many a time are inhibited from buying produce by grave limitations of finance. Learned counsel for the petitioner rightly visualises the apprehension that in such a situation without any one being obliged to buy, and the producer being required by law to off-load his stocks, the latter would have no choice but to rid himself of his produce at throw-away prices that would necessarily be engendered as a result of the harsh provisions of the Stock Order.

45. A necessary ingredient of a reasonable restriction in a situation of the present kind is the guarantee or at least the offer of a precise and a remunerative price to the producer. Their Lordships of the Supreme Court have in a string of recent judgments laid down the principles that this test of reasonableness implies at least some approximation to the cost of production and a reasonable margin of profit thereon for the producer or the manufacturer. Now the floundering position taken on behalf of the State regarding the price that might or might not even be offered to the producer obliged to dispose of his stocks highlights the arbitrariness of the Stock Order. At the cost of repetition, I have mentioned that Mr. Bhandari on behalf of the respondent concedes that neither the State itself nor its quasi-governmental agencies or any other body of persons is under any legal obligation to pay even a minimum price for a commodity so vital as wheat. As a matter of fact, he concedes that the respondent has not burdened itself nor obliged any one to pay even a floor-price for this produce with the result that in a captive and surplus area the same may be depressed to any limits. This apart, the shifting stand of the State in this context deserves some detailed notice. On its own showing in the written statement, the procurement price of wheat under the levy orders was Rs. 105/- a quintal and that is also the support price of the commodity within this State. It has again to be borne in mind that the respondent-State makes no commitment to buy wheat at this price but may or may not do so. There is thus no effective practical or legal guarantee that prices will not dip far beyond even the purported support price in a surplus area from which export is already banned except at the sweet-will of the respondent-State and from which the potential buyers like wholesalers and dealers are

sought to be excluded. The total absence of any uniformity or coherent price policy on so material an issue is equally manifest. Mr. Bhandari concedes that till about the 5th June, 1974, there did not exist any price control on wheat at all within the State. However, a limited price restriction was brought in by the Wheat (Price Control) Order, 1974, issued on the 5th June, 1974, by the Ministry of Agriculture; clause (3) thereof provided as follows:—

"(3) Maximum price at which wheat may be sold by a dealer:

(1) No dealer in a State or Union Territory to which this Order extends shall sell or agree to sell, in the course of inter-State trade and commerce, wheat at a price exceeding rupees one hundred and fifty per quintal.

(2) For the purpose of this Order, a sale of wheat shall be deemed to take place in the course of inter-State trade and commerce if the sale—

(a) occasions the movement of wheat from one State to another, or

(b) effects a transfer of documents of title to the wheat during its movement from one State to another.

* * * *

The provisions of the above-quoted clause would show that fixation of price here again was only in regard to sales in the course of inter-State trade. Even this was allowed to be fixed as high as Rupees 150/- per quintal. This apart, there is substance in the contention of the counsel for the petitioner that this was only applicable to inter-State trade and there was as such no limitation of price to the intra-State trade of wheat at all. Discriminatory comparison of prices both in the adjoining and the other States of the country has also been forcefully pointed out on behalf of the petitioner. In the adjoining State of Delhi by an order promulgated on the 24th June, 1974, the price range of wheat has been fixed from Rs. 158/- to Rs. 161/- per quintal. By similar orders passed under the Essential Commodities Act on the 6th July, 1974, prices of wheat in Maharashtra have been fixed between Rs. 165/- and Rs. 168/- per quintal. It is forcefully pointed out that these price ranges are equally applicable to the producers in those States as well. It is the case that without any rationale or policy, the producer within the State of Punjab is being discriminated against though there are sizeable indications that in fact the cost of production within this State is higher than in other States, indeed if it is not the highest in India. With this background, on the 22nd October, 1974, by virtue of clause 6 of the Punjab Wheat Dealers Licensing and Price Control (Fourth Amendment) Order, 1974, the

price has been controlled in the following terms:

"12. Controlled Price of Wheat:— The maximum price at which fair average quality of wheat other than wheat products, conforming to the specifications specified in the Schedule appended to this order, may be sold shall be one hundred thirty-nine rupees per quintal:

Provided that where the wheat contains admixtures or impurities in excess of the free tolerance limits specified in the Schedule, such price shall be reduced by making deductions to the extent specified in the Schedule and in that case the reduced price shall be the maximum price for the purpose of sale:

* * * *

Mr. Bhandari on behalf of the State has taken the stand that this fixation of price is general and is applicable to wholesalers, producers, licensed dealers, exporters and applicable both to levy and non-levy wheat. It is manifest, therefore, that now the maximum control price has been fixed by virtue of the above said order on 22-10-1974. Now the curious thing here again is that despite the fixation of the abovesaid price, the averments in the return are that the Punjab State Co-operative Supply and Marketing Federation and the Punjab State Civil Supplies Corporation have been asked to offer a price of Rs. 116/- only per quintal to the producers. On the one hand, the stand is that the control price has been uniformly fixed at Rs. 139/- per quintal and, on the other, the position is that the State and its agencies would offer only Rs. 116/- to the producer. No rationale for this has been suggested and this exhibits the arbitrary power of the respondent which has acquired a monopoly of purchasing the commodity in the surplus State to offer any price for the wheat which it chooses. What, however, deserves to be highlighted is that no obligation is accepted even to offer this price even though the producer is bound to divest himself of his excess stock. From the aforesaid resumé it is patent that the price policy is based on no principle, lacking in cohesion as also in uniformity and consistency and appears to be wholly unrelated to the primary criteria laid down by their Lordships of the Supreme Court, namely, the basic cost of production with a reasonable margin of profit thereon.

46. One may not be understood to imply that the State is to be denuded of its power to purchase and take over the surplus or hoarded stocks with the producers or that the producers can hold the consumers to ransom by withholding the wherewithal whereby the latter must live. Far from that, the rapacious producer who inordinately holds his stock unmindful of the needs of the country and

the consumers is deserving of no sympathy. But it appears elementary that a primary producer like the farmer is at least entitled to have and to reasonably hold the fruits of his labour which he painfully extracts from the soil. He is further guaranteed the right to dispose of his produce. Limitations to hold the same must be reasonably related to the maximum or optimum produce which the soil is capable of growing. Equally if he is required to part with his produce, a reasonable and precise channel for doing so must be provided and indicated. The same priority must further be given to ensure at least the basic cost of production of the produce to the farmer. He should not be driven to or left to the tender mercies of a fluctuating and depressed market in a surplus food zone which is capable of being easily manipulated. These appear to my mind to be the basic minimum of a reasonable restriction on the right which is guaranteed to the farmer by Article 19 (1) (f) and (g) of the Constitution. The respondent-State already stands fully armed with the very wide ranging powers given by S. 3 of the Essential Commodities Act. When reasonably applied, they leave no dearth of authority to acquire or regulate surplus stocks in the hands of any one including the producer. In this context, a bare reference to the provisions of Section 3 suffices and in particular sub-clauses (1), (2) (b), (c), (d), (e), (f) and (g); and Sections 3-A and 3-B may be instructively referred to. These provisions leave no manner of doubt about the width and range of the powers with which the respondent-State stands already clothed.

47. Clause (3) of the Stock Order has then been forcefully attacked as patently arbitrary and conducive to arming the State Government with unguided and uncanalised powers to fix any quantity of wheat which may be possessed by a producer without laying any guidelines or rationale for doing so. As an example of the exercise of such a power, it was pointed out that clause (4) appears to be of an ephemeral nature because it provides for the limits of stock only up to the time till any other limit is so fixed under clause (3). It was argued with plausibility on behalf of the petitioner that cl. (3), therefore, arms the governmental agencies to fix any arbitrary minimum limit on the producers' stock; for example, even one quintal per acre which in the garb of the regulatory process would in effect be virtually confiscatory. The language of this clause provides not the least indicia which would provide the basis for the Government to fix the maximum stocks with the producer. It is, therefore, left entirely to the whim of the executive to place arbitrary limits and make arbitrary inroads thereby into the funda-

mental rights guaranteed by Article 19 (1) (f) and (g) to persons like the petitioner. To my mind, the provisions of this clause are independently within the observations of their Lordships of the Supreme Court in *Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh*, AIR 1954 SC 224:—

"Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19 (1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness."

48. Clauses (4) and (5) have been exhaustively dealt with above by me to pin-point the patent unreasonableness of the inroads which they make into the guaranteed rights of the petitioner. The particular provision of clause (5) requiring the disposal of all excess stock within a fortnight of the promulgation of the order, however, independently smacks of unreasonableness in view of the decision of their Lordships in *Oudh Sugar Mills Ltd. v. Union of India*, AIR 1970 SC 1070, where they struck down an order directing the petitioner to dispose of its stocks within only 26 days of the order in the open market. Even that period of time was held to be an unreasonable restriction.

49. I deem it unnecessary to burden this already voluminous judgment with other authorities on the point of unreasonableness in imposing restrictions on the fundamental right under Article 19. It suffices to notice the following pithy observations of their Lordships in *Ramanlal Gulabchand Shah v. The State of Gujarat*, AIR 1969 SC 168:—

"A person is entitled to hold and enjoy his property as he thinks best. If regard is to be had for the benefits of society a clear law and a clear determination are required. Both the elements are missing."

I am inclined to hold that the position appears to be identical in the case of the Stock Order as well. There is no option but to find that clauses (3), (4), (5) and (6) of the same both as a matter of law and in practical effect erode the fundamental rights guaranteed to the petitioner under Article 19 (1) (f) and (g) of the Constitution. Far from merely imposing reasonable restrictions on those rights, the Stock Order virtually negates them by arbitrary, irrational and, if one may say so, oppressive provisions.

50. The second argument on behalf of the petitioner is completely independent of the first one. As a matter of abundant caution it proceeds on the assumption that the Stock Order is immune

to an attack on the basis of Article 19 (1) (f) and (g). Counsel contends that it is the common case that the Stock Order has been promulgated by virtue of the power conferred by Section 3 of the Essential Commodities Act. The said Act and particularly Section 3 (1) (from which the power to issue orders emanates) were enacted long before the emergency in the year 1955. Being pre-emergency legislation, the Act and its provisions were bound to conform both in letter and spirit to the Constitution of India. Section 3, therefore, could not have been intended to remotely visualize or contemplate the conferment of a power which would authorize the promulgation of orders thereunder which would be violative of the fundamental rights guaranteed under Article 19 or, for that matter, any other provision of the Constitution. Therefore, any delegated legislation under Section 3, whether pre or post emergency, must conform to the provisions of the Constitution. Any such legislation or part thereof which, therefore, does not so conform is necessarily beyond the scope and ambit of the power conferred by Section 3 of the Essential Commodities Act.

51. The stand taken by the respondent-State in opposition to the above-said contention deserves express notice. Mr. Bhandari fairly concedes that despite the continuation of the emergency the petitioner is entitled to assail the Stock Order on the ground that it is beyond the scope of the parent statute and in particular Section 3 of the Essential Commodities Act. He, however, took a determined stand that because the validity and the constitutionality of the Essential Commodities Act has never been challenged on behalf of the petitioner, therefore, it was not open to him to assail the reasonableness of the Stock Order issued thereunder. According to him Section 3 (1) being a valid law conferring the power on the Government to issue orders thereunder, the only issue that could be examined by the Court was whether the Stock Order was within the power conferred and any consideration of the question of infringement of fundamental right under the Constitution should be wholly beside the point.

52. The compliment of a rational refutation on principle to the above noticed argument of the learned Counsel for the State need not be extended, because such a contention has been authoritatively held to be extravagant by their Lordships in *Narendra Kumar v. The Union of India*, AIR 1960 SC 430. The relevant observations to my mind deserve quotation in extenso:—

"While this was the main contention on behalf of the respondents, it was also contended that as the petitioners have not

challenged the validity of the Essential Commodities Act and have admitted the power of the Central Government to make an order in exercise of the powers conferred by Section 3 of the Act it is not open to the Court to consider whether the law made by the Government in making the non-ferrous metal control order and in specifying the principles under clause 4 of the order violate any of the fundamental rights under the Constitution. It is urged that once it is found that the Government has power under a valid law to provide for regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein as soon as it is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of the essential commodity or for securing its equitable distribution and availability at fair prices, the order made by them can be attacked only if it is outside the power granted by the section or if it is mala fide. Mala fides have not been suggested and we are proceeding on the assumption that the Central Government was honestly of opinion that it was necessary and expedient to make an order providing for regulation and prohibition of the supply and distribution of imported copper and trade and commerce therein. So long as the Order does not go beyond such provisions, the Order, it is urged, must be held to be good and the consideration of any question of infringement of fundamental rights under the Constitution is wholly beside the point. Such an extravagant argument has merely to be mentioned to deserve rejection."

Once the hurdle of Mr. Bhandari's argument is out of the way then the second contention already noticed above of the learned Counsel for the petitioners is on firm ground and is borne out by high authority. It suffices to again recall the observations made in Narendra Kumar's case (supra):—

"* * * * When, as in this case, no challenge is made that Section 3 of the Act is ultra vires the Constitution, it is on the assumption that the powers granted thereby do not violate the Constitution and do not empower the Central Government to do anything which the Constitution prohibits. It is fair and proper to presume that in passing this Act the Parliament could not possibly have intended the words used by it, viz., 'may by order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce in', to include a power to make such provisions even though they may be in contravention of the Constitution. The fact that the words 'in accordance with the provisions of the articles of the Constitu-

tion' are not used in the section is of no consequence. Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitution came into force. It is clear therefore that when Section 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition do not violate any fundamental rights granted by the Constitution of India."

Following the abovesaid view a Division Bench of this Court consisting of Dua and Khanna, JJ., in *M/s. Chanan Ram Jagan Nath v. The State of Punjab*, AIR 1965 Punj 74, further observed:—

"* * * The language of Section 3 of Essential Commodities Act remains the same what it was before the emergency was declared and there has been no change or amendment in that section. In the circumstances it is not possible to hold that the words of Section 3 had one meaning before the emergency was declared and they acquire a different meaning after the declaration of the emergency. Emergency has no doubt far reaching effects and certain consequences flow from its declaration, but it certainly has not the effect of altering an interpretation which has been placed upon a statutory provision."

As Lord Atkin had said in the *Liversidge's case* 1942 AC 206 the voice of the laws must be heard even above the din of the clash of arms and they speak with one voice, be it emergency or normalcy. I have demonstrated above how the provisions of the Stock Order make sizeable inroads into the fundamental rights guaranteed to the petitioner and that the purported restrictions placed thereby are patently tainted with unreasonableness. Once that is so it would be totally anomalous to hold that purporting to act within the confines of the powers conferred by Section 3 of the Essential Commodities Act — which is admittedly pre-emergency legislation — the respondent-State can exercise delegated powers which would be patently and flagrantly violative of Article 19 of the Constitution. There thus appears to be no choice but to find that the Stock Order is patently beyond the scope and ambit of the powers conferred by Section 3 of the Essential Commodities Act and, therefore, void.

53. The law is no respecter of person but it may perhaps be remotely relevant to notice the class to which the Stock Order was intended to apply. On the State's own showing in para. 25 of its return, now under the law no producer can possess more than 7 hectares of land. The myth of the big feudal landlord is, therefore, dead as a dodo. Indeed after

more than two decades of the agrarian legislation within the State the producers are now a class of peasant-proprietors, who either like the petitioner are progressive farmers forming the back-bone of the Society or continue to be the traditional tillers of the soil, innocent, ignorant and indigent. It is unlikely that the respondent-State deliberately intended to negate what Article 19 (1) (f) and (g) guarantees to this class.

54. I would then be failing in my duty to maintain the consistency of precedent if I were not to advert again to M/s. Chanan Ram Jagan Nath's case AIR 1965 Punj 74. I have respectfully followed and relied on what appears to be the basic ratio of that judgment. Nevertheless in the judgment of Khanna, J., wherein the observation has been made that the impugned order therein which was also issued under the Essential Commodities Act could not be challenged under Article 19 of the Constitution during the continuation of the emergency. It is patent from the body of the judgment that the specific issue of pre-emergency legislation and delegated legislation emanating therefrom was never even remotely raised or considered by the Bench. Those observations are, therefore, clearly distinguishable. Even if it is otherwise, I am clear in my mind that the observations of Khanna, J., are now directly contrary to what their Lordships have subsequently held in the cases (1) Thakur Bharat Singh, AIR 1967 SC 1170 (2) Bennett Coleman and Co., AIR 1973 SC 106 and (3) Shree Meenakshi Mills Ltd., AIR 1974 SC 366 (supra), to which detailed reference has earlier been made in this judgment. In view of this, that view cannot possibly hold the field any longer.

55. In fairness to the learned counsel for the petitioner it may be mentioned in passing that he had contended that the Stock Order was governed by Section 3 (2) clause (f) thereof and was bad because it travelled beyond the scope or violated the complementary provisions of Section 3-B of the Essential Commodities Act. However, Mr. Bhandari on behalf of the State had taken up a categorical stand that the action was not sought to be taken under Section 3 (2) (f) and therefore Sec. 3-B was not at all attracted. In view of this stand I deem it wholly unnecessary to examine this contention of the learned counsel for the petitioner. I may further notice that on behalf of the petitioner, no challenge to the Punjab Wheat Procurement (Levy) Order 1974, Annexure P-1, to the petition was made during the course of the arguments.

56. The Punjab Wheat (Restrictions of Stock by Producers) Order 1974,

is hereby struck down. There will be no order as to costs.

Order accordingly.

AIR 1975 PUNJAB AND HARYANA 343

BAL RAJ TULI AND PRITAM
SINGH PATTAR, JJ.

Chandi Ram and others, Petitioners
v. The State of Haryana and others, Respondents.

Civil Writ Petns. Nos. 87, 125, 155, 161, 191, 194, 225, 247, 251, 282, 303, 304, 307, 312, 327, 357, 408, 424, 471, 488 and 646 of 1975, D/- 25-3-1975.

(A) Punjab Betterment Charges and Acreage Rates Act (2 of 1952), S. 5-A — Punjab Betterment Charges and Acreage Rates Rules, 1955, R. 4 — Vires — Section 5-A intra vires Article 14 — Interim arrangement for recovery of betterment charges provided for — Procedure bound to be summary — Provisions do not give arbitrary power — Constitution of India, Article 14.

Section 5-A of the Punjab Betterment Charges and Acreage Rates Act, 1952 makes interim arrangement for the recovery of betterment charges pending for finalisation of the Schedule under Section 4. By necessary implication, therefore, the procedure under Section 5-A has to be a summary one so that collection of the betterment charges may not be hampered or delayed for an unduly long time. Being an interim measure it has to comply with the bare minima of the rules of natural justice and the power having been vested in fairly high officers of the department, the section cannot be held to be ultra vires on the ground that it gives arbitrary power without any guidelines.

(Para 7)

(B) Constitution of India, Art. 226 — Mandamus — Issuance of — Principles — Interim measure is valid statutory provision — Mandamus restraining State from acting under it beyond certain time can be issued — Punjab Betterment Charges and Acreage Rates Act (1952), Section 5-A.

Where a statutory provision in the nature of interim measure which is challenged is held to be valid, the Court can still restrain the State Government from taking proceedings or action thereunder beyond certain period. Such an arrangement being by its very nature of a short duration if it is allowed to continue, as if it was the provision for permanent arrangement it would amount to abuse of power under that provision. Section 5-A of the Punjab Betterment Charges and Acreage Rates Act, 1952 being an interim arrangement enabling the State Government to recover the betterment charges

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pending the finalization of the Schedule under Section 4, after holding that the provision is not ultra vires Article 14 of the Constitution, the Court can still restrain the Government from acting under the provision after a specified date.

(Paras 12 and 13)

Cases Referred: Chronological Paras

AIR 1975 Punj 213 = 1975 Punj LJ 78 (FB)	5, 16
(1975) C. W. N. 125 of 1975 (Punj & Har)	8
(1974) C. W. No. 2446 of 1974, D/- 19-9-1974 = 1975 Rev LR 231	5, 6, 12
1973 Pun LJ 285	5, 11 13
AIR 1961 SC 552 = (1961) 3 SCR 77	7

R. S. Mital, with M. L. Bansal, for Petitioners; J. N. Kaushal, Advocate-General, Haryana and C. D. Dewah, Addl. Advocate-General, Haryana, for Respondents.

TULI, J.:— This order will dispose of 21 writ petitions (Nos. 87, 125, 155, 161, 191, 194, 225, 247, 251, 282, 303, 304, 307, 312, 327, 357, 408, 424, 471, 488 and 646 of 1975), as they challenge the validity and constitutionality of certain provisions of the Punjab Betterment Charges and Acreage Rates Act, 1952. (hereinafter referred to as the Act) and the Rules framed thereunder, as are applicable to the State of Haryana. The Act received the assent of the Governor of Punjab on January 5, 1953, and was published in the Punjab Government Gazette (Extraordinary) dated January 21, 1953, and came into force in the territories comprised in the then State of Punjab on that date. The Patiala and East Punjab States Union also enacted the Pepsu Betterment Charges and Acreage Rates Act, 1954, which was in force in the territories of that State when the merger of the two States of Punjab and Pepsu took place with effect from November 1, 1956. Thereafter, it was considered desirable that in the new Punjab State there should be one Act governing the levy of Betterment Charges and Acreage Rates. Consequently, sub-section (2) of Section 1 was substituted as under by Section 2 of Punjab Act No. 12 of 1958:—

"1 (2). It shall extend to the territories which, immediately before the 1st November, 1956, were comprised in the State of Punjab and Patiala and East Punjab States Union."

This Amending Act received the assent of the Governor of Punjab on April 21, 1958, and was brought into force on November 15, 1958, by Punjab Government notification of that date. From that date the Act became applicable to the entire State of Punjab, as was constituted on

November 1, 1956, and as a result of the reorganisation of that State, with effect from November 1, 1966, the Act was continued to apply to the State of Haryana.

2. The object of this enactment was to make a levy from the landowners who irrigated their lands from the various irrigation schemes including Bhakra-Nangal Project undertaken by the State, as contribution towards meeting the expenditure of those projects. The Statement of Objects and Reasons, as published in the Punjab Government Gazette (Extraordinary) dated October 28, 1952, reads as under:—

"Statements of Objects and Reasons—

With a view to rehabilitating the agricultural economy of the State, the Government of Punjab have undertaken the construction of a number of irrigation schemes, including the Bhakra-Nangal Project. This has entailed enormous expenditure and large loans have been taken and heavy investments made. It is, therefore, necessary and proper that a levy should be made from the landowners benefited thereby as a contribution towards meeting the said expenditure.

2. The betterment charges, leviable in respect of lands in an irrigation scheme may amount to not more than one-half of the difference between the value of the lands before any work in connection with the scheme was undertaken and their estimated value after the coming into operation of the scheme. An elaborate procedure has been prescribed for ensuring that the charges are equitable.

3. The acreage rates are intended to cover the expenditure incurred by the Government in undertaking sub-division of the lands included in an irrigation scheme into one acre fields or in undertaking level, topographical or soil surveys or in constructing water courses or village roads therein."

In these petitions, we are not concerned with the acreage rates.

3. The Act was further amended by Punjab Act No. 7 of 1959, and the relevant sections of the Act are as under:—

"Section 2 (b) 'betterment charges' means the charges levied under Section 4 on lands included in an irrigation scheme; (c) 'canal' includes—

(i) all parts of a river, stream, lake or a natural collection of water or natural drainage channel to which the provisions of Part II of the Northern India Canal and Drainage Act, 1873 (VIII of 1873) apply;

(ii) all canals, channels, reservoirs, wells, tubewells and lift irrigation arrangements constructed, maintained or controlled by the Government for the supply or storage of water;

(iii) all works, embankments, structures, supply and escape channels connected with such canals, channels, reservoirs, wells, tubewells or lift irrigation arrangements;

(iv) all watercourses, that is to say, all channels which are supplied with water from a canal but which are not maintained at the cost of the Government, and all subsidiary works belonging to any such channels;

(d) 'cost of an irrigation scheme' means that total financial liability accruing from the loan contracted or the investment made, the interest thereon, the cost of maintenance and operation of the scheme or of an extension thereof or of an extension as a result thereof, with reference to the period during which the said liability has to be discharged;

(f) 'irrigation scheme' means any such scheme as is referred to in Section 3;

(h) 'prescribed' means prescribed by rules made under this Act;

(j) the expressions 'Canal Officer' and 'Divisional Canal Officer' have the meanings respectively assigned to them in the Northern India Canal and Drainage Act, 1873 (VIII of 1873);

(jj) 'matured area' means such area of land included in the irrigation scheme, which is subject to payment of occupiers rate under Section 36 of the Northern India Canal and Drainage Act, 1873 (Act No. VIII of 1873) during any harvest;

3. Irrigation schemes and notification of proposal to levy betterment charges:—

Where any scheme has come or comes into operation after the 15th day of August, 1947, for any one or more of the following purposes, namely:—

(i) the irrigation of lands from any existing or projected canal;

(ii) the extension of irrigation of land situate within the approved irrigation boundary of an existing canal;

(iii) the improvement of irrigation supply or capacity factors or water allowances to lands already irrigated;

(iv) the provision for or the improvement of drainage or any reservoir, dam or embankment constructed, maintained or controlled by the Government for the supply or storage of water, the Government may proceed to levy betterment charges in respect of the lands which are included or are likely to be included in the irrigation scheme by notifying in Official Gazette a copy of which shall be posted at a conspicuous place in the village affected and in such other manner as may be prescribed its intention so to do, and shall specify in such notification such particulars respecting the proposed levy as it may think neces-

sary including particulars respecting the type and extent of irrigation proposed;

Provided that no betterment charges shall be levied in relation to an irrigation scheme where the charges ordinarily leviable under other laws for the time being in force are sufficient to cover the cost of the scheme;

Provided further that the amount of the betterment charges recoverable from any scheme will be limited to the difference between the investment on the scheme and such part of it as may make it productive.

Explanation I. 'Capacity factor' means the ratio of the mean supply to the authorised full supply discharge of a channel, and 'mean supply' for a period connotes the sum of the daily supply in cusecs divided by the number of days during that period.

Explanation II. 'Water allowance' means the designed number of cusecs of outlet or distributary capacity per thousand acres of land included in an irrigation scheme.

Explanation III. 'Cusecs' is unit of discharge, and means the rate of flow of one cubic foot of water per second.

4. Procedure for levy of betterment charges:—

(1) At any time after the expiry of one month from the date of the publication of the notification referred to in Section 3, the Government may cause a schedule of betterment charges to be prepared for all lands or class of lands included in an irrigation scheme showing the rates at which the charges shall be leviable on the lands and payable by the landowners and occupancy tenures thereof and the proportions in which the charges shall be so payable.

(2) In preparing a schedule under sub-section (1) for the levy of betterment charges in respect of any irrigation scheme regard shall be had to the following, namely:—

(a) the type of irrigation;

(b) the improvement in irrigation;

(c) the extent of betterment accruing of the lands.

(3) A draft of the schedule prepared under sub-section (1) shall be published in the official Gazette, a copy of which shall be posted at some conspicuous place in the area affected and in such other manner as may be prescribed.

(4) Any land owner or occupancy tenant who may be affected by the proposed betterment charges may, within sixty days from the date of the publication of the schedule in the official Gazette, or from the date of its publication in the village, whichever is later, present a petition in writing to the Government stating his objections, if any, to the levy of the betterment charges or the rate thereof.

(5) After considering the objections and after making such further inquiry into the matter as the Government may think fit, the Government shall determine the final schedule of betterment charges and cause the same to be published in the official Gazette, and in such other manner as may be prescribed.

5. Amount of betterment charges:—

(1) The amount of the betterment charges leviable in respect of any lands included in an irrigation scheme shall not exceed one-half of the difference between the value of the lands with reference to such date prior to commencement of any work in connection with the irrigation scheme as the Government may, by notification in official Gazette, fix in this behalf and their estimated value with reference to such other date after such commencement as the Government may similarly fix, and such valuations shall be made in the prescribed manner.

(2) Where in an irrigation scheme only lift irrigation arrangements are maintained and operated by the land-owners or occupancy tenants, the betterment charges leviable shall not exceed one-half of the charges which would otherwise have been payable for gravity flow irrigation:

Provided that whenever such lift irrigation arrangements are converted into gravity flow irrigation the land-owners or occupancy tenants, as the case may be, shall be liable to pay the full betterment charges in respect of lands.

5-A. Power to levy advance payment of betterment charges, realisation thereof, etc.—

(1) Notwithstanding anything to the contrary contained in this Act and subject to the provisions of sub-section (2), every person liable to pay betterment charges under this Act shall, with effect from the Kharif harvest of the agricultural year 1958-59, be liable to pay to the Government advance payment of betterment charges in respect of his matured area at each harvest at such rate not exceeding twenty-five rupees per acre of such area as the Government may by notification direct:

Provided that the Government may fix different rates for different matured areas.

(2) The liability to make advance payment of betterment charges shall cease from the date on which the Schedule of betterment charges has been published in the Official Gazette under sub-section (5) of Section 4.

(3) The amount of betterment charges which any person is liable to pay under this Act shall be realised from him after deducting therefrom the amount of

advance payment of betterment charges paid by him.

(4) If the amount of advance payment of betterment charges is found to be in excess of the amount of betterment charges, the excess shall be refunded by the Government to the person from whom it was realised.

(5) The amount of advance payment of betterment charges shall be realised, and deduction or refund thereof as referred to in sub-sections (3) and (4) shall be made, in such manner as may be prescribed.

9. Mode of Recovery of betterment charges and acreage rates.

(1) The betterment charges and the acreage rates may be paid in one or more instalments as may be prescribed:

Provided that where the betterment charges or acreage rates are paid in instalments, interest shall be payable in respect of such instalments at such rates as may be prescribed and such interest shall be recovered in the same manner as the betterment charges or the acreage rates.

(2) Notwithstanding anything contained in this section, the Government may, subject to such conditions as may be prescribed, allow a landowner to relinquish any part of his land in favour of the Government in satisfaction of the betterment charges payable in respect thereof.

9-A (1) Notwithstanding anything to the contrary contained in this Act, pending the publication of final schedules under Section 4, any landowner may, if he so chooses, make an advance payment in lumpsum of betterment charges leviable under the Act, at such rate as the Government may by notification direct, and where a land-owner exercises his choice to do so, he shall not be liable to pay advance payment of betterment charges, under Section 5-A, and if he has already paid any amount under Section 5-A, the advance payment payable under this section shall be reduced to that extent.

(2) The provisions of sub-sections (3), (4) and (5) of Section 5-A shall, as far as may be, apply to the payment made under sub-section (1)."

4. The Punjab Betterment Charges and Acreage Rates Rules, 1955 (hereinafter referred to as the Rules), were framed with a view to make provisions for the determination of the betterment charges and acreage rates and for the recovery thereof from the landowners and occupiers. Rule 4 of the Rules, as amended in 1957, read as under:—

"4. Method of appraisalment of enhancement in value of land:—

(1) The entire area included in an irrigation scheme shall be divided by the

Board into blocks or assessment circles so as to have more or less uniform physical characteristics of soil in each block or circle as per classification in the last settlement, taking note of any changes which may have affected the productivity of the soil or the area concerned.

(2) The board shall work out for each class of land in an assessment circle an estimate of net assets in cash as defined in clause (18) of Section 3 of the Punjab Land Revenue Act, 1887 (Act XVII of 1887):—

(a) for the date prior to the commencement of the scheme as fixed by the Government by notification under Section 5 of the Act; and

(b) for the date after such commencement as the Government shall fix by notification, under Section 5 of the Act, subject to the following:—

(i) the rates to be adopted for various commodities of produce of land, of labour and any other expense, shall be those prevalent in the year of that date;

(ii) for the purposes of calculating the net assets both for pre-scheme and post-scheme dates, the share that would be retainable by a tenant if the lands were let to non-occupancy tenant paying rent, whether in kind or cash, shall be two-third of the produce;

(iii) the yield to be assumed for calculating the net assets on both pre-scheme and post-scheme dates shall be as fixed in the last Settlement Report for soils of similar classification. Where the yield for any particular kind of irrigation or class of soil is not available in the last Settlement Report for the assessment circle concerned in the Irrigation Scheme, the yield may be taken as fixed in the last Settlement Report for the assessment circle situated in similar climatic region and receiving similar quantum of irrigation supplies, corrected, where necessary, by general observations regarding the quality of soil and local enquiry;

(3) Value of the land of landowner or any occupancy tenant will be taken as 30 times his net assets.

(4) The Betterment Charges shall be calculated with reference to classes of lands recorded in the last settlement and as modified in the latest Revenue Record available and also with reference to different types of irrigation facilities provided for any particular types of land."

That rule was found to be not workable and by notification dated January 18, 1973, the Haryana Government substituted that rule by the following:—

"4. Calculation of value of land.

(1) The value of the land for—

(a) the date prior to the commencement of the scheme as fixed by the Government by notification under Section 5 of the Act; and

(b) the date after each commencement as the Government shall fix by notification under Section 5 of the Act, shall be determined taking tahsil or assessment circle or a village as unit. The value of the land shall be worked out on the basis of the average sale price of the land in the unit for a period of three years prior to the two dates mentioned under sub-paras (a) and (b) above.

(2) The betterment charges shall be levied at rates, keeping in view the type and extent of irrigation provided or proposed to be provided."

Rule 11A, inserted by notification dated January 5, 1959, prescribes the procedure for realising advance payment of betterment charges and reads as under:—

11A. (1). When the rate of advance payment of betterment charges is notified by the State Government under subsection (1) of Section 5-A of the Act, the Canal Officer shall prepare a demand statement in respect thereof in the form prescribed for the charging of occupier's rate containing full particulars of the amount of advance payment of betterment charges which every person is liable to pay under the Act and cause a notice to be served upon him.

(2) As soon as the demand statement referred to in sub-rule (1) is completed in respect of a village, the provisions of rules 12, 13, 14 (a), 14 (c), 15, 23, 24, 25, 27, 28, 29, 30, 33 (b) and 34 shall, as far as may be, apply to the realisation of the advance payment of betterment charges in the same manner as they apply to the realisation of betterment charges under the Act.

(3) Receipts shall invariably be given by the Lambardar or other persons making the collection to each assessee, for making advance payment of betterment charges.

(4) An account of each landowner shall be maintained in the Divisional Canal Office, showing the recoveries of advance payment of betterment charges."

5. After the enactment of Section 5-A the State Government began to realise the advance betterment charges with effect from Khariff 1958 and did not prepare the schedules under Section 4 of the Act determining the amount of betterment charges recoverable from the landowners with the result that some of the landowners filed writ petitions in this Court for restraining the State of Haryana from recovering advance betterment charges under Section 5-A from them. One such writ petition (Baru Singh Malik v. State of Haryana, 1973 Pun LJ 285) was decided by M. R. Sharma, J., on 27-10-1972, and the learned Judge held that—

"the provisions of Section 5-A cannot be interpreted to mean that the State Government would be allowed to ignore

the other provisions of the Act and continue making the levy on ad hoc rates. It is urged before me by the learned counsel for the petitioners that his clients were asked to pay charges at the rate of Rs. 5/- per acre from Kharif 1954 up to Kharif 1971, whereafter they are being asked to pay these charges at the rate of Rs. 10/- per acre. The levy was originally imposed in Kharif 1954. In other words, the State Government has been charging the betterment levy for the last 18 years without its proper determination under the substantive provisions of the Act. In the written statement filed on behalf of the State Government it has not been indicated that the scheme would be finalised in the near future. It would, thus, be seen that the levy which was originally intended to be a fee in respect of services rendered is now being charged as a tax. It is no doubt true that under Section 5-A of the Act the State Government is duty bound to adjust this levy when a scheme is finally made, but the poor peasants and the land-holders cannot be expected to draw hope from promises of this type which are not expected to be fulfilled in the near future. The executive Government did not approach the legislative wing with a request to give it a mandate for the imposition of a tax and for this reason alone it cannot be allowed to realise anything as a tax even though the statute only authorises it to levy fees at a concessional rate."

In view of the special circumstances of that case, the learned Judge directed that—

"the State Government shall refrain from making a levy of the betterment charges upon the petitioners till the finalisation of schedule envisaged by Section 4 of the Act. If as a result of such a finalisation, the petitioners are found to be liable to pay any amount, it shall be open to the State Government to recover the same from the petitioners as arrears of land revenue."

An appeal under Clause 10 of the Letters Patent against that judgment was dismissed in limine and that spurred the State Government to take steps for the preparation and finalisation of the Schedules. First of all, Rule 4 of the Rules was amended, as has been stated above. The landowners continued to file writ petitions in this Court and three such petitions were disposed of by Hon'ble the Chief Justice and P. C. Jain, J., on 19-9-1974. The judgment was written in Sheo Kumar v. State of Haryana, (C. W. No. 2446 of 1974). In those cases, it was found that the demand for advance betterment charges was made for Rabi 1973-74 without the publication of the requisite notification under Rule 11-A of the Rules and on that ground the impugned

demands of advance betterment charges were quashed. It was, however, observed that the decision would not debar the State from following the procedure laid down by law for creating afresh the demands for Rabi 1973-74 and for future crops, and for enforcing the same after hearing the objections, if any, that may be filed by the petitioners. Similarly, the petitioners of those cases were given the right to approach this Court afresh on the other points raised in the petitions on which the counsel had not been heard. Another batch of civil writs was decided by M. R. Sharma, J., on August 8, 1974, on the basis of his own earlier judgment in Baru Singh Malik's case (supra). The State filed 18 appeals under Clause 10 of the Letters Patent which were referred for decision to a Full Bench presumably on the ground that an appeal under Clause 10 of the Letters Patent against the judgment of the learned Single Judge in Baru Singh Malik's case (supra) had already been dismissed by a Division Bench. Those appeals came up for hearing before a Full Bench on 31-1-1975 (reported in AIR 1975 Punj & Har 213) (FB) and were disposed of on the agreement of the counsel for the parties as under:—

"The learned Advocate-General for the State of Haryana and counsel for the writ petitioner-respondents, who are present before us, agree that the direction issued by the learned Single Judge to the State Government to refrain from making a levy of the betterment charges upon the writ-petitioners (now respondents) till the finalisation of the schedule envisaged by Section 4 of the Punjab Betterment Charges and Acreage Act, 1952, may be set aside, and for it may be substituted the direction which was given by a Division Bench of this Court in Civil Writ No. 2446 of 1974 — Sheo Kumar v. State of Haryana, decided on 19-9-1974 (Punj & Har). Even otherwise, we are of the considered view that on the allegations appearing in the respective writ petitions from which these appeals have arisen, the only order that can and should be issued to the State is the one that was given in the case of Sheo Kumar (supra). We dispose of all these appeals accordingly, that is, by substituting for the direction issued by the learned Single Judge in the writ petitions in question the direction to the State to refrain from demanding any advance betterment charges from the writ-petitioner-respondents under Section 5-A of the Act without issuing the requisite notification under Section 5-A (1) and without following the procedure prescribed in Rule 11-A of the Punjab Betterment Charges and Acreage Rates Rules, 1955 (as amended in 1959). The demand of advance payment of betterment charges which

was impugned in the writ petitions, that is for 1973-74, is also quashed on the same ground. In the circumstances of the case we make no order as to costs in any of these appeals."

The judgment is reported as *State of Haryana v. Polu Ram*, 1975 Punj LJ 78 = (AIR 1975 Punj & Har 213) (FB).

6. The State of Haryana issued notification No. S.O.-135/P.A.2/55/S.5/74 dated August 23, 1974, reading as under:—

"In exercise of the powers conferred by sub-section (1) of Section 5 of the Punjab Betterment Charges and Acreage Rates Act, 1952, the Governor of Haryana hereby fixes the 16th June, 1948, as the date prior to the commencement of the work, and 16th June, 1967, as the date after the commencement of the work, for the determination of the sale price of the lands included or likely to be included in the Bhakra Nangal Project Canal System."

It has been stated in the returns filed in some of these writ petitions by Shri Hargopal, Under-Secretary to Government, Haryana, Irrigation and Power Departments, that the compliance of the judgment of this Court in *C. W. No. 2446 of 1974 (Punj)* (Sheo Kumar case) has been made by the State Government and subsequent to that judgment, all legal and administrative steps required under the Betterment Act are being followed by the State Government as per directions in that decision.

7. The first point that has been vehemently argued by Shri R. S. Mittal, on behalf of some of the petitioners, is that Section 5-A of the Act is ultra vires Article 14 of the Constitution as it confers arbitrary power without any guidelines and without providing any procedure for the determination of the advance betterment charges. It has to be borne in mind that Section 5-A only makes an interim arrangement for the recovery of the betterment charges for the period during which the schedule under Section 4 is not finally prepared. Naturally, it has not to make any elaborate provision for the procedure to be followed because of the provision being transitory in character. Even then rule 11-A has made an adequate provision for the procedure to be followed for determining the amount of advance betterment charges to be recovered from the landowners or occupiers for each crop. Under that rule the rate of advance payment of betterment charges is to be notified by the State Government under sub-section (1) of Section 5-A of the Act and thereafter the Canal Officer has to prepare a demand statement in respect thereof in the form prescribed for the charging of occupier's rate containing full particulars of the amount of advance payment of better-

ment charges which every person is liable to pay under the Act and cause a notice to be served upon him. Thereafter, the provisions of certain rules mentioned therein become applicable. The demand slips are distributed under Rule 12 and an assessee is entitled to present his objections against the demand to the Divisional Canal Officer or the Deputy Collector concerned within thirty days of the date of service of the demand slip or where the demand slip is not duly served, when he has knowledge of the demand slip. Those objections have to be disposed of by the officer to whom they are presented and thereafter no objection to the demand at the time of collection of betterment charges is to be entertained nor is the collection to be suspended. It is true that the provision of appeal made in Rule 14 (b) has not been made applicable to such objections but a statutory provision does not become bad merely because a right of appeal is not granted against a particular order. The objections have to be disposed of either by the Deputy Collector or the Divisional Canal Officer who are fairly high officers of the Department and in the interest of expeditious recovery of the amount, the right of appeal has not been conferred on the assessee. It does not mean that the power to be exercised by the Deputy Collector or the Divisional Canal Officer in deciding the objections is arbitrary. He will have to decide the objections raised by the assessee in accordance with the principles of natural justice, though in a summary manner. It is, therefore, not a case in which the provision for raising objections to the demand and their disposal is not made in the Act or the Rules. Reliance has been placed on the Supreme Court judgment in *Kunnathat Thatunni Moopil Nair v. State of Kerala*, AIR 1961 SC 552, which is clearly distinguishable on facts. In that case, Travancore-Cochin Land Tax Act imposed a tax called 'land tax' at a flat rate of Rs. 2/- per acre which was held to be ultra vires Article 14 of the Constitution. Certain other provisions of the Act were also struck down as ultra vires. Section 5-A of that Act provided for provisional assessment of basic tax in the case of unsurveyed lands reading as under:—

"5-A (1). It shall be competent for the Government to make a provisional assessment of the basic tax payable by a person in respect of the lands held by him and which have not been surveyed by the Government and upon such assessment such person shall be liable to pay the amount covered in the provisional assessment.

(2) The Government after conducting a survey of the lands referred to in sub-section (1) shall make a regular assessment of the basic tax payable in respect

of such lands. After a regular assessment has been made, any amount paid towards the provisional assessment made under sub-section (1) shall be deemed to have been paid towards the regular assessment and when the amount paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the person assessed."

This section was held to be ultra vires Articles 14 and 19 (1) (f) of the Constitution with the following observations:—

"Section 5-A declares that the Government is competent to make a provisional assessment of the basic tax payable by the holder of unsurveyed land. Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher Civil Court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character. Again, the Act does not impose an obligation on the Government to undertake survey proceedings within any prescribed or ascertainable period, with the result that a land-holder may be subjected to repeated annual provisional assessments on more or less conjectural basis and liable to pay the tax thus assessed. Though the Act was passed about five years ago, we were informed at the Bar that survey proceedings had not even commenced. The Act thus proposes to impose a liability on land-holders to pay a tax which is not to be levied on a judicial basis, because (1) the procedure to be adopted does not require a notice to be given to the proposed assessee; (2) there is no procedure for rectification of mistakes committed by the Assessing Authority; (3) there is no procedure prescribed for obtaining the opinion of a superior Civil Court on questions of law, as is generally

found in all taxing statutes, and (4) no duty is cast upon the Assessing Authority to act judicially in the matter of assessment proceedings. Nor is there any right of appeal provided to such assessee as may feel aggrieved by the order of assessment."

It may be observed that the betterment charges levied under the Act are not a tax but fall in the category of fees or reimbursement of capital expenditure incurred by the State Government for providing irrigation facilities to the landowners or occupiers. Ordinary provisions of a taxing statute, as has been pointed out by their Lordships of the Supreme Court in the above judgment, therefore, do not apply. Section 5-A of the Act, however, has made a provision for issuing notices to the landowners and occupiers who are liable to pay the advance betterment charges and they have been given the right to file objections which have to be disposed of, as stated in Rule 11-A of the Rules noticed in detail above. Only a right of appeal has not been provided against that decision. It is not an invariable rule that a right of appeal must be provided in every case. It is for the Legislature to provide such a remedy or not. The ratio decidendi of the Supreme Court judgment, therefore, does not apply to the provisions of Section 5-A of the Act. On this differentiation, Section 5-A of the Act cannot be held to be ultra vires Articles 14 and 19 (1) (f) of the Constitution.

It will not be out of place to mention that in the case before the Supreme Court, the main taxing provision of the statute was struck down and, therefore, all ancillary sections of the Act providing for the levy or collection of that tax could not survive and had to go with the main section. In the cases before us, no attack has been made to the levy of betterment charges from the petitioners under the Act. Only the recovery of advance betterment charges under Section 5-A has been assailed. As I have already pointed out, Section 5-A makes interim arrangement for the recovery of betterment charges pending the finalisation of the schedule under Section 4. By necessary implication, the procedure under Section 5-A has to be a summary one so that the collection of the betterment charges may not be hampered or delayed for an unduly long time. Being an interim measure it has to comply with the bare minima of the rules of natural justice, and the power having been vested in fairly high officers of the Department, the section cannot be held to be ultra vires on the ground that it gives arbitrary power without any guidelines. The maximum amount of advance betterment charges was fixed by the Legislature as

Rs. 25/- per crop and within that limit the rate of advance betterment charges has to be fixed. It has been stated at the Bar by the learned Advocate-General that the highest rate ever fixed was Rs. 10/- per crop having perennial irrigation, which was by no means on the high side. It varied from Rs. 1.25 per acre to Rs. 10/- per acre per crop so that a judicious mind was applied while prescribing the amount of the advance betterment charges to be paid by the landowners. We have, therefore, no hesitation in repelling the attack on the constitutional validity of Section 5-A of the Act.

8. The learned counsel for the petitioners have then argued that the dates June 16, 1948, as the date prior to the commencement of the work, and June, 16, 1967, as the date after the commencement of the work, for determination of the sale price of the lands in order to compute the amount of betterment charges payable by the landowners or occupiers, have been fixed arbitrarily in the notification dated August 23, 1974, and, therefore, the notification should be struck down. It has been explained by the learned Advocate-General that in the notification issued under Section 3 of the Act on May 4, 1956, it was mentioned that with regard to the Bhakra-Mainline Canal System, the value of the land shall be determined in the case of perennial scheme of irrigation when the extent of irrigation provided is 62 per cent. for computing the betterment charges according to the increase in value of the lands benefited thereby. A copy of that notification has been filed along with the written statement in C. W. No 125 of 1975 (Punj & Har), Baloo v. State of Haryana. It is thus explained that June 16, 1967, is not an arbitrary date but that was the date on which the extent of irrigation provided reached 62 per cent. As regards the earlier date prior to the commencement of the work, although the work of Bhakra Nangal Project had been started even before partition, the Punjab Government prescribed June 16, 1948, as the date because of the coming into operation of the irrigation scheme after August 15, 1947. From that point of view that date also cannot be said to be arbitrary. The petitioners have not been able to rebut this assertion on behalf of the respondents and, therefore, that notification cannot be struck down on the ground that it has mentioned arbitrary dates.

9. The learned counsel for the petitioners have vehemently argued that they have already paid considerably large amount on account of advance betterment charges and no further amount should be recovered from them unless the final schedule is published under Section 4 of the Act. In reply, it has been stated by the learned Advocate-General that the

betterment charges recoverable from the landowners of Haryana State receiving irrigation from the Bhakra Nangal Project have been estimated to be Rupees 36,33,50,000/- out of which about Rs. 15.89 crores have been recovered so far, so that about 60 per cent. of those charges have yet to be recovered. The recovery of betterment charges in 1971-72, 1972-73 and 1973-74 amounted to Rs. 125 lacs, Rs. 141 lacs and Rs. 138 lacs respectively, so that it will take a number of years to make the full realisation. It is thus submitted that the petitioners and other landowners have not made any excess payment so far and all these payments are liable to be adjusted when the final schedule is published. When the earlier writ petitions came up for hearing before M. R. Sharma, J., these facts could not be pleaded because of the non-availability of the record from the Punjab State which related to the period prior to November 1, 1966, and, therefore, that decision was modified by the Full Bench.

10. The learned counsel for the petitioners have also submitted that the amounts of occupier's rate and owner's rate recovered under Sections 36, 37 and 38 of the Northern India Canal and Drainage Act, 1873, should have been counted towards the amount recoverable from the petitioners and other landowners on account of betterment charges. In reply, it has been explained by the learned Advocate-General that the occupier's rate and owner's rate as prescribed in those sections are taken towards the productive expenditure while the betterment charges are to recover the unproductive expenditure incurred on the Bhakra Nangal Project and the Bhakra Mainline Canal System. The provisos to Section 3 make this position abundantly clear and while finalising the schedule under Section 4, the competent officers will pay due consideration to the provisions of Section 3 of the Act. The landowners will have the right to raise their objections when they receive notices for the amount fixed against them. It is too premature to express any opinion on this aspect of the matter.

11. Shri Rajesh Chaudhry, the learned counsel for some of the petitioners, raised a novel point, that is, the levy of betterment charges could not be made by the State Government under any entry in List II or List III of the Seventh Schedule of the Constitution. His argument is that the levy is a tax and not a fee and no tax can be levied by the State Government in respect of the entries mentioned in List II; only fees can be levied. M. R. Sharma, J., held in Baru Singh Malik's case that the betterment charges were by way of fee for the services rendered. This levy is certainly

not a tax because it is not levied on all the landowners but only on such landowners whose lands have benefited from irrigation received from the canals flowing from the Bhakra Nangal Project. As the statement of the objects and reasons indicates, the levy was made with a view to recoup the large expenditure that the State had to incur on the projects for providing irrigation facilities to the various landowners. Therefore, this levy is in the form of contribution to the Government for having incurred heavy expenditure on those projects and, in our opinion, the legislation for that contribution could be made under Entry 17 of List II of Seventh Schedule of the Constitution, which reads as under:—

"17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I."

There is thus no merit in this submission which is repelled.

12. Having held that Section 5-A of the Act is intra vires and action can be taken in accordance therewith, it has to be decided whether the State Government has not taken too long to prepare and finalise the schedules under Section 4 of the Act and further resort to Section 5-A should or should not be permitted. Clearly, one of the following two courses can be adopted:—

"(i) to restrain the State Government from making any further recovery of advance betterment charges till the finalisation of the schedule under Section 4; or

(ii) to allow the Government to continue levying advance betterment charges under Section 5-A of the Act for a few more years during which period it should finalise the schedule under Section 4 of the Act in order to make further recoveries from the landowners or occupiers." After carefully weighing the pros and cons of these two alternatives, we are of the opinion that the alternative of allowing the State Government to continue recovery of the betterment charges under Section 5-A of the Act for another two or three years will be in the interest of the landowners and occupiers rather than to stop the recovery now in consequence of which they shall have to pay heavier amounts when the schedules under Section 4 of the Act are finalised. We accordingly direct that the State Government shall continue to recover the advance betterment charges from the landowners and occupiers under Section 5-A of the Act till Kharif crop 1977, that is, till September 30, 1977, and for the Rabi crop starting from October 1, 1977, the State Government will be entitled to recover the betterment charges only if by that time the schedules under Section 4

of the Act are finalised. In case of the non-finalisation of the schedules by September 30, 1977, recovery of advance betterment charges under Section 5-A will not be made thereafter. We have mentioned the date September 30, 1977, because it was on 19-9-1974, when C. W. No. 2446 of 1974 (Punj) Sheo Kumar v. State of Haryana was decided by the Division Bench, that the Advocate-General had given an assurance that the State Government would finalise the schedules within three years and he has stuck to that assurance before us. This date has, therefore, been fixed with his consent and agreement.

13. The learned Advocate-General, in the first place, tried to argue that if a statutory provision is held to be valid, the Court should not restrain the State Government from taking proceedings or action thereunder. This rule, however, cannot be said to apply in the case of a statutory provision making an interim arrangement. Such an arrangement is by its very nature of a short duration and if it is allowed to continue, as if it is a provision for permanent arrangement, it will amount to abuse of power under that provision. In the judgment of M. R. Sharma, J., in Baru Singh Malik's case (supra), there appears to be a factual mistake as to the crop from which the levy of advance betterment charges commenced. The learned Judge has mentioned Kharif 1954 whereas it should be Kharif 1958. Even from that date, more than sixteen years have already expired without the State Government having finalised the schedules. The learned Advocate-General frankly submitted that the delay had been caused by the inaction of the Punjab Government prior to November, 1966, and after the formation of the State of Haryana, no responsible officer realised that the schedules had to be finalised in order to determine the amount of betterment charges and recovery thereof under Section 4 of the Act. The interim arrangement provided for in Section 5-A of the Act, which had been acted upon by the State of Punjab prior to November 1, 1966, continued to be in vogue and the attention of the Haryana Government was drawn to this matter only after the decision of M. R. Sharma, J., in Baru Singh Malik's case, letters patent appeal against which was dismissed by a Division Bench. We consider this explanation to be satisfactory and, therefore, have decided to allow the time of three years with effect from September 30, 1974, as was asked for by the learned Advocate-General.

14. The learned Advocate-General has also assured that till September 30, 1977, the rate of advance betterment charges recoverable for each crop will

pellant or respondent to be made a party and proceed with the appeal, and the question of abatement would arise only when no such application is made within the prescribed time. The question which therefore arises for consideration is whether any of the legal representatives of the deceased Aladin was on the record already, or had been brought on the record within the prescribed time limit, and his estate could be said to be represented by him.

The point arose for consideration before a Division Bench of this Court in Poonam Chand v. Motilal, ILR (1955) 5 Raj 77 = (AIR 1954 Raj 287) where Motilal, one of the respondents, died during the pendency of the appeal and, while an application was made to bring two of his minor sons on the record within the prescribed time limit, the prayer for bringing his youngest son on the record was barred by time. It was held that, in the absence of fraud or collusion, the two legal representatives who were brought on the record within time sufficiently represented the estate of the deceased and it was not necessary to ask for bringing the third legal representative on the record. It was observed that as the existence of the third legal representative had come to notice, he could be brought on the record even after the expiry of the period of limitation. The case was thus decided on the principle of the sufficiency of the representation of the estate of the deceased.

4. The question of sufficiency of representation in such cases arose for consideration before their Lordships of the Supreme Court also in Daya Ram v. Shyam Sundari, AIR 1965 SC 1049. There two of the legal representatives of Shyam Sundari were not brought on the record within the time limit prescribed by law, and the question arose whether the omission rendered the appeal incompetent? Their Lordships examined the matter with due regard to the provisions of Order XXII, Rule 4, Civil P. C. and addressed themselves to the specific question whether it was the intention of the legislature that unless each and every one of the legal representatives of the deceased was brought on record, there was no proper constitution of the appeal, and answered it as follows,—

"The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record."

In laying this principle of law, their Lordships made a reference to a decision of their Lordships of the Madras High Court in Kadir

Mohideen v. Muthukrishna Ayyar, (1903) ILR 26 Mad 230 where it was held that this would be so even if the person brought on the record was only one of the several legal representatives or was not the true legal representative. Their Lordships of the Supreme Court upheld the Madras view and went on to observe as follows,—

"In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating. We have not been referred to any principle of construction of Order 22, Rule 4 or of the law which would militate against this view."

It is thus beyond controversy that the question of abatement for failure to bring one of the legal representatives on the record within the prescribed time-limit, has to be examined with reference to the question of the sufficiency of the representation of the deceased, and an appeal will not therefore abate for the omission to bring the remaining legal representatives on the record in time. But when it is brought to the notice of the Court that some of the legal representatives have not been brought on the record, it would of course be the duty of the appellant to bring them also on the record to complete the array of the parties.

5. The decision in Daya Ram's case AIR 1965 SC 1049 was specifically considered and followed by their Lordships of the Supreme Court in Dolai Maliko v. Krushna Chandra Patnaik, AIR 1967 SC 49. There one of the appellants had died but some of his heirs were not brought on the record as his legal representatives within the prescribed time-limit. There was therefore no question of an enquiry into the bona fides or the diligence on the part of those of the appellants who were brought on the record within the prescribed time-limit. Moreover it was a case where the heirs who had been left out included female heirs who could not be represented by the widow and the major son who had been brought on the record in time.

The High Court held that as all the heirs of the deceased had not been brought on the record, the appeal had abated because of the omission of a minor son, a married daughter and an unmarried daughter. Their Lordships of the Supreme Court addressed themselves to the question whether the estate of the deceased appellant could be said to be sufficiently represented in spite of that omission, and followed their earlier view in Daya Ram's case AIR 1965 SC 1049 that in a case where the person brought on record was a legal representative, it would be consonant with justice and principle that in the absence of fraud and collusion the bringing on record of such a legal representative was sufficient to save the appeal from abatement. Their Lordships went on to observe as follows,—

".....this is a case where one of the appellants died and his heirs have to be brought on record. In such a case there is no question of any diligent or bona fide enquiry for the deceased appellant's heirs must be known to the heirs who applied for being brought on the record. Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record."

6. This was followed by a decision of their Lordships of the Supreme Court in Mahabir Prasad v. Jage Ram, AIR 1971 SC 742. That was a case where a decree for rent was obtained by Mahabir Prasad, his mother Smt. Gunwanti Devi and his wife Smt. Saroj Devi. The execution court held that the decree was not executable and dismissed the execution application. Mahabir Prasad filed an appeal and impleaded Smt. Gunwanti Devi and Smt. Saroj Devi as party-respondents. Smt. Saroj Devi died during the pendency of the appeal, and her name was struck off on the application of Mahabir Prasad. The High Court dismissed the appeal holding that it had abated as the heirs and legal representatives of Smt. Saroj Devi were not brought on the record within the period of limitation. Their Lordships of the Supreme Court once again examined the principle of sufficiency of representation in such cases and held as follows,—

"Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate."

So as Mahabir Prasad was one of the heirs of Saroj Devi, it was held that there could be no abatement merely because no formal application for showing him as an heir and legal representative had been made. It is therefore well settled that in a case where one of the legal representatives of the deceased appellant or respondent is already on the record, even though in another capacity, the proceeding will not abate simply because the other legal representatives are there and an application has not been made in time to bring them on the record.

7. In view of the above decisions of their Lordships of the Supreme Court, which declare the law on the subject, we have no doubt that as Ladu, who was one of the legal

representatives of Aladin, was already on the record as an appellant in the second appeal before the Board of Revenue, it was not permissible for the learned members of the Board to hold that the appeal had abated, and we have no doubt that their impugned judgment suffers from an error of law apparent on the face of the record which must be corrected by way of certiorari.

8. We have gone through Rameshwar Prasad v. Shambahari Lal Jagannath, AIR 1963 SC 1901 to which reference has been made in the impugned judgment of the Board of Revenue, but that was quite a different case where the appeal had already abated against one of the appellants (under Order XXII, Rule 3, Civil P. C.) as no application had been made for bringing his legal representatives on the record within the prescribed time limit. But this is not so in the present case. As has been stated, Aladin's son Ladu was already on the record and the appeal had not abated against Aladin. That case cannot therefore govern the decision in the present case. We have also gone through Ramagya Prasad Gupta v. Murli Prasad, AIR 1972 SC 1181 on which reliance has been placed by Mr. Parekh on behalf of the respondents, but that was also a different case where one of the respondents had died during the pendency of the appeal and none of his legal representatives had been brought on record within the period of limitation prescribed for the purpose.

9. Mr. Parekh has invited our attention to the decision in Lilo Sonar v. Jhagru Sahu, AIR 1925 Pat 123; Mt. Hifsa Khatoun v. Mohammad Salimar Rahman, AIR 1959 Pat 254 (FB); Gauri Shankar Singh v. Smt. Jwalamukhi Devi, AIR 1962 Pat 392; Barmeshwar Nath Prasad Singh v. Babu Kuer Rai, AIR 1964 Pat 116 and Parhlad Jha v. Sonelal Mahton, AIR 1974 Pat 338. He has also made a reference to the decisions of learned Single Judges of this Court in Roopchand v. Mithalal, AIR 1959 Raj 17; Jawari Mal v. Mangi Lal, 1961 Raj LW 132 and Nathu v. Laxmi Narain, AIR 1974 Raj 153. They were rendered on their peculiar facts and it is not necessary for us to consider them in details because of the declaration of the law by their Lordships of the Supreme Court in the cases mentioned above.

10. In the result, the writ petition is allowed, the impugned judgments Annexures F and G of the Board of Revenue dated November 8, 1967 and December 20, 1967 are set aside and the learned Members of the Board of Revenue are directed to dispose of the appeal according to the law, after bringing the remaining heirs of the deceased Aladin on the record to complete the array of the parties. Costs in this court will abide the final result.

Petition allowed.

AIR 1975 RAJASTHAN 211

S. N. MODI J.

Smt. Sunderdevi and another, Appellants.
v. Manakchand and others, Respondents.

Second Appeal No. 308 of 1967, D/-
3-9-1975*.

(A) Hindu Succession Act (1956), Section 14 — Will executed by Hindu widow of widow's estate prior to Act — Death of widow after Act came into force — Will is valid — Validity of will should be judged from the time it is to take effect — (Succession Act (1925), Section 90).

Where a Hindu widow, who had executed a will of her widow's estate (in her husband's property) in her possession before the Act of 1956 came into force, dies after the Act came into force, the will cannot be held to be invalid simply because it was made at a time when the widow had no right to bequeath her widow's estate, the reason being that the will speaks at the death of the testator and not at the time of its execution. The restriction which the Hindu law imposed on her right to dispose of widow's estate was not absolute. And whatever incapacity was imposed by the Hindu law on her right to dispose of her widow's estate possessed by her was removed before her death by the Act of 1956. That Act made her absolute owner of all such property which was inherited by her on the death of her husband and was in her possession. (Para 5A)

The property, which a person does not possess or own or has no power to dispose of at the time of the will, may be bequeathed and such a will would be valid provided the testator happened to be the owner at the time of his death. ILR (1953) 3 Raj 1013 and Halsbury's Laws of England (Hailsham Edition) Vol. 34 Para 291 at p. 236, Rel. on. (Para 5A)

Cases Referred: Chronological Paras
ILR (1953) 3 Raj 1013 5A

Sumerchand Bhandari and Rajesh Baliya for Appellants; M. C. Bhandari and Dalveer Bhandari, for Respondents.

JUDGMENT:— This is a second appeal by the defendants in a suit for declaration under Order 21, Rule 63, C. P. C.

2. The facts giving rise to this appeal are that the plaintiff-respondent Manakchand (decree-holder) obtained a money decree against the defendant No. 3 Moolchand (judgment-debtor) and attached half share in the property described in para No. 1 of the plaint alleging that the judgment-debtor Moolchand owned half-share in it. The defendant-appellant Mst. Sunderdevi, wife of Duli Chand and Mst. Chukabai wife of Mool-

chand (objector) moved an objection petition under Order 21, Rule 58, C. P. C. and asserted that the judgment-debtor Moolchand was entitled to only one-fourth share in the property in dispute and the rest 3/4th share was owned and possessed by them. The objection petition was allowed by the executing court and 3/4th share in the property was released from attachment. The decree-holder Manakchand then instituted the present suit for declaration that the judgment-debtor Moolchand be declared owner of the half-share in the property. The plaintiff alleged that the property initially belonged to the Joint Hindu Family of two brothers Hanutmal and Mangilal and after the former's death, the property by rule of survivorship devolved upon Mangilal. The widow of Hanutmal Mst. Phephabai inherited no share in the property. After the death of Mangilal, the plaintiff alleged that the property devolved upon his two sons Moolchand and Dulichand, each having half-share in the property. The defendant-appellants, that is, the objectors admitted that the property initially belonged to two brothers Hanutmal and Mangilal but they denied that on the death of Hanutmal the property devolved upon Mangilal. According to them, half-share in the property belonging to Hanutmal devolved upon Hanutmal's widow Mst. Pephabai who remained in occupation of her husband's half-share in the property upto the date of her death which took place on Sawan Sudi 15, Smt. year 2019. As regards the remaining half-share the defendant-appellants pleaded that after the death of Mangilal, his half-share was inherited by his two sons Dulichand and Mool Chand in equal shares. The defendant-appellants further pleaded that Mst. Pephabai gave her half-share in the property by a registered will dated 2-9-1953 to the defendant-objectors in equal shares. they further pleaded that Dulichand gifted his one-fourth share in the property to his wife Mst. Sunder Devi, defendant No. 1, by a registered gift-deed dated 5-1-1958. In these circumstances, it was pleaded that the defendant No. 1 Mst. Sunder Devi became the owner of the half-share, defendant No. 2 Chukabai of one-fourth share and defendant No. 3 Moolchand of one-fourth share. The trial court after framing proper issues and after evidence dismissed the plaintiff's suit holding that the defendant No. 3 Moolchand had only one-fourth share in the property. The learned District Judge, Ajmer, on appeal by the plaintiff-decree-holder recorded the following findings:—

1. That there was nothing on the record to show that the property in dispute was a coparcenary property or joint family property of Hanutmal and Mangilal. Both Hanutmal and Mangilal were co-owners as they jointly purchased the property in dispute.

2. That on the death of Hanutmal half-share in the property was inherited by his widow Mst. Pephabai as limited owner,

* (Against judgment and decree of the District Judge, Ajmer in Civil Appeal No. 65 of 1966 D/- 13-4-1967).

3. That the will Ex. A/4 was executed on 2-9-1953 by Mst. Pephabai in favour of the defendant-objectors Mst. Sunder Devi and Mst. Chukabai.

4. That the will Ex. A/4 when executed on 2-9-1953 was a nullity, because in the year 1953 Mst. Pephabai was only a limited owner and she had at that time no authority to execute the will.

3. Dealing with the last finding which resulted in setting aside the judgment of the trial Court, the learned District Judge observed:

"To take the best of the defendants' case, Smt. Pephabai succeeded her husband Hanutmal. The exact year of the death of Hanutmal has not come on record but it is an admitted fact that Hanutmal expired before his brother Mangilal and defendant Mool Chand when examined on 7-12-1965 deposed that Mangilal had expired about 25 years back. So this can safely be said that Smt. Pephabai succeeded her husband as a limited owner only. Now before the passing of the Hindu Succession Act, 1956, a widow or other limited heir had no power to alienate the estate inherited by her from the deceased owner except for religious or charitable purposes or other purposes amounting to legal necessity. Not only this, the widow or other limited heir could not in any case dispose of by will the property inherited by her or any portion thereof whether the property be movable or immovable vide Section 180 of the Hindu Law by Mulla (13th Edition). Will Ex. A/4 shows that it was executed on 2-9-1953. Apparently, at that time, Smt. Pephabai had no legal authority to execute the same or to dispose of the property in dispute in the manner mentioned in the will. In this connection, it was urged by the learned counsel for the respondents that the will was to take effect after the death of Smt. Pephabai and as she expired after the coming into force of the Hindu Succession Act, it should be held that defendants Nos. 1 and 2 Smt. Sunderdevi and Smt. Chukabai have got half-share in the house in dispute through that will. I am afraid I am not in agreement with this proposition. If the will when executed in the year 1953 was a nullity, as it really was, it cannot be said that due to change of law thereafter, it became effective as Smt. Pephabai died after the coming into force of the Hindu Succession Act. The simple reason for this is that in the year 1953 when this will was executed, it was nothing but a waste paper and the document was a nullity. The matter would have been different, of course, if Smt. Pephabai after the coming into force of the Hindu Succession Act executed fresh will in anybody's favour but that was apparently not done. In this view of the matter, I am of the opinion that the will Ex. A/4 was executed at the time when its executant Smt. Pephabai had no authority to execute it and it being a nullity the property mentioned in it did not pass on to defendants Nos. 1 and 2. In other words,

after the death of Smt. Pephabai, both the brothers Moolchand and Dulichand came to be the owners of the other half portion of the house also and, as such, Moolchand has got half-share in the property."

In view of the above finding, the learned District Judge allowed the appeal, decreed the suit and declared that Moolchand judgment-debtor has got half-share in the property in dispute. Aggrieved by the said decree, the objectors, namely, the defendant No. 1 Mst. Sunderdevi and defendant No. 2 Mst. Chukabai had preferred this second appeal.

4. There is no doubt that Mst. Pephabai had inherited half-share in the property after the death of her husband as a limited owner and she had no authority to will away her half-share on 2-9-1953. It is proved from the evidence on the record and it was also admitted before the trial court that Mst. Pephabai was in possession of her husband's half-share till her death which took place after the coming into force of the Hindu Succession Act, 1956. Section 14 of the Hindu Succession Act, 1956 made her absolute owner in respect of the half-share of the property inherited by her from her husband. Mst. Pephabai therefore at the time of her death had full authority to will away her husband's property. The appellants' learned advocate contends that although the will was executed at a time when Mst. Pephabai had no authority to dispose of her widow's estate but since the will was to take effect after her death, and admittedly at that time she had unfettered capacity to dispose of the said property, the will was perfectly valid.

5. The important point which arises for consideration in this appeal is therefore whether the validity of the will like the one in the present case should be judged from the time it is executed or from the time it is to take effect.

5A. Section 90 of the Indian Succession Act, 1925, runs as under:

"Section 90.— The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator."

This section was interpreted by a Division Bench of this Court in Mst. Sirekanwar v. Kanwarlal, ILR (1953) 3 Raj 1013. It was laid down that "unless a contrary intention appears by the will itself, the will should be interpreted as speaking at the death of the testator." It was further observed—

"The effect of this section is that a bequest passes not that property which the testator means to leave at the time of executing the will but whatever is in existence at the time of his death. . . . and on this principle the will would speak as at the death of the testator and not as at the time it is made."

In Sirekanwar's case (supra), it was argued that the will which was originally invalid could not be validated later on because the family stood divided at the time of the testator's death. Repelling this argument, their Lordships observed as under :—

"This argument, though plausible, does not appear to be sound. The analogy of a minor or a person of an unsound mind cannot be justly applied to a member of a joint family who is major and of sound mind. In the case of a person who is a minor or of unsound mind there is an inherent incapacity to make any valid disposition. In the case of a member of a joint family, he is not inherently incapable to make any disposition. If he has any separate property, he can certainly dispose of it in any manner he likes. The restriction which the Hindu Law imposed on him is only with regard to the property which is joint. If such property, therefore becomes separate before his death, his original incapability to dispose of that property is automatically removed and if he has not revoked his previous will, there is no reason why it should not take effect. As regards the principle that a Hindu cannot by will bequeath property which he could not alienate by gift, it may be pointed out that this only means that he cannot will away that property which he could not validly give in gift at the time of his death. If Kishenlal had died as a member of joint family, the will made by him would certainly have been invalid because at the time of his death, the right of Kanwarlal's survivorship as a coparcener would have come in conflict with Mst. Sirekanwar's right by devise. But since the family was divided before his death and a preliminary decree was passed, the will was perfectly valid at the time of his death and simply because it was made at a time when he was a member of the joint family, it cannot be held to be invalid."

It is thus abundantly clear that the property, which a person does not possess or own or has no power to dispose of at the time of the will, may be bequeathed and such a will would be valid provided the testator happened to be the owner at the time of his death. The analogy of a minor or a person of unsound mind cannot be applied to the case of a widow. In the present case, even in 1953 Mst. Phephabai could alienate the estate inherited by her from her deceased husband for religious or charitable purposes or other purposes amounting to legal necessity. She was also not incapable to dispose of her stridhan by way of will. It, therefore, cannot be said that there was any inherent incapacity in case of Mst. Phepha Bai to make any valid disposition. The restriction which Hindu Law imposed on her right to dispose of widow's estate was not absolute. And whatever incapability was imposed by the Hindu Law on her right to dispose of her widow's estate possessed by her was removed on coming into force of the Hindu Succession Act, 1956. That Act made her absolute owner of

all such property which was inherited by her on the death of her husband and was in her possession. If Mst. Phepha Bai had bequeathed widow's estate possessed by her after coming into force of the Hindu Succession Act, 1956, such disposition would have been valid, because at that time she had unfettered right to do so. Now, in the present case, as there was no inherent incapacity to dispose of widow's estate and further whatever incapacity was there in 1953, it was removed before her death by the Hindu Succession Act, 1956, the will cannot be held to be invalid simply because it was made at a time when Mst. Phephabai had no right to bequeath her widow's estate, the reason being that the will speaks at the death of the testator and not at the time of its execution.

6. In Halsbury's Laws of England, Vol. 34 (Hailsham Edition), Para 291 at page 236, it is laid down :—

"A will unless a contrary intention appears therein must be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator and as if the condition of things to which it refers in this respect is that existing immediately before his death."

In this view of the matter, the decision of the learned District Judge cannot be upheld.

7. The appeal is, therefore, allowed, the judgment and decree of the learned District Judge are set aside and those of the trial court are restored. The appellants shall get costs from the plaintiff-respondent of all the three courts.

Appeal allowed.

AIR 1975 RAJASTHAN 213

S. N. MODI J.

Mishrilal, Appellant v. Pukhraj and others, Respondents.

Second Appeal No. 286 of 1967, D/-2-9-1975*.

(A) Civil P. C. (1908), Order 32, R. 3 (5) — A refusing to act as guardian of his minor sons, guardian-ad-litem appointed to defend them — Suit decreed — Appeal by defendants in which A represented minor sons instead of guardian-ad-litem — Dismissal of appeal — Second appeal by one of sons alleging that he had become major — Maintainability.

As A, one of the defendants in the suit, did not accept to act as guardian for his minor sons, an Advocate was appointed as guardian-ad-litem for the minors. The suit being decreed, the defendants preferred an

* (Against judgment and decree of Civil Judge, Sirohi in Civil Appeal No. 71 of 1965 D/-7-2-1967.)

IS/IS/D443/75/GMJ

appeal in which A represented his minor sons instead of the guardian-ad-litem. The appointment of the Advocate as guardian-ad-litem was not terminated. On the dismissal of the appeal, M, one of the sons of A, alone filed a second appeal alleging that he had attained the age of majority.

Held, that the only person competent to file an appeal on behalf of M in the lower appellate Court was the guardian-ad-litem. As it was not so filed, the appeal was not valid. As there was no valid appeal by M in the lower appellate court, he had no right to file the second appeal. Case law relied on.

(Para 6)

Cases Referred: Chronological Paras
AIR 1956 All 310 = 1956 All LJ 45 (FB) 4
AIR 1953 Orissa 343 = 18 Cut LT 315 4
AIR 1953 Pepsu 129 = ILR (1952) Patiala 4
197 4
AIR 1942 Pat 348 = 23 Pat LT 162 4

A. L. Dave, for Appellant; Hastimal Parikh, for Respondents.

JUDGMENT:— This is an appeal by one of the defendants, namely, Mishrilal against the judgment and decree of the Civil Judge, Sirohi, in a suit for perpetual injunction.

2. The learned counsel for the plaintiff-respondents Mr. H. M. Parikh has raised a preliminary objection as to the maintainability of the appeal. According to him, the appeal is not maintainable by the appellant Mishrilal.

3. In order to appreciate the preliminary objection taken up by Mr. Parikh, it is necessary to narrate some relevant facts of the case.

4. The plaintiffs Pukhraj, Babhoot Mal, Umedmal, Premchand, (now dead) Jeevraj and Deepchand, who are respondents Nos. 1 to 6 in this appeal, instituted a suit for permanent injunction against the appellant Mishrilal, his brothers Ghanshyamlal, Devi Lal and Premshanker and his father Purshottam on 24-7-1962 in the Court of the Munsif, Bali. Mishrilal and Premshanker were shown as minors, aged 13 and 10 years respectively on the date of the suit. Since Purshottam the father of the minors, did not accept to act as guardian for his minor sons, Shri Raghunath Parihar, Advocate, was appointed as guardian-ad-litem of minors Mishrilal and Premshanker under Order 32, Rule 3 CPC. The trial court decreed the suit against the defendants. An appeal was then filed by the defendants including the minors Mishrilal and Premshanker in the Court of the Civil Judge, Sirohi, on 13-12-1965. In this appeal, Purshottam represented his minor sons Mishrilal and Premshanker instead of Shri Raghunath Parihar, Advocate, appointed as guardian-ad-litem by the trial court. The learned Civil Judge, Sirohi, after hearing the parties dismissed the appeal on merits. Mishrilal alone has now preferred this second appeal alleging that he had attained the age of majority. The other

defendants along with the plaintiffs were impleaded as respondents.

5. The contention of Mr. Parikh is that since Shri Raghunath Parihar, Advocate, had been appointed guardian-ad-litem by the trial court, the appeal before the learned Civil Judge should have been filed on behalf of the minor Mishrilal under the guardianship of Shri Raghunath Parihar instead of his father Purshottam. It is further contended that under Order 32, Rule 3 (5) CPC the guardian-ad-litem continues to be the guardian throughout the proceedings including the proceedings in the appellate court. He further urges that since no proper appeal was preferred in the lower appellate court on behalf of Mishrilal, this second appeal by him is wholly misconceived, untenable and incompetent.

6. Sub-rule (5) of Rule 3 of O. 32 CPC runs as under:—

“Sub-rule (5)—

A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree.”

This sub-rule (5) was inserted by the Code of Civil Procedure (Third Amendment) Act (XVI of 1937). Prior to that, there was no statutory provision as to the nature of the guardian-ad-litem appointed whether he continued only during the pendency of the suit or he continued during the pendency of the entire lis. Sub-rule (5) provides that a person appointed to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree. It is thus abundantly clear that under this sub-rule (5) the guardian of the minor who had been appointed in the suit while it was pending in the trial Court must continue even during the appellate proceedings, unless his appointment is terminated by retirement, removal or death. In the present case, admittedly the appeal before the lower appellate court was filed by Purshottam representing Mishrilal instead of Shri Raghunath Parihar Advocate who had been appointed guardian-ad-litem by the trial court. There is no suggestion that the appointment of Shri Raghunath Parihar as guardian-ad-litem of the minor Mishrilal was ever terminated by his retirement, removal or death. In the circumstances, Purshottam representing his minor son had no authority to file the appeal on behalf of the minor Mishrilal. The only person competent to file an appeal on behalf of Mishrilal was Shri Raghunath Parihar Advocate. The appeal before the lower appellate court so far as the appellant Mishrilal was concerned was thus not filed by a competent person,

and it cannot be treated as a valid appeal in the eye of law on behalf of the minor Mishrilal. I am supported in my view by several authorities including the Full Bench decision of the Allahabad High Court in *Rajbehari Lal v. Dr. Mahabir Prasad* AIR 1956 All 310 (FB) and the Division Bench decisions in *Sultansing v. Rachhpal* AIR 1953 Pepsu 129, *Gulabchand v. Mt. Kishori Kuer* AIR 1942 Pat 348 and *Arakhito Ranto v. Pratito Ranto* AIR 1953 Orissa 343. It is not disputed before me that in case there was no valid appeal by Mishrilal before the lower appellate Court, Mishrilal had no right to file the present second appeal before this Court.

7. The preliminary objection taken up by the learned counsel for the plaintiff-respondents thus succeeds and consequently the appeal fails and it is dismissed with no order as to costs.

Appeal dismissed.

AIR 1975 RAJASTHAN 215

C. M. LODHA, J.

M/s. Sohan Lal Loonkaran, Petitioner v. State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 2453 of 1974, D/- 15-3-1975.

(A) Essential Commodities Act (1955), Section 5 — Central Government Notification No. 1844 dated 18-6-1966, para (a) (ii) — Rajasthan (Display of Prices of Essential Commodities) Order (1966), Clause 5-A — Validity — Original order made with prior concurrence of Central Government — Amendment of — Prior concurrence also necessary — Held, Cl. 5-A is void for want of prior concurrence of Central Government and directions of Collector based on that clause are also void. (General Clauses Act (1897), Section 21).

Where the State Government made the Rajasthan (Display of Prices of Essential Commodities) Order (1966) in exercise of the powers conferred by Section 3 read with Notification No. 1844 with prior concurrence of the Central Government, it cannot by Notification introduce a new Clause 5-A in the said Order without the prior concurrence of the Central Government. Such amendment and orders of the Collector based thereon would have to be struck down, as void. (Paras 12, 13)

H. M. Parekh, for Petitioner; D. S. Shisodiya, Addl. Govt. Advocate, for the State.

ORDER:— Only one short point has been argued in support of this writ petition and it is this—that Sec. 5-A inserted in the Rajasthan (Display of Prices of Essential Commodities) Order, 1966 (which will hereinafter be referred to as 'the order') is ultra vires and void having been made without

the prior concurrence of the Central Government and, therefore, the orders Exhibit-1 and Exhibit 2 dated 3 May, 1974 and 1 July, 1974 respectively, issued by the Collector, Barmer and the confiscation of the cement and the prosecution launched against the petitioner in pursuance thereof are liable to be quashed.

2. In exercise of the powers conferred by Section 5 of the Essential Commodities Act (Act No. 10 of 1955), the Central Government, vide S. O. No. 1844 dated June 18, 1966, directed—

"(a) that the powers conferred on it by sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in clauses (d), (e), (f), (g), (h), (i), (ii), and (j) of sub-section (2) thereof shall, in relation to all commodities other than food-stuffs and fertilisers (whether inorganic, organic or mixed), be exercisable also by a State Government or, in relation to a Union Territory, by the Administrator thereof, subject to the following conditions, namely;

(i) xxx xxx xxx

(ii) that all orders under clause (f) shall require the prior concurrence of the Central Government;

(iii) xxx xxx xxx

(b) xxx xxx xxx"

3. Section 3 of the Essential Commodities Act, 1955 deals with "Powers to control production, supply, distribution etc., of essential commodities." The relevant portion of this section reads as under:—

"(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices (or for securing any essential commodity for the defence of India or the efficient conduct of military operations), it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide;

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) xxx xxx xxx

(f) for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order."

4. In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 read with the notification No. SO/1844 dated June 18, 1966 with the

prior concurrence of the Central Government the State Government made an order called the Rajasthan (Display of Prices of Essential Commodities) Order, 1966. Clause 5 of the Order provides that:

'No dealer shall—

(i) sell to any person any article mentioned in the schedule at a price higher than that specified in respect of such article in the list of prices;

(ii) refuse to sell such article to any person at the price so specified or marked;

(iii) sell any article to any person without issuing a cash memo or a bill and without keeping a duplicate copy of such memo or bill:

Provided that it shall not be necessary to issue such cash memo (giving particulars of the purchaser i. e. address etc.) or bill or to keep any such duplicate copy in respect of sale of any article costing not more than Rs. 7/- unless demanded by the purchaser."

5. By another notification No. F. 37 (39) Ind (A) 66 dated 23 December, 1966, the Government of Rajasthan made an order to amend the Order and, inter alia, added the following new clause after cl. 5 (already extracted above):

'5-A(i) The Government or any competent officer, if so authorised in writing by the Government may, in respect of any Essential Commodity issue directions to any dealer or class of dealers that such Essential Commodity shall be sold by him in such quantity or number, subject to such conditions, after such intervals and in such manners as may be specified in such directions.

(ii) On and from the receipt of such directions, the dealer shall be bound to comply with such directions."

6. The Collector, Barmer, issued the directions (Ex. 1) dated 3 May, 1974 in exercise of the powers conferred upon him by the aforesaid clause '5-A' whereby he ordered that the dealers in cement shall be entitled to sell only 30% of the cement in their stock in the open market and the rest 70% shall be kept in reserve. He also directed that no dealer in cement shall export any cement outside the district of Barmer without written permission from the Collector.

7. On the night of 6 September, 1974 a truck loaded with 68 bags of cement was found standing outside the godown of the petitioner and a suspicion having been aroused that the cement may be exported outside the district, investigation was made at the spot by the officer concerned and besides 68 bags of cement, some more cement was seized by the officer and a report was made to the Collector against the petitioner for violating the directions issued by the Collector vide his order dated 3 May, 1974 (Ex. 1). The Collector by his order dated 14 January, 1975 (Ex. 3) found that 49 more bags of cement were lying in the godown than revealed by the stock register of the petitioner and that 68 bags of cement loaded

in the truck were to be exported. Consequently he directed that all the 1350 bags of cement lying in the godown of the petitioner shall be confiscated and so also 68 bags of cement loaded in the truck. He further directed that the petitioner be prosecuted under Section 3/7 of the Essential Commodities Act for defiance of his order. It appears that the petitioner was subsequently challan-ed in the court of Chief Judicial Magistrate, Barmer.

8. Aggrieved by the action of the Collector in confiscating the bags of cement and prosecuting him, the petitioner has filed this petition under Article 226 of the Constitution of India and prayed for granting the following reliefs:—

(1) That the provisions of the Rajasthan (Display of Prices of Essential Commodities) Order, 1966 along with the amendment order be declared void.

(2) That the orders Exhibits 1 and 2 issued by the Collector be quashed.

(3) That the respondents be restrained from interfering in any way with the business of purchase, sale and distribution of cement of the petitioner.

(4) That the stock of the cement seized by the Collector be released and the proceedings started by him under Section 6A of the Essential Commodities Act, 1955 be quashed.

(5) That the prosecution of the petitioner under Section 3/7 of the Essential Commodities Act in the Court of Chief Judicial Magistrate, Barmer be quashed.

(6) That the order of the Collector dated 14 January, 1975 (Ex. 3) be quashed.

9. The orders Exhibit 1 and Exhibit 2 issued by the Collector, Barmer have already been withdrawn vide Ex. R/I and, therefore, relief No. 2 has become infructuous.

10. During the pendency of this writ petition the Government of Rajasthan has promulgated the Rajasthan Cement (Licencing and Control) Order, 1974 under which licence for selling of cement has to be obtained. The relief No. 3 has also, therefore, become infructuous.

11. Learned counsel for the petitioner has given up the prayer for declaring the original Rajasthan (Display of Prices of Essential Commodities) Order, 1966 void and has, thus, confined himself, as already stated above, to one relief that clause 5-A inserted by way of amendment in the Order is void and the order Exhibit 3 passed by the Collector is liable to be quashed. His sole contention is that by virtue of para (a) (ii) of S. O. No. 1844 of June 18, 1966 read with Section 21 of the General Clauses Act, clause 5-A is void, inasmuch as it was introduced without the prior concurrence of the Central Government. There is no denying the fact that prior concurrence of the Central Government was not taken while issuing the Notification dated 23rd Decem-

ber, 1966. It has not been asserted in the reply that such a prior concurrence was taken. On the other hand, it has been pleaded in para No. 4 of the reply that there was no necessity of taking such concurrence. This is conceded on behalf of the State Government also that no prior concurrence of the Central Government was taken. The only question, therefore, which survives for decision is whether clause 5-A is valid in spite of there being no prior concurrence of the Central Government for inserting it in the order.

12. Section 21 of the General Clauses Act (Act No. 10 of 1897) which is equivalent to Section 23 of the Rajasthan General Clauses Act, provides that where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued. There is a clear direction in the notification by the Central Government dated June 18, 1966 that all orders under clause (f) shall require the prior concurrence of the Central Government. Admittedly the order as originally promulgated by notification dated 19 August, 1966 was issued with prior concurrence of the Central Government. The State Government has no doubt power to add to, amend or vary the order but that power must be exercised in the like manner and subject to the like sanction and conditions. It was, therefore, obligatory for the State Government to have obtained the prior concurrence of the Central Government before adding new clause 5-A to the order. Since it was not done, Section 5-A, so far as it relates to cement, is liable to be struck down. As a necessary corollary, the directions issued by the Collector, Barmer (Ex. 1 and Ex. 2) were also void.

13. There is no denying the fact that the impugned order dated 14 January, 1975 (Ex. 3) was passed by the Collector for the alleged violation of his order (Ex. 1) and since Ex. 1 is void, the order (Ex. 3) must also fall, with the result, that the order directing confiscation of the cement as well as prosecution of the petitioner must be quashed.

14. In the result, I allow this writ petition, set aside the impugned order of the Collector, Barmer, dated 14 January, 1975 (Ex. 3) and quash the direction given by him for confiscation of the bags of cement in question and prosecution of the petitioner.

15. Let a copy of this order be sent to the Chief Judicial Magistrate, Barmer for dropping the criminal proceedings instituted against the petitioner in pursuance of the orders Ex. 1 and Ex. 3. There will be no orders as to costs.

Writ petition allowed.

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D. P. GUPTA, J.

Arjun Singh, Petitioner v. The State of Rajasthan and others, Respondents.

Civil Writ Petition No. 1966 of 1975, D/- 30-7-1975.

(A) Constitution of India, Articles 14, 15 and 16 — Scope — Articles form part of same constitutional Code of guarantee and supplement each other.

Thus Article 16 really gives effect to the doctrine of equality in the matter of employment or appointment to an office under the State and to the prohibition of discrimination guaranteed by Article 14 in such matters. AIR 1952 SC 123 and AIR 1961 SC 564 and AIR 1962 SC 36 and AIR 1968 SC 349, Rel. on. (Para 16)

(B) Constitution of India, Articles 359 (1) and 16 — Presidential order D/- 27-6-1975 suspending enforcement of rights under Articles 14, 21 and 22 — Interpretation and effect of — Enforcement of rights under Article 16 not affected. (Interpretation of Statutes).

The words "the rights as may be mentioned" and "rights so mentioned" employed in Article 359 (1) are absolutely clear and firmly indicate that the enforcement of only those rights conferred by Part III would be suspended as are specifically mentioned in the order issued by the President under Article 359 (1). Thus the enforcement of only those rights which are expressly specified in the Presidential order issued under Article 359 (1) would be suspended during the period the emergency would remain operative. (Para 37)

The Presidential order D/- 27-6-1975 specifically refers to the rights conferred by Articles 14, 21 and 22 of the Constitution and the proceedings to enforce such rights would no doubt remain suspended so long as the emergency subsists. But the enforcement of the rights conferred upon by other Articles included in Part III cannot be held to be impliedly suspended merely because the general right under Article 14 would remain suspended during the period of the emergency. Even if two interpretations were possible, then also such an interpretation should be given which would advance the preservation of such of the fundamental rights which were not expressly taken away on account of the declaration of Emergency and the Presidential order issued in respect thereof. (Para 35)

Hence the Presidential order does not have the effect of barring proceedings in respect of or suspending the enforcement of the rights conferred by Article 16 and matters in which relief is sought strictly on the basis of rights conferred by Article 16 could be entertained and continued to be heard by the High Court, unless an order is issued by

the President of India under Article 359 (1) of the Constitution specifically in respect of the rights conferred by Article 16 of the Constitution. (Para 36)

Cases	Referred:	Chronological	Paras
AIR 1968 SC 349 = (1968) 1 SCR 407 =			
1968 Lab IC 360			15
AIR 1968 SC 765 = (1968) 2 SCR 227 =			
1968 Lab IC 872			22
AIR 1967 SC 483 = (1966) Supp SCR 464			21
AIR 1967 Bom 482 = 69 Bom LR 218			32
AIR 1966 SC 1078 = (1966) 2 SCR 573			20
AIR 1964 SC 381 = (1964) 4 SCR 797			18,
			19, 20, 36
AIR 1963 Assam 94 (FB)			23, 25, 37
AIR 1962 SC 36 = (1962) 2 SCR 586			14, 15
AIR 1962 Pat 272 = 1962 BLJR 56			30
AIR 1961 SC 564 = (1961) 2 SCR 931			13
AIR 1958 Bom 311 = 59 Bom LR 734			31
AIR 1957 All 414 = 1957 All LJ 389 (FB)			28
AIR 1957 Mad 634 = 69 Mad LW 947			29
AIR 1955 SC 661 = (1955) 2 SCR 603			26, 31
AIR 1952 SC 123 = 1952 SCR 435			12
(1931) 76 Law Ed 704 = 285 US 204			33
(1876) 1 Ex. D. 223 = 34 LT 69			34

M. R. Calla, for Petitioner; M. Mridul, for Intervenor, A. K. Mathur, Addl. Govt. Advocate, for the State.

ORDER:— The question which arises in this writ petition at the outset is as to whether the grounds that the petitioner desires to urge could be allowed to be raised in view of the order issued by the President of India suspending the rights of all persons to move any Court for the enforcement of the rights conferred by Article 14 of the Constitution of India, after the proclamation of emergency.

2. Learned counsel for the petitioner, Mr. Calla, urged that although the rights conferred by Article 14 cannot be enforced by this Court in view of the Presidential declaration, yet the rights conferred by Article 16 of the Constitution in matters relating to employment and appointment to any office under the State could still be invoked, as the order issued by the President does not affect the provisions of Article 16 of the Constitution.

3. Mr. Mridul, appearing as an intervenor supported the aforesaid contention of the learned counsel for the petitioner and argued that the provisions of Article 16 could still be pressed into service in spite of the suspension of the rights conferred by Article 14. On the other hand, Mr. Mathur, learned Additional Government Advocate, submitted that Article 16 is an incidence or species of the same right of equality of opportunity which has been conferred by Article 14 of the Constitution and in view of the fact that the rights conferred under Article 14 have been suspended during the period of the emergency, the provisions of Article

16 also could not be invoked by the petitioner.

4. In order to appreciate the rival contentions in their proper perspective, it would be proper to set out relevant provisions and orders. Article 13 of the Constitution of India enacts that all laws in force in the territory of India immediately before the commencement of the Constitution would be void in so far as they are inconsistent with the provisions of Part III of the Constitution, relating to the fundamental rights. It has further been provided that the State shall not make any law so as to take away or abridge the rights conferred by Part III of the Constitution and any law so made in contravention of the provisions of the said Part would be void to the extent of such contravention.

5. Article 14 and the related Articles 15 and 16 of the Constitution read as under:—

"14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

6. Article 352 of the Constitution authorises the President of India, in case he is satisfied that a grave emergency exists whereby the security of the country is threatened, either by external aggression or by internal disturbance, he may make a declaration to that effect, by a proclamation.

7. Article 358 provides that while a proclamation of emergency is in operation, the State would be empowered to make laws or to take any executive action in derogation of the provisions of Article 19 of the Constitution and the law so made or the action so taken would be valid, but any law so made in contravention of the provisions of Article 19 during the period of emergency, shall cease to have effect as soon as such proclamation ceases to be operative.

8. Article 359 (1) provides as under:—

“359. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.”

9. In exercise of the powers conferred upon the President of India under Cl. (1) of Article 352 of the Constitution, a Proclamation of Emergency was issued on December 3, 1971 declaring that a grave emergency existed as the security of the country was threatened due to external aggression. On June 25, 1975 the President of India further issued the following Proclamation of Emergency:—

“Proclamation of Emergency”

“In exercise of the powers conferred by clause (1) of Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance.

NEW DELHI,

F. A. AHMED,

The 25th June, 1975.

President.”

10. Thereafter on June 27, 1975 the President issued an order under Art. 359 (1) of the Constitution, which reads as under:—

“G. S. R. 361(E).— In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any Court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamation of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any Order made before the date of this Order under clause (1) of Article 359 of the Constitution.

No. II/16013/1/75-S&P(D)II

S. L. KHURANA, Secy.”

11. In view of the Presidential order issued under Article 359 (1) of the Constitution there can be no doubt that the right to move any court, including this court, for enforcement of the rights conferred by Articles 14, 21 and 22 of the Constitution, has been suspended during the period the two Proclamations of Emergency issued by the President under Article 352 (1) of the Constitution subsist. There is also no doubt that all proceedings pending in this Court or any other Court for the enforcement of the rights conferred by Articles 14, 21 and 22 shall also remain suspended during the aforesaid period. However, the question that requires consideration is as to whether the rights conferred by Article 16 of the Constitution cannot also be enforced and are impliedly suspended because of the Presidential order dated June 27, 1975. While on the one hand it is canvassed that Article 16 has not been specifically mentioned in the Presidential order issued under Article 359 (1) of the Constitution, on the other hand it is contended that Article 16 is an incident of the application of the concept of equality enshrined in Article 14 and that the rights conferred by Article 16 are as a matter of fact part and parcel of the provisions of Article 14 and that as Article 14 has been mentioned in the Presidential order issued under Article 359 (1) it was not at all necessary to specifically mention Article 16 as well in the said order.

12. The concept of equality before the law is of universal application and a fundamental part of the Constitution of every civilized country. It is no doubt a negative concept as it prohibits the State from discriminating between persons similarly situated and it is very well understood to declare that like persons should be treated alike, without discrimination. Although the word ‘discrimination’ does not occur in Article 14, however it prohibits discriminatory treatment

amongst equals. Patanjali Sastri C. J., speaking for the Supreme Court, in *Kathi Raning v. State of Saurashtra* AIR 1952 SC 123 observed:—

“All legislative differentiation is not necessarily discriminatory. In fact, the word ‘discrimination’ does not occur in Article 14. The expression ‘discriminate against’ is used in Article 15 (1) and Article 16 (2), and it means, according to the Oxford Dictionary, ‘to make an adverse distinction with regard to; to distinguish unfavourably from others’. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified.”

13. In *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* AIR 1961 SC 564 while discussing the relative scope of Articles 14, 15 and 16, S. K. Das J. observed:—

“Article 14 enshrines the fundamental right of equality before the law or the equal protection of the laws within the territory of India. It is available to all, irrespective of whether the person claiming it is a citizen or not. Article 15 prohibits discrimination on some special grounds — religion, race, caste, sex, place of birth or any of them. It is available to citizens only, but is not restricted to any employment or office under the State. Article 16 Cl. (1), guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; and cl. (2) prohibits discrimination on certain grounds in respect of any such employment or appointment. It would thus appear that, Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters relating to employment or appointment to any office under the State.”

In *Rama Rao's* case it was further observed:—

“We have said earlier that Article 15 is, in one respect, more general than Article 16 because its operation is not restricted to public employment; it operates in the entire field of State discrimination. But in another sense, with regard to the grounds of discrimination, it is perhaps less wide than Article 16, because it does not include ‘descent’ amongst the grounds of discrimination. The argument before us is that the provision impugned in this case must be tested in the light of Article 15 and not Article 16. It is

submitted by the learned Advocate General that the larger variety of grounds mentioned in Article 16 should lead us to the conclusion that Article 16 does not apply to offices where the law recognises a right based on descent. We consider that such an argument assumes as correct the very point which is disputed. If we assume that Article 16 does not apply, then the question itself is decided. But why should we make that assumption? If the office in question is an office under the State, then Article 16 in terms applies; therefore, the question is whether the office of Village Munsif is an office under the State. We have held that it is. It is perhaps necessary to point out here that Cl. (5) of Article 16 shows that the Article does not bear the restricted meaning which the learned Advocate-General has canvassed for; because an incumbent of an office in connection with the affairs of any religious or denominational institution need not necessarily be a member of the Civil Service.”

14. In *General Manager, Southern Railway v. Rangachari* AIR 1962 SC 36 Gajendragadkar J., as he then was, again considered the relative scope of Articles 14 and 16 and observed:—

“In this connection it may be relevant to remember that Article 16 (1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15 (1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.” (emphasis supplied)

15. In *the State of Mysore v. P. Narasingha Rao* 1968 Lab IC 360 = AIR 1968 SC 349 Ramaswami J., speaking for the Supreme Court, observed:—

“Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion.” While the observations of Gajendragadkar J. in *Rangachari's* case AIR 1962 SC 36 were quoted with approval, it was further observed in *Narasingha Rao's* case (AIR 1968 SC 349):—

“As we have already stated, Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words, Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such. Hence, there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons

who are alleged to have been favoured; Article 16 (1) does not bar a reasonable classification of employees or reasonable tests for their selection."

16. This it is well established by the aforesaid decisions of the Supreme Court that Article 14 enshrines the general concept of equality and Article 16 is only an instance of the application of that concept in respect of employment or appointment to public services. Thus Article 16 really gives effect to the doctrine of equality in the matter of employment or appointment to an office under the State and to the prohibition of discrimination guaranteed by Article 14 in such matters. Their Lordships of the Supreme Court have clearly held in the above mentioned cases that the provisions of Articles 14, 15 and 16 form part of the same constitutional code of guarantees and supplement each other and that Article 16 is only an incidence of the application of the general rule of equality laid down under Article 14 to matters of public employment.

17. The Supreme Court had also occasion to consider the legal effect of the proclamation of emergency by the President under Article 352 of the Constitution and of the Presidential orders issued in exercise of the powers conferred by clause (1) of Article 359 of the Constitution. On October 26, 1962 the President declared that grave emergency existed as the security of the country was threatened at that time by external aggression and the President issued two orders under Article 359 (1). The first order dated November 3, 1962 suspended the rights of citizens to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution during the period the proclamation of emergency remained in force. The second Presidential Order was issued on November 11, 1962 which amended the earlier one by adding that the right to move any Court for the enforcement of the rights conferred under Article 14 would also remain suspended till the emergency lasted.

18. In *Makhan Singh Tarsikka v. The State of Punjab* AIR 1964 SC 381 the Supreme Court made the following observations on the question of interpretation of Article 359 of the Constitution:—

"Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any Court for the enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Article 359 (1) is to bar the remedy of the citizens to move

any court for the enforcement of the specified rights."

Dealing with the effect of the Presidential Order issued under Article 359 (1) the Supreme Court observed in the aforesaid case AIR 1964 SC 381:—

"Since the object of Article 359 (1) is to suspend the rights of the citizens to move any court, the consequence of the Presidential Order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the Order has been issued, because the Order takes away the right to move any court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Article 359 (1) and the Presidential Order issued under it is instituted after the order has been issued, it will have to be dismissed as being incompetent. In other words, Article 359 (1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate."

In *Makhan Singh's case* (AIR 1964 SC 381) their Lordships of the Supreme Court held that "right to move any Court" in Article 359 (1) refers to right to move any court of competent jurisdiction including the right to move the Supreme Court under Article 32 (1) and the High Court under Article 226 (1) of the Constitution as well as under Section 491 of the Criminal Procedure Code.

19. Gajendragadkar J. speaking for the majority of the Court in *Makhan Singh's case* (AIR 1964 SC 381) further held:—

"What is the nature of the proceedings which are barred by the Presidential Order issued under Article 359 (1)? They are proceedings taken by citizens for the enforcement of such of the rights conferred by Part III as may be mentioned in the order. If a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the Order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken, or the words in which the relief is claimed as the substance of the

matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Article 359 (1) and would, therefore, be hit by the Presidential Order issued under the said article. The sweep of Article 359 (1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights. We have already seen that the operation of Article 359 (1) and the Presidential Order issued under it is limited to the period during which the proclamation of emergency is in force, or for such shorter period as may be specified in the Order. That being so, we feel no difficulty in holding that proceedings taken by a citizen either under Article 32 (1) or under Article 226 (1) are hit by Article 359 (1) and the Presidential Order issued under it. If the Presidential Order precludes a citizen from moving the Court for the enforcement of the specified fundamental rights, it would not be open to the citizen to urge that the Act is void for the reason that it offends against the said fundamental rights. It is in order to prevent the citizen from making such a claim that the Presidential Order has been issued, and so, during the period of its operation, the challenge to the validity of the Act cannot be entertained." (emphasis supplied)

20. In *Durgadas Shirali v. Union of India* AIR 1966 SC 1078 the Supreme Court reiterated its observations in *Makhan Singh's case* AIR 1964 SC 381 regarding the legal effect of the Proclamation of Emergency and the Presidential orders issued under Article 359 (1) of the Constitution and it was further observed:—

".....the sweep of Article 359 (1) and the Presidential Order issued under it is wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce fundamental rights under Articles 14, 19, 21 and 22. It was pointed out that during the pendency of the Presidential Order the validity of the Ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 21 and 22".

21. In *Jaichand Lal Sethia v. The State of West Bengal* AIR 1967 SC 483, after

referring to the aforesaid two cases, it was observed by the Supreme Court:—

"If the appellant seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. It is not also open to the appellant to challenge the Order on the ground of contravention of Article 19, because as soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. But the appellant can challenge the validity of the order on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359 (1). Such a challenge is outside the purview of the Presidential Order."

22. In *Mohd. Yaqub v. State of Jammu and Kashmir* AIR 1968 SC 765 = (1968 Lab IC 872) Wanchoo C. J. observed:—

"It will be seen from the terms of Article 359 that it gives categorical powers to the President during the period when a Proclamation of Emergency is in operation to suspend the enforcement of any of the fundamental rights conferred by Part III. It is for the President to decide the enforcement of which of the fundamental rights should be suspended during the operation of the Proclamation of Emergency. There is nothing in Article 359 which in any way limits the power of the President to suspend the enforcement of any of the fundamental rights conferred by Part III. Article 359 clearly shows that any fundamental right in Part III can be suspended during an Emergency and we cannot limit Article 359 in the face of the unambiguous and express words thereof and say that only the enforcement of fundamental rights under Articles 22 and 31 (2) can be suspended thereunder. It may be that prima facie these two fundamental rights appear to have a clearer nexus with security of India; but it does not follow that other fundamental rights may not in an emergency have such a nexus. In any case Article 359 itself proceeds on the basis that the suspension of the enforcement of all or any of the fundamental rights is for the sake of security of India and so gives the power to the President to suspend such enforcement if he considers it necessary for that purpose."

23. The question as to whether on account of the promulgation of the Presidential Order suspending the rights conferred by Article 14 of the Constitution would also impliedly take away the right of any person to move any Court for the enforcement of the rights conferred by Article 16 as well, was considered by a Full Bench of the Assam High Court in *Shyam Behari Tewari v. Union of India* AIR 1963 Assam 94 (FB). In that case Mehrotra, C. J., with whom S. K. Dutta J. agreed, expressed the view that any attempt to enforce a right of equality under Article 16 of the Constitution would

in effect be merely an attempt to enforce the right under Article 14. He observed:—

“Article 16 embodies the principle of equality before law or equal opportunity contained in Article 14 in the sphere of employment. It is a special Article dealing with employment, but a person who seeks his remedy under Article 16 in the matter of employment is in effect enforcing the fundamental right enshrined under Article 14 of the Constitution. In effect, he is enforcing the rights conferred on him under Article 14 in the sphere of employment, and in view of his statement that he does not challenge the validity of the rule on the ground of violation of Article 14, he cannot be allowed to challenge the validity of the rule on the ground that it infringes Article 16. The fundamental right guaranteed under Article 14 is a general right of which the right conferred under Article 16 is a species and in our opinion, the petitioners in view of this statement are not entitled to contend that the Rule violates Article 16 of the Constitution..... The claim of the petitioners that Rule 149 violates the provisions of Article 16 of the Constitution is in effect an attempt to enforce the fundamental right of equality before law or equal protection of law embodied in Article 14 in the sphere of employment. Moreover in view of our decision that Rule 149 is not attracted to the cases where the services of a permanent employee are terminated, as such termination amounts to punishment, it is not necessary to test the validity of R. 149 on the ground that it infringes Articles 14 and 16 of the Constitution.”

24. However, the other learned Judge constituting the Full Bench, Nayudu J. disagreed with the aforesaid proposition and observed:—

“The question, therefore, is required to be examined whether exception can be taken to the validity of R. 149 (3) with reference to Article 16 of the Constitution..... This Article is a special Article dealing with the fundamental right of equality of opportunity in matters of public employment. As pointed out by the Supreme Court in the case reported in AIR 1962 SC 36, Articles 16 (1) and 16 (2) supplement Articles 14 and 15 (1). The fact that the petitioners did not rely on Article 14, in my opinion, would not preclude their placing reliance on Article 16 and seek the aid of the Court to enforce their fundamental rights guaranteed under that Article. This view of mine receives support from the observations of the learned Judges of the Supreme Court in the abovequoted decision, reported in AIR 1962 SC 36; wherein they observed that Articles 14, 15 (1) and 16 (1) and (2) are supplementary to each other, which implies that by themselves they are different from each other and are not identical. Hence I am clearly of the opinion that the objection to Rule 149 could be examined in the light of Article 16 (1) and (2) of the

Constitution. But as already stated, in the view I have taken that Rule 149 (3) in so far as it purported to apply to permanent Government servant is unconstitutional having regard to Article 311, it is, in my opinion, unnecessary to examine the matter any further in regard to the constitutional validity of the Rule with reference to Article 16.”

25. Thus a majority of the learned Judges constituting the Full Bench of the Assam High Court held that during the period the Presidential Proclamation issued under Article 359 (1) of the Constitution remains in force the right under Article 16 cannot be enforced in any court as it was a species of the right guaranteed under Article 14 and would virtually amount to the enforcement of the rights conferred by Article 14 itself. However, it may be noted that the observations made by the learned Judges of the Assam High Court in Shyam Behari's case AIR 1963 Assam 94 (FB) were as a matter of fact merely in the nature of obiter dicta, because both Mehrotra C. J. as well as Nayudu J. held that as the termination of the services of the petitioner in that case was violative of the provisions of Article 311 of the Constitution, it was not necessary in that case to consider the question as to whether the provisions of Rule 149 of the Railway Establishment Code (Vol. I) were invalid because of the alleged infringement of the rights guaranteed under Article 14 or 16 of the Constitution.

26. Ordinarily, if the language employed in a statute or a statutory instrument is plain, then the ordinary grammatical meaning should be assigned to the words used therein. In cases where two provisions, one general and another applicable to a special class, are contained in the same statute or in different statutes dealing with the same subject-matter, the cardinal rule of construction laid down by their Lordships of the Supreme Court, in *Bengal Immunity Co. Ltd. v. State of Bihar* AIR 1955 SC 661 is:—

“When there is a law generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of the matters comprised therein.”

27. Jagadish Swarup in his treatise on “Legislation and Interpretation” (Second Edition) at page 306, stated the law on the subject thus:—

“A particular enactment is not repealed by a general enactment in the same statute. When there is a law generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of matters comprised therein. Where there are two provisions in an Act, one of which is specific or of a special character and the other of a general character the specific or special provision qualifies the general one and ought to be applied in preference to and unaffected by the general one. when the spe-

cific provision in a statute is applicable to a particular set of facts, any other general provision in respect of the same matter in the same statute cannot be held to be applicable to those facts. The matter must be held to be governed by the specific provision. In other words, where a special provision deals with a particular thing or class of things, a more general provision even though its terms would cover the particular thing or class of things, is excluded from application thereto by reason of the particular provision."

28. The aforesaid statement of law was quoted with approval by Beg J. while delivering the majority judgment of the Full Bench of the Allahabad High Court in *Aidal Singh v. Karan Singh* AIR 1957 All 414 (FB). It was held in that case that Article 227 of the Constitution was more general in character and was wider in application and that in cases where a remedy could be given under Articles 226 and 227, the Court should prefer to apply Article 226.

29. In *V. Sundaram Iyer v. Deputy Registrar of Co-operative Societies, Ramana-thapuram* AIR 1957 Mad 634 Rajagopala Ayyangar J., while dealing with the provisions of Sections 49 and 51 of the Madras Co-operative Societies Act, held that Sec. 51 of the aforesaid Act was a rule of general application which provided for variety of matters and was almost exhaustive. Out of the larger group, some types of disputes which arose in exceptional circumstances were segregated as indicated in the opening words of Section 49 and were subjected to special treatment. It was held in the aforesaid case:—

"This, therefore, is a special rule applicable to particular persons and in particular circumstances. The rule of construction, therefore, that where there are two sets of provisions, the one general and the other special, the latter alone would apply to cases falling within it, notwithstanding the generality of the other provision, applies to the construction of these two provisions, and it has to be held that where there is overlapping of the terms of Ss. 51 (1) and 49 (1), the latter alone would be applicable to cases covered by it."

30. In *Fagu Ram Mahadeo Ram v. Pannalal* AIR 1962 Pat 272. Untwalia J. of the Patna High Court, as he then was, was pleased to observe:—

"It is one of the accepted canons of interpretation of statute that, if in the same field there is a special provision, which is applicable as also there is a general provision, the latter would give way to the former."

31. Following the rule of construction laid down by their Lordships of the Supreme Court in *Bengal Immunity Co. case* AIR 1925 SC 661, it was held by the Bombay High Court in *State v. Kapurchand Adabhan* AIR 1958 Bom 311 that the provisions of sub-section (1) of Section 103 of the Bombay Prohibition Act are general in

terms as the expression "any of the provisions of this Act" was used therein which prima facie included all the provisions of the Act including the provisions of Section 67 or Section 67-1A, yet the cases coming within the four corners of Sections 67 and 67-1A would be regulated by the special provision contained in sub-section (2) of Section 103 and not by the general provision.

32. In *P. V. Naik v. State of Maharashtra* AIR 1967 Bom 482 Desai J., with whom Chandrachud J. concurred, observed as under:—

"It is well established that when specific provision in a statute is applicable to a particular set of facts, any other general provisions in respect of the same matter in the same statute cannot be held to be applicable to those facts. The matter must be held to be governed by the specific provision."

33. Butler J. while delivering the judgment in *D. Ginsberg and Sons v. Joseph Popkin* (1931) 76 Law Ed 704 = 235 US 204 at p. 208 remarked:—

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."

34. In *Dryden v. Putney Overseers* (1876) 1 Ex. D. 223 Quain J. remarked at page 232:—

"It may be laid down as a rule for the construction of statutes that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision."

35. Applying the aforesaid rule of interpretation, it is no doubt correct that Article 14 makes a general provision in respect of equality before law, and Article 16 is a species of the same general right made applicable only to matters relating to employment or appointment to any public office. It cannot be denied that Article 16 (1) and (2) merely provides for the application of the concept of equality enshrined in Article 14 of the Constitution. It is no doubt an incidence of the general right of equality and even a instance thereof confined to matters relating to public employment. It may also be borne in mind that Articles 14, 15 and 16 form part of the same code of guarantees relating to equality of opportunity and supplement each other. But nevertheless Articles 14 and 16 are separate Articles specified in the Constitution. As Article 359 (1) provides that the enforcement of such of the rights conferred by Part III of the Constitution would not be permissible as may be specified in the order, it cannot be held that the enforcement of the fundamental rights guaranteed under some other Articles of Part III of the Constitution would be impliedly suspended during the emergency, without